Document:-
A/CN.4/3181

Summary record of the 3181st meeting

Topic:
<multiple topics>

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

Commission and the Secretariat had thus both recognized the existence of a legal principle of protection.

44. The terms "prevent", "mitigate" and "prepare", used in draft article 16, paragraph 1, had been drawn from the 2009 version of *Terminology on Disaster Risk Reduction* produced by UNISDR.[109] The terms were not mutually exclusive, and in some cases their meanings overlapped. The expression "appropriate measures", in draft article 16, paragraph 2, referred to the innumerable practical measures that could be adopted, depending on the social, environmental, financial or cultural circumstances. They included, in addition to those mentioned in the sixth report, ecosystem management, drainage systems, contingency planning and the establishment of monitoring mechanisms. The three consecutive measures singled out in draft article 16, paragraph 2, were instrumental to the development and applicability of many, if not all, other measures. First, risk assessment concerned the generation of knowledge about hazards and vulnerability, without which no effective measures could be enacted. Next, the collection and dissemination of loss and risk information allowed all stakeholders to assume responsibility for their action and to determine priorities, while at the same time enhancing transparency and public security. Finally, early warning systems were vital in triggering the implementation of contingency plans and limiting exposure to hazards. The word "include" indicated that the list of possible measures could be widened. Examples of such measures would be provided in the commentary to draft article 16. The commentaries to all the texts adopted by the Drafting Committee would give a balanced account of the Commission's reasoning in developing the draft articles.

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

[Agenda item 1]

45. Mr. TLADI (Chairperson of the Drafting Committee) announced the composition of the Drafting Committee on protection of persons in the event of disasters.

The meeting rose at 1 p.m.

3181st MEETING

Wednesday, 17 July 2013, at 10 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, Ms. Jacobsson, 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. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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[109] Available from www.unisdr.org/we/inform/terminology/.

* Resumed from the 3175th meeting.

Tribute to the memory of Sir Ian Sinclair, former member of the Commission (*concluded*)*

1. The CHAIRPERSON said that Sir Ian Sinclair had been a prolific author, a great scholar and a true pillar of the Foreign and Commonwealth Office, where he had spent much of his career. His in-depth knowledge of the legal bodies of the United Nations and of the complex workings of international conferences had hugely enriched the work of the Commission, of which he had been a member from 1982 to 1986.

2. Sir Michael WOOD said that he had worked alongside Sir Ian for many of the years when he had been principal Legal Adviser to the Foreign and Commonwealth Office. He was perhaps best remembered today for his writings, notably his book on the Vienna Convention on the law of treaties,[110] which had become a classic, cited before international courts and tribunals. Sir Ian had been particularly interested in State immunity: he had been much involved in the development of the European Convention on State Immunity and had given a masterly series of lectures on the law of sovereign immunity at The Hague Academy of International Law. In his book on the International Law Commission,[111] he had been quite critical of the working methods in use in the mid-1980s, but what shone through in all his writings and his career was his attachment to the Commission. Although he had spent 34 years at the Foreign and Commonwealth Office, he had also had great knowledge of the United Nations, particularly its legal bodies, as well as the law of the European Economic Community, having been a member of the delegation that had negotiated the treaty of accession to the European Communities of the United Kingdom. He had also pleaded in a number of cases before the International Court of Justice and had been an active participant in the Institute of International Law. He himself had learned a great deal from working alongside Sir Ian, as, he was sure, was the case for all those who had known him.

3. Mr. KITTICHAISAREE, speaking on behalf of the members of the Commission from Asia, expressed condolences to the family and friends of Sir Ian Sinclair, who would be sorely missed. International lawyers in Asia, like their counterparts in other regions, had benefited from his seminal work on the 1969 Vienna Convention. Sir Ian's field of interests had also included the law of sovereign immunity, human rights law, international legal cooperation, diplomatic relations law and maritime boundary law, a field in which he had served as agent and legal counsel for the United Kingdom in the *English Channel* case. The world of international law was indebted to distinguished British lawyers like Sir Ian Sinclair, whose illustrious predecessors had included Hersch Lauterpacht, Gerald Fitzmaurice and Humphrey Waldock. He had discharged his responsibilities in the Commission with distinction, something emulated by his successors: Derek Bowett, Ian Brownlie and, of course, Sir Michael Wood.

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* Resumed from the 3179th meeting.

[110] *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester, Manchester University Press, 1984).

[111] *The International Law Commission* (Cambridge, Grotius, 1987).

4. Mr. VALENCIA-OSPINA, Mr. PETRIČ, Mr. EL-MURTADI SULEIMAN GOUIDER and Mr. CANDIOTI likewise joined in paying a tribute to Sir Ian Sinclair and expressed their most sincere condolences to his family and loved ones as well as to the British authorities and people. As had been recalled by the members who had already spoken, Sir Ian had had a distinguished career and had touched the lives of all those who had had the honour of knowing him. His writings, particularly his book on the Vienna Convention on the law of treaties, and the significant role he had played in the drafting of that Convention, of the Vienna Convention on succession of States in respect of treaties and other texts such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[112] were a testament to his outstanding legal skills. Ian Sinclair was just as capable of making penetrating criticism as of welcoming the advances in international law, all the while showing his trust in those around him.

Formation and evidence of customary international law (A/CN.4/657,[113] sect. E, A/CN.4/659,[114] A/CN.4/663[115])

[Agenda item 8]

First report of the Special Rapporteur

5. The CHAIRPERSON invited Sir Michael Wood, Special Rapporteur on the topic "Formation and evidence of customary international law", to introduce his first report (A/CN.4/663).

6. Sir Michael WOOD (Special Rapporteur) thanked all those who had helped in the preparation of the first report on formation and evidence of customary international law, a topic that was already attracting a great deal of interest in the international legal community. He drew attention to the memorandum prepared by the Secretariat (A/CN.4/659) compiling elements of the Commission's previous work that could be particularly relevant to the topic of formation and evidence of customary international law; the memorandum was of the highest quality and contained a wealth of information. He invited members to study in particular paragraph 14; the section entitled "State practice"; paragraph 23; observation 8 in the section on *opinio juris*; and observations 13 to 18 and 20, 22 and 23 in the subsequent sections and chapters. He suggested that when the Secretariat prepared such important documents, the authors themselves should come to a meeting of the Commission to introduce them and respond to any questions that members might have.

7. The Commission had held an initial debate on the topic in July 2012 on the basis of his own preliminary note,[116] and many of the points raised on that occasion were referred to in the current report. Overall, the members who had spoken during the debate had welcomed the topic, as had those who had discussed it in the Sixth Committee. The importance of customary international law within the constitutional order and the domestic law of many States had been noted, as had the reaction of the international law community, which had already shown considerable interest in the topic.

8. The topic was undoubtedly a challenging one, and it would be necessary to approach it with caution. There was a view, in part based on the experience of the International Law Association's committee that had dealt with the topic, that it was "impractical, if not impossible, to consider the whole of customary international law, even at a very abstract level"—which was not what the Commission was doing—and that the Commission was "doomed to fail, because it would end up by stating the obvious or being ambiguous".[117] Even if the Commission ended up stating the obvious, however, would that necessarily be a bad thing? He had said in 2012 that a clear and straightforward set of conclusions relating to the topic might well be of practical use for the vast range of lawyers, many of them not experienced in international law, who found themselves confronted by issues of customary international law.[118] By bringing a little more clarity to the topic, the conclusions might also help dispel the scepticism that existed in some quarters about customary international law.

9. It was important to recall that the aim of the Commission's project was to consider, not the substance of customary international law, but rather the general rules, known as "secondary rules", related to the identification of customary international law.

10. In his first report, he had sought to set out in general terms the approach he proposed to take and to begin to gather the relevant materials. In the introductory part of the report, he had stressed that the outcome of the Commission's work should be practical and not seek to resolve theoretical problems. In paragraphs 13 to 27 of the report, which dealt with the scope and outcome of the Commission's work, he indicated that he would propose a set of conclusions with commentaries and addressed the question of whether *jus cogens* should be part of the topic.

11. Paragraphs 28 to 45 of the report dealt with terminological issues and an analysis of Article 38, paragraph 1, of the Statute of the International Court of Justice, which was widely viewed as an authoritative statement of the sources of international law. The issue of the relationship between customary international law and other sources of international law was of great practical importance for the topic. Section A of chapter II of the report ended with the central idea that the rules for identifying the sources of law could be found by examining in particular how States and courts set about the task of identifying the law (para. 38). The following chapter of the report, which dealt with the materials to be consulted, highlighted the constant presence of two elements of customary international law, namely State practice

[112] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

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

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

[115] *Idem*.

[116] Reproduced in *Yearbook … 2012*, vol. II (Part One), document A/CN.4/653.

[117] *Ibid*., vol. I, 3148th meeting, paras. 18–19.

[118] *Ibid*., 3152nd meeting, para. 2.

and *opinio juris*, which tended to support, subject to the necessary reservations and caution, an approach based on those two elements. That chapter of the report would have to be supplemented with information from States and an analysis of the work of other bodies, especially the International Law Association and the ICRC.

12. It would be premature in his view to refer the two draft conclusions in his report to the Drafting Committee. Instead, he suggested that the Commission's discussions should focus initially on the title of the topic and whether to deal with *jus cogens*. With respect to the title, he recalled that the English terms "formation" and "evidence" were simply intended to indicate that, in order to determine whether a rule of customary international law existed, the Commission would consider both the requirements for its formation and the evidence that established the fulfilment of those requirements (para. 15 of the report). However, since the translation of the word "evidence" appeared to be problematic, it might be preferable to replace it with the word "identification", which would be easier to translate and in itself would cover both aspects. The title in English could thus be "The identification of rules of customary international law". With regard to *jus cogens*, it would be preferable not to deal with it, so as not to complicate the Commission's task further, especially since a proposal had been made to include it as a separate topic in the long-term programme of work. In conclusion, he stressed the importance of gathering information on the practice of States and regional organizations.

13. Mr. MURASE said that the doubts he had expressed on the topic from the very beginning had only grown, now that he had read the Special Rapporteur's first report. He wished to focus on three points that were particularly problematic and were intrinsically linked, namely the scope of the topic, the methodological approach adopted and the choice of materials to be consulted.

14. With regard to the scope of the topic, the concepts of "formation" and "evidence" were so diametrically opposed that placing the two together merely invited methodological confusion. It would therefore be preferable to limit the scope to the evidence needed to show the existence of rules of customary international law. Simply deleting the word "formation" in the title of the topic would not suffice if the approach itself was not reconsidered. Furthermore, maintaining the two elements would require the Commission to conduct an analysis of the "material" and "formal" sources of international law, given that the analysis of the formation of a rule of customary law was based on "material" sources, while its identification was based on "formal" sources. The Special Rapporteur had not taken due account of that point, however. He had defined the concept of "formal sources" as "that which gives to the content of rules of international law their character as law" (para. 28 of the report). That definition was not in keeping with the widely accepted understanding of that expression but seemed to refer instead to the origin of the law and thus the philosophical sources of law. As for the "material" sources of international law, the Special Rapporteur had made only passing reference to them, in fact he had entered into substantive discussion of the highly academic and theoretical issue of the formation of customary international law. He himself therefore suggested deleting the word "formation" in the title and in the draft conclusion in paragraph 23 of the report.

15. The problem he had just described was exacerbated by the unduly quick transition to a discussion of Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice. Article 38 did not address the question of sources of international law in general—it merely listed the types of law which the Court could apply, a body of law that could be classified as "judicial sources", since each international court or tribunal had its own applicable law. However, those sources did not extend to the whole of international law: for example, they excluded the unilateral acts and decisions of States which were at the origin of many rules of international law. The International Court of Justice was by no means a central decision-making organ for matters of customary international law, and it would therefore not be appropriate to take the Statute of the International Court of Justice as a basis for preparing a general definition of customary international law for the entire international community. Furthermore, Article 38 did not give a clear definition of customary international law; the Commission should in no way appear to be writing a commentary to that provision. For all those reasons, he believed that the wording of draft conclusion 2 (*a*), in paragraph 45 of the report, was inappropriate.

16. Turning his attention to the methodology, he said that he would like to have clarification of the statement in paragraph 20 of the report that the approach should be the same regardless of the intended audience of the Commission's project, for he disputed the notion that a useful understanding, shared by all, could be achieved. Furthermore, the statement in paragraph 22 that defining the substance of *particular* rules of customary international law whose formation and evidence were under consideration did not come under the scope of the topic seemed unclear. It implied making a distinction (but based on what criteria?) between particular rules and general rules. If one accepted the Special Rapporteur's proposed analogy with the work on responsibility of States, involving an initial distinction between primary and secondary rules, there would have to be a constant dialogue between the two types of rules. The problems they raised could not be divorced from each other, especially given that the characteristics of customary international law varied in different branches of international law.

17. With regard to the materials to be consulted, the jurisprudence should be treated in a very circumspect manner. The role of judges was not to identify general rules but to hand down rulings, based on the arguments presented by the parties, in the specific and subjective cases brought before them. Thus, debates before the International Court of Justice over the existence of a particular rule of customary international law did not have the same basis or objectives as the Commission's project. The jurisprudence of other international courts and tribunals, meanwhile, should be considered as what Article 38 of the Statute of the International Court of Justice characterized as "subsidiary means for the determination of rules of law". The jurisprudence of domestic courts with regard to the identification of rules of customary international law and their incorporation into domestic law depended

on the status granted to those rules in the constitution of each country and on national judicial traditions. It was not appropriate for the Commission to seek to propose a set of guidelines to States on the matter. In conclusion, he recommended that the complexity of the issues being debated in the literature, and in particular the discussions about the two elements of customary international law, should not be underestimated.

18. Mr. FORTEAU said that he generally agreed with the Special Rapporteur's approach, which was based on a meticulous analysis of the case law and the memorandum by the Secretariat on the topic. However, contrary to what was stated in the memorandum, he believed that the Commission's task of making the evidence of customary international law more readily available was relevant: customary law must indeed be based on the practice of all States, something that was not yet the case given various inequalities and obstacles, including of a linguistic nature.

19. With regard to the methodology, the Special Rapporteur would have to explain more clearly how the Commission's work would differ from that of the International Law Association (para. 7 of the report). He would also have to guard against adopting an overly restrictive approach to the law and bear in mind that the "soft law" that existed at all the stages up until a law became binding was also part of the formation of customary international law. Contrary to what was stated in paragraph 38, it was important to examine the nature of the rules governing the formation of customary international law, given that those so-called secondary rules had a special status in international law. They were always applicable before international courts and tribunals, as the International Court of Justice had pointed out, with reference to treaty law, in the *Kasikili/Sedudu Island* judgment.

20. With regard to the project itself, there was no need to establish a standard terminology, as proposed in paragraphs 39 to 45 of the report. Even though it would be helpful to dispel confusion, various expressions (customary international law, rules of customary international law, international custom) seemed to coexist in contemporary practice without any adverse effects. However, it was necessary to clarify, or modify, the title and purpose of the topic. Unless it wished to engage in the progressive development of the rules applicable to the formation of customary international law, the Commission did not need to study the process in terms of the debates in the literature. Its work should focus on the identification of customary international law, and it should accordingly confine itself to defining the criteria and types of evidence to be used for that purpose, putting itself in the position of practitioners of the law who needed to know how to determine whether a rule was customary in nature. As to the scope of the project, *jus cogens* could be excluded; as had already been stated, while rules of *jus cogens* had to be rules of customary law, not all customary rules were *cogens*. They were in fact two completely separate things.

21. With regard to the identification of customary international law, the Special Rapporteur had identified two main approaches in the case law of the International Court of Justice: either the Court simply determined that a rule of customary law existed, or it analysed in detail the two classical components of customary law, namely practice and *opinio juris*. Even when the Court did not elucidate the grounds for the existence of a rule, however, that did not mean that it had not applied the two components. A distinction therefore had to be made between approaches to the identification of a rule of customary law and methods of substantiating the Court's judgments. Furthermore, a detailed study of the Court's relevant case law would have to be made, as it sometimes seemed to consider other criteria such as the "evidence available" mentioned by the President of the Court in the statement cited in paragraph 65 of the report.[119] That element, as well as the agreement of the parties on the state of customary law, something to which national courts sometimes referred, could result in the identification of a varying number of rules of customary law. Those questions were therefore of significant practical interest.

22. Lastly, the Commission would have to maintain a balance with regard to the relationship between customary international law and the development of the law: it should neither encourage State institutions to engage in development nor dissuade them from doing so. The International Court of Justice had made it clear, in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, that this decision had been appropriate in the "current state" of customary international law. The Commission, too, must take care not to strip customary international law of its flexibility and its evolutive nature.

23. In conclusion, he said that he considered the proposed programme of work overly ambitious. A number of thorny issues had to be dealt with, such as the capacity of international organizations to contribute to the formation of customary international law, the applicability of the principle of specialization, the practice of NGOs and the current status of the system of persistent objection.

24. Mr. KITTICHAISAREE said that it was indeed crucial to preserve the flexibility of the customary process. In his view, that meant that the identification process should be practical and realistic and not "ultra-positivistic". The Special Rapporteur had rightly accorded great importance to the relevant work of the International Law Association (London statement of 2000[120]), which had shown how flexible the process should be. State practice, for example, need not necessarily be universal. Some did not think that customary law was evolutive, but the traditional approach to the identification of customary law was based on two elements: "general practice accepted as law", in the words of the Statute of the International Court of Justice, and *opinio juris*, which the Commission had called the "subjective element" of customary law. The second element was more difficult to define, particularly in view of the growing number of States. According to Anthony D'Amato, practice was action by States,

[119] P. Tomka, "Custom and the International Court of Justice", *The Law and Practice of International Courts and Tribunals*, vol. 12 (2013), pp. 197–198.

[120] "London statement of principles applicable to the formation of general customary international law" (with commentary), adopted in resolution 16/2000 (Formation of general customary international law) on 29 July 2000 by the International Law Association; see *Report of the Sixty-ninth Conference, London, 25–29 July 2000*, p. 39.

whereas *opinio juris* was the statement of their beliefs, as manifested in treaties and declarations. The President of the International Court of Justice had expressed a similar position at the conference on "The judge and international custom" in September 2012.[121] However, it would be too extreme to follow the views of Judge R. Abraham in his separate opinion in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. There, he had concluded that certain States might have acted on the basis of "a purely unilateral choice and sovereign decision" reached without any belief that the action was "required … by some international obligation, whether conventional or customary—but solely in the belief that international law entitled them to do so. Here again, the '*opinio juris*' is lacking" (para. 38). Unfortunately, it was unrealistic to try to find the ulterior motive behind a State's action in order to prove the existence of *opinio juris*.

25. In fact, it was often impossible to disentangle *opinio juris* and practice. The International Law Association rightly differentiated among the various stages in the life of a customary rule and concluded that it was not always necessary to separately establish the existence of the subjective element of customary international law. On the other hand, the International Court of Justice had stated on a number of occasions that there must be a "settled practice" together with *opinio juris* in order to identify a rule of customary international law. However, both bodies considered that *opinio juris* that was well established in treaty law, for example, could compensate for practice that was less clear-cut. In that connection, the Special Rapporteur would have to deal with the relationship between treaty law and customary international law, with particular reference to the *North Sea Continental Shelf* cases.

26. It would also be useful to analyse the relationship between the approach of other intergovernmental actors and the formation of customary international law, as proposed in paragraph 53 of the report. The resolutions of international organizations were of special importance in that regard.

27. Lastly, the Special Rapporteur might consider the need to follow what the President of the International Court of Justice, in the conclusion of his speech at the September 2012 conference, had called the four particular methods that had played an important role in the Court's assessment of evidence of customary international law, depending on the circumstances. The methods were (1) referring to multilateral treaties and their *travaux préparatoires*; (2) referring to United Nations resolutions and other non-binding documents which were drafted in normative language; (3) considering whether an established rule applied to the circumstances as a matter of deduction; and (4) resorting to an analogy.[122]

The meeting rose at 1 p.m.

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[121] Tomka, "Custom and the International Court of Justice" (footnote 119 above).

[122] *Ibid*., p. 215.

3182nd MEETING

Thursday, 18 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. Hassouna, Mr. Hmoud, Ms. Jacobsson, 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. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*continued*)*

[Agenda item 13]

STATEMENT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRPERSON welcomed Judge Peter Tomka, President of the International Court of Justice, and invited him to address the Commission.

2. Mr. TOMKA (President of the International Court of Justice) said that, in fulfilment of its role as the principal judicial organ of the United Nations, the International Court of Justice had rendered two major decisions in the past year on the merits of cases concerning boundary disputes.

3. The decision in the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* had settled a long-standing argument regarding maritime delimitation and sovereignty over certain maritime features in the western Caribbean. Although the case had been brought to the Court in 2001, the delivery of the final judgment had been delayed by the need to examine several objections to the Court's jurisdiction and by the lodging, by Honduras and Costa Rica, of requests for intervention. In its judgment of 2007, on preliminary objections, the Court had concluded that it lacked jurisdiction over the claim by Nicaragua to three islands, since the matter had been resolved in favour of Colombia by the 1928 Treaty concerning Territorial Questions at issue between Colombia and Nicaragua.[123] Nevertheless, several maritime features had remained in dispute in the maritime area where delimitation by the Court was being sought by the parties.

4. The Court had first assessed whether the small maritime features could be subject to the exercise of sovereignty through appropriation. It had emphasized that, unlike low-tide elevations, islands, however small, were capable of appropriation. Upon review of the scientific evidence, the Court had concluded that the disputed features were above water at high tide and were therefore capable of appropriation.

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* Resumed from the 3180th meeting.

[123] Signed at Managua on 24 March 1928, League of Nations, *Treaty Series*, vol. CV, No. 2426, p. 337.