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Summary record of the 3104th meeting

Topic:
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the draft report, had inadvertently remained in the French text. The paragraph should therefore be deleted to bring it into line with the English version.

Paragraph (11) in the French text was deleted.

The commentary to guideline 1.1.3, as amended, was adopted.

1.1.4 *Reservations formulated when extending the territorial application of a treaty*

Guideline 1.1.4 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

87. Sir Michael WOOD proposed that the word “definitive” in the first sentence should be deleted, as the Commission usually spoke of “consent to be bound” without any qualifiers.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

88. Mr. PELLET (Special Rapporteur) proposed that, in the French text, the expression “*compte tenu*” should be replaced with either the word “*moyennant*” or with the word “*avec*”, which would align it with the English text.

Paragraph (5) was adopted with that minor drafting amendment to the French text.

Paragraph (6)

Paragraph (6) was adopted.

The commentary to guideline 1.1.4, as amended, was adopted.

The meeting rose at 1 p.m.

3104th MEETING

Wednesday, 13 July 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Present: Mr. Adoke, Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrić, Mr. Saboia,

Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (continued) (A/CN.4/638, sect. D, A/CN.4/643, A/CN.4/L.794)

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the fourth report on the protection of persons in the event of disasters.

2. Sir Michael WOOD said that he agreed with the members who had underscored the fact that the report under consideration, which was concise yet informative, arrived at an appropriate balance among the various interests at stake. That was no mean achievement since the sensitive nature of the issues involved had been illustrated at the previous meeting. The Special Rapporteur had once again demonstrated both his diplomatic and his legal skills. The three draft articles that he was now proposing were central to the overall draft and complemented those which had been adopted the previous year.

3. Mr. Vasciannie had put forward some tightly argued and challenging objections to draft articles 10 and 11. He himself understood those concerns and agreed that the Commission did need to be cautious in all its work. That work sometimes had more impact than might be expected or even, perhaps, than it deserved. Obligations under international law were increasingly the subject of litigation, including in domestic courts, and as courts looked closely at the Commission’s work, it bore a heavy responsibility.

4. He agreed with virtually everything that had been said during the exchange of views at the previous meeting. If Mr. Vasciannie’s proposed amendments to draft articles 10 and 11 were adopted, they would deprive those provisions of all real significance and render the topic virtually meaningless.

5. The fact was that the Commission was engaging, in part at least, in progressive development. Mr. Vasciannie’s references to State sovereignty were rather one-sided and did not acknowledge the modern view of sovereignty, namely that it carried obligations as well as rights. It was rather old-fashioned to refer to “weaker countries” and “powerful countries”. On the whole, the draft articles were taking shape in a balanced manner, and the three draft articles proposed in the fourth report were essential to that balance.

6. Mr. Dugard had been correct in saying that the Commission should not be deterred by the possibility that States might disregard their obligations; other members had rightly indicated that the risk in question was exaggerated. The Commission had already taken good note of the Secretary-General’s statement that the notion of “responsibility to protect” did not extend to natural

disasters, and it had already decided that the “responsibility to protect” within the meaning of the 2005 World Summit Outcome³⁰¹ had no place in its work³⁰² on the topic. Fears about non-compliance or abuse must not deter it from stating in the draft articles what it considered to be right.

7. It was encouraging that, as could be seen from the first part of the Special Rapporteur’s fourth report, the Commission’s work on the topic so far had generally been well received in the Sixth Committee. Many interesting and thoughtful remarks had been made in New York. It was to be hoped that good note would be taken of them and that they would be borne in mind when the time came to revise the draft articles that had already been adopted.

8. One of the difficulties with the Commission’s traditional working methods was that comments from Governments and international organizations generally reached it after it had adopted the draft articles concerned on first reading. Years could pass before the second reading, and when States were asked to comment on the full set of draft articles adopted on first reading, they might feel obliged to repeat what they had said at an earlier stage (if they could recall it). That process might have made sense in the past, when the workload of legal advisers to Ministries of Foreign Affairs had been lighter.

9. The example set in 2009 by the Special Rapporteur on the responsibility of international organizations might be a good one to follow in appropriate cases. In his seventh report,³⁰³ Mr. Gaja had proposed amendments to some draft articles adopted in previous years *before* the Commission had adopted the full set of draft articles on first reading. That had made it easier for States to comment on the first-reading text, because at least some of their points had already been taken into consideration. He encouraged the Special Rapporteur to take the same course of action. Purists might object that this approach departed from an orderly progression from first to second reading, but that was not the case. That manner of proceeding improved the first-reading text. It was more efficient and took greater account of States’ opinions.

10. At the previous meeting, Mr. Pellet had made some interesting comments on the methodology employed so far. First, it was true that the Commission should not overemphasize the influence of international humanitarian law on its work, but where it had drawn inspiration from that field of law, it should acknowledge that fact. Perhaps more should be done to explain why the Commission had found that source useful, even though the draft articles did not apply to situations covered by international humanitarian law, as was made plain by draft article 4.

11. Secondly, it had been said that the report contained insufficient references to practice and relied instead on

abstract texts and reasoning. However, it was an area in which practice was sadly plentiful, but not always easy to piece together and document. Moreover, in a new area of law that had been developing rapidly for some years, practice was not necessarily the best guide. In those circumstances, the assessment of practice might be particularly difficult and subjective, as had been demonstrated at the previous meeting by the revealing exchanges on certain historical examples. That was why the Commission must pay careful attention to the texts adopted by States and by organizations such as the International Federation of Red Cross and Red Crescent Societies (IFRC), which were a distillation of the practice followed by those with considerable experience in the field.

12. The third methodological point concerned the duty to protect. He was unsure that he had fully grasped the criticism made in that respect, but enough had been said on the subject during the discussions at the previous meeting.

13. Turning to the three draft articles proposed by the Special Rapporteur in his fourth report, he said that first, like any other obligation under international law, the duty to seek assistance must be performed in good faith. The State’s efforts to secure assistance must be genuine and must be addressed to those who were likely to be willing to provide it, without regard to irrelevant political considerations.

14. Secondly, it was implicit in the word “seek” that the affected State must take positive steps to request assistance. As Mr. Hmoud had said, the term meant that the State needed to be proactive; it was not sufficient for it to launch a *pro forma* appeal addressed to no one in particular.

15. Thirdly, how should one interpret the threshold established by the phrase “if the disaster exceeds its national response capacity”? The “margin of appreciation” used by the European Court of Human Rights in a different context (*A. and Others v. the United Kingdom*) was not particularly helpful and should not feature in the commentary. Greater objectivity was required. Once again, the notion of good faith came into play.

16. Fourthly, should the test be that the disaster “exceeds [the] national response capacity”? By the time that was known to be the case, it was, almost by definition, too late. Wording along the lines of “appears likely to exceed the national capacity” might be better.

17. Fifthly, Mr. Nolte was right: the words “as appropriate” were inappropriate in draft article 10.

18. All those points could be considered by the Drafting Committee or dealt with in the commentaries.

19. Draft article 11 set forth the fundamental duty of the affected State not to withhold its consent arbitrarily. The adverb “arbitrarily” could be replaced with “unreasonably”, a more general term less open to legal quibbling. Still, the draft article, which he strongly supported, conveyed the basic idea. The text prompted four further comments. First, whichever word was used—“arbitrarily” or “unreasonably”—the commentary should

³⁰¹ 2005 World Summit Outcome, General Assembly resolution 60/1 of 16 September 2005, paras. 138–139. See also the Secretary-General’s report entitled “Implementing the responsibility to protect” (A/63/677) and General Assembly resolution 63/308 of 14 September 2009.

³⁰² See *Yearbook ... 2008*, vol. II (Part Two), pp. 133–134, paras. 247–250, and *Yearbook ... 2009*, vol. II (Part Two), p. 135, para. 153, and p. 137, para. 164. See also *Yearbook ... 2008*, vol. I, 2978th to 2982nd meetings, pp. 129–184, *passim*.

³⁰³ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/610.

explain as carefully and clearly as possible what it meant in practice in the context. For example, any refusal of consent for purely political reasons and which harmed the public interest should be deemed arbitrary.

20. Secondly, he shared the doubts expressed by Mr. Pellet at the previous meeting about the reference to cases where the affected State was “unwilling” to provide the requisite assistance. The Commission should not assume that the affected State would shirk its basic duty to secure the protection of persons and provision of disaster relief in its territory, a duty embodied in draft article 9. In the light of that draft article, it would be strange to refer only to cases where the affected State was “unable” to provide the necessary assistance. Both terms could be omitted in draft article 11, which would simply read, “Consent to external assistance shall not be withheld arbitrarily”. Of course, where outside assistance was unnecessary, it would not be arbitrary to withhold consent.

21. Thirdly, as others had said, the text must make it clear that reasons had to be given for any refusal of consent. Failing that, it was hard to see how the affected State’s good faith and the absence of arbitrary conduct could be assessed.

22. Lastly, some thought should be given to whether any exceptions to the rule regarding consent should be allowed. For example, the affected State might not be in a position to give its consent because it was so overwhelmed by the disaster that there was no functioning government. In that exceptional but not impossible situation, the population still needed protection. Even if no explicit mention were made of that eventuality in the draft articles themselves, it should be borne in mind and referred to in the commentaries.

23. Draft article 12 (Right to offer assistance) might state the obvious, but the reasons for that were clear and well explained in the report. However, he agreed with the point made by Mr. Hmoud at the previous meeting concerning the reference to NGOs in that draft article and possibly elsewhere. He also endorsed Mr. Pellet’s suggestion that the order of draft articles 11 and 12 should be reversed to take account of the temporal progression from the offer of assistance to the question of consent.

24. Moving on to three methodological points of his own, he pointed out that the Commission had not yet dealt with the duty to prepare for natural disasters, having decided to examine that aspect at a later stage. Since it was one of the most important duties of States in respect of disasters, it needed to be considered sooner rather than later. Secondly, it might be wise to rethink the position of international organizations in the draft articles, since they were playing an increasingly prominent role in disaster relief, especially when they were given specific powers, functions or responsibilities. They might even have responsibilities related to the exercise of what was sometimes termed “international territorial administration”.

25. Thirdly, the Sixth Committee had encouraged Commission members to remain in close contact with those working in the field of protection. The Special Rapporteur himself had been in touch with a range of people. The time

had come for all the members of the Commission to build up their networks. The previous week, some had made a good start by visiting the IFRC. Perhaps a more structured, long-term dialogue with the IFRC should be undertaken.

26. He supported the referral of the three draft articles proposed in the Special Rapporteur’s fourth report to the Drafting Committee.

27. Mr. McRAE said that the main challenge for the Commission was to move beyond the mere expression of broad basic principles in order to articulate the rights and responsibilities of the various actors who would help to ensure that the protection of persons in the event of disasters was not left to the discretion of States, which must be reminded that they had duties as well as rights.

28. The Special Rapporteur had achieved the correct balance in the relationship between the Commission’s work on the topic and the “responsibility to protect”. When the Special Rapporteur had presented his preliminary report, he himself had been among those who had said that if the Commission intended to take a position on the responsibility to protect, it would be opening up an extraneous issue and inviting responses based on differing views of that notion rather than on any commitment to the protection of persons. On the other hand, if it were to spell out obligations in that sphere, it would make an indirect but much more useful contribution to the development of the notion of the responsibility to protect than by directly invoking it.

29. As had been pointed out at the previous meeting, the fourth report focused more on a State’s duty to protect its own population than on States’ responsibility to act when the population of another State was under threat. That had produced considerable tension in the Commission, with many members advocating an explicit or implicit reaffirmation of the principle of non-intervention. The Special Rapporteur had managed to sidestep the problem and had found a way of placing obligations on the affected State deriving from the duty to preserve life and dignity and to cooperate. He had thus found a way to avoid a possible impasse.

30. The central question with regard to the draft articles was whether they should be binding. The duty set forth in draft article 10 (Duty of the affected State to seek assistance) was not a substantive obligation and applied only in limited circumstances. In addition, it was difficult to see whether that requirement was consistent with State practice, due to the lack of analysis thereof.

31. Ethiopia and Myanmar had frequently been mentioned during the debates at the two previous meetings. An analysis of the situation in Myanmar would show that neighbouring States had in fact provided assistance and that Myanmar and those States had probably discussed that assistance. Such discussions might well have satisfied the requirements of draft article 10. In Ethiopia, on the other hand, had aid of any kind been provided by another State? If a State accepted assistance in the event of a disaster, it was unlikely to be held responsible for failing to seek help. Furthermore, as Mr. Hmoud had pointed out, nothing in the draft article indicated from whom the assistance had to be sought or received.

32. He was not trying to play down the events in Ethiopia and Myanmar, but if one looked at the facts, one might conclude that draft article 10 simply described what happened in reality. In addition, given the fairly minimal requirements imposed by draft article 10, concerns about State responsibility might turn out to be far fewer than suspected. It would therefore be appropriate, as an exercise in progressive development, to adopt draft article 10 and to refer in the commentary to its relationship with practice, on which further research undoubtedly needed to be done, and to the limited scope of the obligation.

33. In the case of draft article 11 (Duty of the affected State not to arbitrarily withhold its consent), Mr. Vasciannie's concerns about potential responsibility were more substantial. The correct approach would be not to minimize the obligation, but to clarify and delimit it. As other members had pointed out, the problem lay in the idea expressed by the word "arbitrarily". In what circumstances might an affected State be held responsible for arbitrarily rejecting an offer of assistance? It was impossible to leave draft article 11 as it stood without defining in greater detail what was arbitrary and what was not. It was necessary to go beyond the reference to "strong and valid reasons" in the fourth report. As other members had noted, draft articles 11 and 12 were closely linked. A State exercising its right under draft article 12 to offer assistance which was then rejected by the affected State might invoke the responsibility of the affected State by claiming that its refusal was arbitrary within the meaning of draft article 11. What was meant by arbitrary might also be clarified by looking more closely at the right recognized in draft article 12.

34. In that connection, two important clarifications had to be made in respect of draft article 12. First, the right to offer assistance should not encompass assistance to which conditions that were unacceptable to the affected State were attached. Assistance which clearly, from the way it was offered, had political objectives or was tantamount to interference in the affected State's internal affairs could not be deemed a legitimate exercise of the right to offer aid recognized under draft article 12. Secondly, the aid offered had to be consistent with the provisions of the draft articles (as Mr. Saboia had suggested) and, in particular, it should not be offered or delivered on a discriminatory basis. If those qualifications were made to draft article 12, a firm basis would be laid for indicating what would not be arbitrary within the meaning of draft article 11. In short, a State which rejected conditional or discriminatory aid would not be considered to be acting arbitrarily.

35. Draft article 12 could be improved by the inclusion of a provision to the effect that "Any such assistance offered shall not be subject to conditions and shall be in accordance with the principles of these draft articles, including in particular the principle of non-discrimination". That would substantially clarify matters for affected States that were confronted with offers of various types of assistance from various sources. Rejection of assistance that did not comply with that additional provision would not be arbitrary within the meaning of draft article 11. The scope of the provision could be made clear in the commentary.

36. That did not mean that those were the only criteria for determining arbitrariness: the Special Rapporteur referred to grounds of national security, for example. There was another circumstance that would justify rejection by the affected State. When a State refused assistance because it did not need it, perhaps because it was already receiving sufficient aid from other sources, it could not be regarded as acting arbitrarily. Perhaps that was obvious, but it would be wise to mention it in the commentary to draft article 11. If the Commission were to adopt draft article 11, it would have to define more clearly the circumstances in which an affected State could refuse offers of assistance and be sure that it had the freedom to do so.

37. As to the duty of the affected State to explain the reasons for its decision, especially if it rejected assistance, he questioned the need for such explanations to be given to NGOs. It was unreasonable to impose on an affected State the additional burden of having to explain to potentially dozens of NGOs why it was turning down their aid. Mr. Hmoud had suggested that one solution would be to exclude NGOs from the list of entities entitled to offer assistance under draft article 12. Rather than going that far, the Commission might indicate that the affected State's obligations under draft article 11 did not apply to NGOs.

38. Another question was whether draft article 11 should apply to States that were unwilling to supply the requisite assistance themselves, or only to those that were unable to do so. It would be tempting to delete the reference to the former, as Mr. Pellet had suggested, but that would not alter very much, since the purpose of draft article 11 was to ensure the protection of persons affected by disasters by limiting the affected State's ability to refuse help. The best way of guaranteeing that protection was for the affected State to accept assistance regardless of the reasons why it needed help. That suggested that draft article 11 should cover cases where the State was unwilling to furnish assistance itself and that the question of affected States' responsibility for failing to provide assistance to persons within their territory when they were capable of doing so should be dealt with elsewhere. That was why draft article 11 must not be changed with respect to that point.

39. Finally, the draft articles seemed to apply to situations when a State was affected by a disaster and other States offered their assistance. But what about disasters affecting a group of States? Did the same provisions apply, with each State being treated as if it were a separate affected State? That question had implications for draft article 11. In paragraph 49 of the fourth report, the Special Rapporteur suggested that when a disaster affected neighbouring States, it might not be so easy for each individual State to assess the disaster's severity, and national response capacity might differ depending on whether the response was coordinated. He would like to know whether, in his future reports, the Special Rapporteur intended to address the question of disasters affecting several States.

40. He was in favour of referring all the draft articles under consideration to the Drafting Committee, which was best placed to consider the various restructuring proposals made. At the present stage, he would simply say that he was not in favour of merging draft articles 10 to 12.

Although they were interrelated, they covered different topics to which it was preferable to devote a separate article, each accompanied by its own commentary.

41. Mr. PERERA said that, in his treatment of a topic that required a carefully balanced and nuanced approach on account of the competing principles and interests involved, the Special Rapporteur had headed in the right direction and had avoided the main pitfalls.

42. As the Special Rapporteur had said when introducing his fourth report, he had tried to find a balance between two poles of tension without sacrificing either. He had also been careful not to introduce elements or notions of a political nature that could have mired the Commission's work in interminable controversy.

43. In dealing with the affected State's duty to seek assistance when its national response capacity was overwhelmed, the Special Rapporteur drew on the guiding principles annexed to General Assembly resolution 46/182, which affirmed that, in the context of disaster response, "[t]he sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations" (para. 3). He correctly concluded that the implementation of international relief was contingent upon the affected State's consent.

44. The Special Rapporteur thereafter injected the necessary elements of balance by pointing out that the core principles of sovereignty and non-intervention and the requirement of the affected State's consent must themselves be considered in the light of States' responsibilities in exercising their sovereignty. He then analysed the scope of the affected State's duties towards persons in its territory.

45. Draft articles 10 to 12, as proposed by the Special Rapporteur in his fourth report, were linked through the interaction of the duties of the affected State and of the international community towards disaster victims and the principles of sovereignty and territorial integrity and the requirement of the affected State's consent.

46. He agreed with the Special Rapporteur that in draft article 10, it was more appropriate to speak of a duty to "seek" assistance than of a duty to "request" assistance. The Special Rapporteur had provided cogent reasoning for that preference by saying that "a duty to 'seek' assistance implies a broader, negotiated approach to the provision of international aid" (para. 44) and that the term implied the initiation of a process through which agreement might be reached. He himself endorsed the conclusion that a duty to seek assistance ensured the protection of affected populations and persons while satisfying the core requirement of State consent. Nevertheless, he also agreed with Sir Michael that the State must actively seek assistance in good faith. The draft article would be improved by making it explicit that it was up to the affected State to determine whether the disaster exceeded its national response capacity and whether it had sufficient resources to meet protection needs. Those decisions lay within the affected State's sovereign domain, and explicitly saying so would be consistent with the overall approach and with the thrust of the previous draft articles, especially draft article 9. With a

view to the discussions within the Drafting Committee, he said he also supported the proposal made by Mr. Vasciannie at the previous meeting to use hortatory language.

47. With regard to the affected State's duty not to arbitrarily withhold its consent to outside assistance, draft article 11 upheld the proposition that sovereignty also entailed obligations and that while the affected State had the right to refuse an offer of assistance, that right was not unlimited—a notion underscored in previous reports. It was fully consistent with efforts to find middle ground between an absolute consent regime and a regime that completely dispensed with the consent requirement. In order to arrive at that middle ground, the draft article must first state the well-established condition that international assistance could be furnished only if the affected State requested it or consented to it. The requirement that consent must not be withheld arbitrarily should follow that provision so as to maintain the draft article's requisite balance. In that connection, he agreed with Sir Michael and Mr. McRae that the term "arbitrarily" had to be explained and that it was necessary to say why the provision of international assistance was subject to certain conditions.

48. As the debate at the previous meeting had shown, draft article 12 raised a number of issues calling for careful consideration. The Special Rapporteur had provided material which demonstrated that an offer of humanitarian assistance must not be regarded as unlawful interference in the internal affairs of the affected State when it had "an exclusively humanitarian character" and when humanitarian assistance was provided by intergovernmental organizations and NGOs "working with strictly humanitarian motives". Paragraphs 95 and 98 of the report referred to the 2003 resolution on humanitarian assistance of the Institute of International Law³⁰⁴ and to General Assembly resolution 43/131 on humanitarian assistance to victims of natural disasters and similar emergency situations, respectively. Those elements must be reflected in draft article 12 and, there again, he endorsed Mr. McRae's comments concerning political conditions. However, he also agreed with those who had drawn attention to the difficulties of formulating a draft article which embodied the "right" to offer assistance. That posed particular problems, for the text sought to cover not only States but also the competent intergovernmental organizations and relevant NGOs. That would impose on the affected State, in the immediate aftermath of a disaster, the immense burden of ensuring that such a right was not misused, as had unfortunately been the case in Sri Lanka after the tsunami in 2004. National efforts to cope with disaster situations must be supported by a "duty" to offer assistance under the umbrella of international cooperation and solidarity. He agreed with those who had taken the view that offering assistance in a disaster situation did not amount to the exercise of a legal right, but was rather a matter of international solidarity and cooperation. Mr. Murase had captured the essence of such solidarity when he had said, with reference to the events of March 2011 in Japan, "the world stood by us when we were most in need" (3102nd meeting above, para. 49). That expressed the essence of international cooperation better

³⁰⁴ Institute of International Law, *Yearbook*, vol. 70 (2003) ... (see footnote 275 above).

than a recital of dry statistics. In conclusion, he said he was in favour of referring the draft articles under consideration to the Drafting Committee.

49. Mr. AL-MARRI said that disasters had been occurring at an unprecedented pace, striking highly advanced countries like Japan just as hard as less advanced countries such as Haiti. They had produced protracted emergency situations in which assistance was needed not only at the time of the disaster, but for much longer periods. It was sometimes hard to distinguish between natural disasters and those brought on by armed conflicts or the collapse of States. The report mentioned disasters but avoided any mention of armed conflicts or the rebuilding of a country's institutions and regime. Similarly, it did not define disasters in terms of their nature or magnitude but rather sought to find ways of enabling a State to manage them. In that connection, it was essential to underscore the principles of State sovereignty and non-interference and the need to obtain a State's consent in order to mobilize international assistance.

50. The topic under consideration had been placed on the Commission's agenda in 2007,³⁰⁵ and progress had been made, in that nine draft articles would be completed in the near future, including one on the affected State's duty to seek assistance when it was unable to manage a crisis, using its own resources. The purpose of the "duty to seek assistance" was to enable a State to select the kind of help it needed, something that tied in with the principles of sovereignty and non-interference. In his fourth report, the Special Rapporteur mentioned not only the need to obtain the affected State's consent but also certain criteria that applied. A State's offer must be examined promptly but need not be accepted with undue haste. Offers that were not sufficiently well grounded, were politically motivated rather than being focused on the rights and needs of the persons affected, or were not in line with the principles set forth in draft article 6 could be refused, as stated by the Special Rapporteur in paragraph 73 of his fourth report. The aid offered by specialized governmental organizations and international NGOs differed from that offered by private bodies. It was in that context that the provisions of the three draft articles—draft article 10 on the duty of the affected State to seek assistance, draft article 11 on the duty of the affected State not to arbitrarily withhold its consent and draft article 12 on the right to offer assistance—had to be examined.

51. The draft articles already adopted had been favourably received by States and some international organizations. It had been suggested that the notions of human dignity and humanity and their relationship with the human rights of persons affected by disasters, mentioned in draft article 6, should be clarified. The fact that the term "disaster" had been defined in draft article 3 had made it easier to draw up draft articles on serious disasters. It had also been suggested that the affected State should always receive international assistance and not only in the event of what were deemed to be major disasters. Emphasis had been placed on the need to safeguard an affected State's right to manage and organize aid while protecting its sovereignty,

rights and independence, and on the obligation of other States to respect the principle of non-interference. It should be noted with regard to the principle of neutrality embodied in draft article 6 that the principle of non-alignment was broader and more appropriate, the principle of neutrality being narrower and pertaining exclusively to the sphere of armed conflicts.

52. The fourth report set forth the rights and duties of affected States, namely the principle of consent, restrictions on refusal and the obligation to respond promptly to an offer of assistance. The Special Rapporteur should take account of the consequences of the affected State's refusal of assistance that was offered in good faith and of its rejection of a call for assistance from victims. He could also mention the refusal of certain States to seek or accept assistance. He would then be able to suggest that if an affected State did not have the necessary resources, it had the duty to seek or accept international assistance or to authorize its provision. Was a State responsible if it turned down assistance, given that that refusal might constitute an internationally wrongful act if it resulted in the violation of the stricken population's human rights? That clearly seemed to be the case if the State, which bore a responsibility to protect its citizens, deprived victims whose life was in danger of the food, shelter and medicine that international assistance could supply. Taking those factors into account, it would be wise to define the role of the international community, which must not remain idle when disaster victims needed basic protection. While solutions had to be found for instances when a State shirked its responsibility to assist victims, notions such as humanitarian intervention or mandatory protection could not be addressed, because they applied in the context of preventing crimes against humanity or genocide. As the Special Rapporteur pointed out in paragraph 70, consent could not be invoked by a State as a fundamental right if it resulted in a lack or reduction of protection and assistance when external assistance was needed and available. He himself therefore proposed that this question be examined in greater detail and that the consequences of refusal in that context be spelled out, especially if it led to the death or displacement of helpless individuals who were dependent upon a State that had taken such a decision quite unlawfully.

Reservations to treaties (*continued*)* (A/CN.4/638, sect. A, A/CN.4/639 and Add.1, A/CN.4/647 and Add.1, A/CN.4/L.779, A/CN.4/L.793, A/CN.4/L.795)

[Agenda item 2]

SEVENTEENTH REPORT OF THE SPECIAL
RAPPORTEUR (*continued*)*

53. The CHAIRPERSON invited Mr. Pellet, Special Rapporteur, to introduce the addendum to his seventeenth report on reservations to treaties (A/CN.4/647/Add.1).

54. Mr. PELLET (Special Rapporteur) said that the final part of his seventeenth and final report was divided into two sections, the first of which was entitled "Dispute

³⁰⁵ *Yearbook ... 2007*, vol. II (Part Two), p. 98, para. 375, and p. 100, para. 378 (*h*).

* Resumed from the 3099th meeting.

settlement in the context of reservations”, and the second, “Guide to practice—Instructions”, which might seem surprising. First of all, the title of the first section did not reflect its contents. In 1997, in his second report,³⁰⁶ he had announced that he intended to propose an annex to the Guide to Practice, to be devoted to dispute settlement, and in 2010 he had again expressed that intention before the Sixth Committee, where that announcement had aroused strong interest, especially among the Nordic States—that was hardly surprising—but also among African and Latin American States. The further he had progressed with that part of his report, the more he had come to realize that it would be better to be less ambitious: the entire first section, entitled “The issue”, set out his hesitations. For the reasons given in paragraphs 71 to 76 of his seventeenth report, it was unusual for the Commission to include dispute settlement clauses in its draft articles. There were general reasons, but also reasons specific to the law on reservations and the fact that the Guide to Practice was not a treaty. It would accordingly be incongruous to attach to it any compulsory or even optional dispute settlement machinery, even though examples of such machinery twinned with soft law instruments did exist. In the end, as he had indicated at the end of paragraph 77, he had taken the view that such a solution would be inappropriate, as it would be too cumbersome and formal: dispute settlement was not synonymous with compulsory dispute settlement. As paragraph 79 suggested, it would probably be wise for the Commission to do the same as it had for the reservations dialogue and to refer the issue either to States or to the General Assembly, although, as he had noted in paragraph 100, it seemed preferable to leave it to the latter to decide how to proceed. That being so, there would be little point in recommending that States should resolve their disputes regarding reservations by peaceful means, for the same recommendation could be made in respect of any dispute. He had therefore endeavoured to explain the reasons for going further than that in paragraphs 80 to 82 of his seventeenth report. There, he noted, first, that the reservations dialogue was an initial response to uncertainties or differences of opinion regarding reservations; secondly, that it was not always successful and left unresolved disputes which, while they did not pose an overall threat to international peace and security, could have substantial practical implications; and, thirdly, that States had only formal equality in such disputes. The issues which had occupied the Commission for 17 years were terribly technical: he was sure that the Commission’s members would not contradict him there. The major developed or emerging States had the human and technical resources to draft their reservations and objections in keeping with their own interests, to analyse the other parties’ reservations and to reflect on the appropriate means of reacting. Small, poor States could not do as much, for obvious reasons, which meant that most of the time reservations and objections came solely from industrialized countries. He had gradually arrived at the conclusion that it would be wise to establish an optional assistance mechanism rather than a dispute settlement mechanism, and he therefore proposed that the Commission should recommend the establishment of a reservations and objections to reservations assistance

mechanism. He had drawn on the arrangements for the systematic consideration of certain reservations introduced under the auspices of CAHDI at the Council of Europe and the European Union’s COJUR, which had already been described in previous reports and to which he adverted in paragraphs 80 to 94. That had been only one source of inspiration among several, because the CAHDI mechanism could not be universalized, for the various reasons listed in paragraph 93. As explained in paragraph 94, the CAHDI mechanism, which combined technical rigour with political realism, suggested that a cooperation mechanism that did not culminate in a binding or even formal decision might produce satisfactory and effective results. In the light of those findings, he proposed that the Commission recommend the establishment of a reservations and objections to reservations assistance mechanism which, broadly speaking, would have the following characteristics: first, it would be flexible and completely optional; secondly, it would have the dual functions of providing technical advice on matters of reservations and reactions thereto and of assisting in the resolution of differences of opinion on reservations; thirdly, it would be small, consisting of a small number of government experts, not necessarily the same at all times; and fourthly, in fulfilling those dual functions, it would take due account of the Vienna Convention rules and, of course, of the Guide to Practice. He did not think that the Commission could or should offer a blueprint of the mechanism, but he was firmly convinced that the idea should be floated to see how it would be received by the General Assembly: as he had said earlier, several delegations and individual representatives in the Sixth Committee had highly commended the idea. He also thought that it would be premature to try to force the General Assembly’s hand by “selling” it a ready-made product. That explained the cautious wording of the recommendation he proposed in paragraph 101 and the fact that the outline of what the mechanism might be remained very general and purely tentative. He proposed that, as it had done with its recommendation on the reservations dialogue, the Commission should refer the modest text to the Working Group on reservations to treaties, on the understanding that the idea of adding an annex II to the Guide to Practice was in any case open to debate.

55. Whereas the reservations and objections to reservations assistance mechanism was basically an extension of the reservations dialogue, Part Three of the seventeenth report harked back to the very beginning of the whole exercise, namely to the conclusions adopted by the Commission on the proposal he had put forward following the consideration of his first report in 1995,³⁰⁷ conclusions never subsequently challenged. They concerned the nature and form of the Guide to Practice and made it plain that it was a soft law instrument designed to guide practice without purporting to establish binding rules, since in principle the 1969 Vienna Convention, the Vienna Convention on Succession of States in respect of treaties (hereinafter “1978 Vienna Convention”) and the 1986 Vienna Convention would remain untouched.³⁰⁸ Although that approach had been constantly confirmed by the Commission and reiterated in reports and statements to

³⁰⁶ *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, pp. 50–51, paras. 47–50.

³⁰⁷ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, and vol. II (Part Two), p. 108, paras. 487–488.

³⁰⁸ *Yearbook ... 1996*, vol. II (Part Two), pp. 79–80, paras. 110–113.

the Sixth Committee, he was aware of some lingering doubts among members of the Sixth Committee, legal advisers and some Commission members. That realization had led him to prepare an "Introduction to the Guide to Practice", which he was intending to insert at the beginning of that instrument and which would comprise instructions for its use.

56. The proposed introduction, the text of which was to be found in paragraph 105, first explained that the Guide to Practice consisted of 180 guidelines and the commentaries thereto, which formed an integral part of the Guide. It explained its purpose, which was to provide assistance to practitioners of international law when they were faced with problems related to reservations (definition, form and procedure, permissibility or effects), reactions to reservations and the interpretative declarations or declarations that they might elicit. The introduction also adverted to the legal nature of the Guide by explaining that, while it had no binding force in itself, it reproduced certain binding rules that derived their force, not from the Guide, but from customary law or, for the parties thereto, from the Vienna Conventions. Some of the binding rules set forth in the Guide were indeed taken from those instruments or were the necessary consequences thereof. Paragraphs 4 and 5 of the introduction made it clear that States and international organizations were always free to set aside those rules, which were purely residual and voluntary. The same was true of the Guide to Practice: States were entirely free to draft their treaties as they wished. The proposed introduction likewise explained that the Commission had not wished to depart from the three Vienna Conventions, but rather to clarify their provisions—which explained the fairly lengthy exposition in the commentaries of the *travaux préparatoires* to the Conventions—and to draw conclusions that had failed to emerge in the Conventions themselves. Lastly, the introduction was to present and, if possible, explain the reasons for the layout of the Guide to Practice, even though it seemed reasonably logical and Cartesian, to show how the various parts fitted together and to explain the numbering system, which might be somewhat baffling.

57. Once the subject had been discussed, the Commission could decide either to include the 10 introductory paragraphs at the beginning of the Guide to Practice, as contained in chapter IV of the Commission's report on the work of its sixty-third session (A/CN.4/L.783/Add.8), it being understood that the text would be examined in detail in due course by the Commission meeting in plenary session, or to refer those paragraphs to the Working Group on reservations to treaties, if some passages proved to be controversial. In other words, the Commission could take note of the draft introduction contained in paragraph 105 of his report and ask the secretariat to incorporate it directly in chapter IV of the Commission's draft report on the work of the current session, on the understanding that the text would again be submitted to the Commission, meeting in plenary session, when the report was considered. It could also refer the draft introduction to the Working Group on reservations to treaties if it deemed that filter to be necessary. He further asked the Commission to refer to the Working Group the draft annex proposed in paragraph 101 of his report, since its wording needed to be discussed and it could not be included in the Commission's annual report before such a discussion had taken place.

58. Sir Michael WOOD said that he endorsed the Special Rapporteur's first proposal to examine the draft introduction paragraph by paragraph in a plenary meeting. Because he himself was somewhat puzzled by the new reservations and objections to reservations assistance mechanism, he thought it would be helpful to discuss it briefly at the next plenary meeting.

59. Mr. MELESCANU said that he agreed with Sir Michael that the Commission should examine the draft introduction to the Guide to Practice at a plenary meeting and adopt it without delay. With regard to the reservations and objections to reservations assistance mechanism, he said that in view of time constraints, the most efficient solution would certainly be to refer it to the Working Group on reservations to treaties.

60. Mr. HASSOUNA said that the best solution would indeed be to refer the addendum to the seventeenth report, as a whole, to the Working Group on reservations to treaties.

61. Mr. PETRIČ said that he had doubts about whether the solution proposed by Mr. Melescanu and supported by Mr. Hassouna would work, since it was for the plenary Commission, and not the Working Group on reservations to treaties, to reach a final decision on the document in question. Members of the Commission who were not members of the Working Group might wish to reopen the debate in a plenary meeting, so the plenary Commission should therefore consider the document submitted by Mr. Pellet.

62. Mr. NOLTE said that time constraints were not so great as to justify a departure from the procedure normally followed by the Commission when considering reports. The Commission's members should be given sufficient time to discuss in a plenary meeting the proposals contained in document A/CN.4/647/Add.1.

63. The CHAIRPERSON suggested that the Commission consider the addendum to the seventeenth report (A/CN.4/647/Add.1) at the next plenary meeting and take a decision on whether to include the draft introduction contained in that document in its annual report.

It was so decided.

Draft report of the International Law Commission on the work of its sixty-third session (continued)

CHAPTER IV. Reservations to treaties (continued) (A/CN.4/L.783 and Add.1–8)

64. The CHAIRPERSON invited the members of the Commission to resume their consideration, paragraph by paragraph, of document A/CN.4/L.783/Add.3.

F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (continued)

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY (continued)

(b) *Text of the guidelines and the commentaries thereto* (continued) (A/CN.4/L.783/Add.3)

1.1.5 *Reservations formulated jointly*

Guideline 1.1.5 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

65. Following a discussion in which Sir Michael WOOD, Mr. VASCIANNIE, Mr. PELLET (Special Rapporteur) and Mr. NOLTE participated, the CHAIRPERSON suggested that in the first sentence of the English text, the word “current” should be deleted.

It was so decided.

Paragraph (2) was adopted with that amendment to the English text.

Paragraph (3)

66. Sir Michael WOOD said that the concept of a “joint” reservation should be developed further through the following addition at the end of the first sentence: “in the sense that it is formulated by one or more States or international organizations in a single instrument”. In addition, the words “formulation of” should be inserted at the beginning of paragraph 3 (a) and (b).

Those proposals were adopted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (9)

Paragraphs (4) to (9) were adopted.

The commentary to guideline 1.1.5, as amended, was adopted.

1.1.6 *Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of the treaty*

Guideline 1.1.6 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

67. Mr. NOLTE proposed that, in the English text, the word “samples” be replaced with “examples”.

It was so decided.

Paragraph (2), as amended in the English text, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

68. Sir Michael WOOD proposed that the words “In the Commission’s view” should be deleted.

69. Mr. PELLET (Special Rapporteur) proposed that at the end of the paragraph, the word “or” should be replaced by “nor”.

Those proposals were adopted.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (18)

Paragraphs (5) to (18) were adopted.

The commentary to guideline 1.1.6, as amended, was adopted.

1.2 *Definition of interpretative declarations*

Guideline 1.2 was adopted.

Commentary

Paragraph (1)

70. Mr. PELLET (Special Rapporteur) said that the word “apparent” in the first sentence should be deleted, since the silence to which it referred was a very real one.

Paragraph (1), as amended, was adopted.

Paragraph (2)

71. Mr. PERERA said that the first sentence was extremely long and difficult to understand, whereas the same idea was expressed in paragraph (34) much more clearly. Perhaps the wording of paragraph (34) could be reproduced in paragraph (2).

72. Mr. PELLET (Special Rapporteur) said that paragraphs (2) and (34) did not serve the same purpose: the first outlined the problem, while the second indicated that guideline 1.2 had resolved it. In order to respond to the concerns expressed by Mr. Perera, however, he proposed that the phrase “often on the occasion of the expression of consent by its authors to be bound” be deleted: that would simplify the sentence somewhat.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

73. Mr. NOLTE said that the word “hesitant”, in the first subparagraph, sounded strange in English.

74. Mr. PELLET (Special Rapporteur) suggested the use of the word “incertaine” and its English equivalent (“uncertain”).

75. Sir Michael WOOD said that in English, the word “inconsistent” was preferable.

76. Mr. McRAE said that the English reader might wonder what the adjective “inconsistent” modified. He therefore proposed the wording “is not used consistently”.

77. Mr. PELLET (Special Rapporteur) said that in that case, the French text should read “*n’est pas constante*”.

Paragraph (4) was adopted, as amended by Mr. McRae in English and Mr. Pellet in French.

Paragraph (5)

78. Mr. NOLTE said that in the English text, the beginning of the second sentence was not clear.

79. Sir Michael WOOD pointed out that the French text, in contrast, was perfectly clear.

80. Mr. McRAE proposed that in order to clarify the English text, the words “to focus instead” should be replaced with “and focuses instead”.

It was so decided.

81. Mr. NOLTE said that at the start of the final sentence, the words “obviously” and “unquestionably genuine” were redundant.

82. Mr. PELLET (Special Rapporteur) said he saw that part of the text as simply a statement, but that in order to accommodate Mr. Nolte, he would have no objection to the deletion of the word “obviously”.

It was so decided.

Paragraph (5), as amended, was adopted.

Paragraph (6)

83. Mr. NOLTE said that the phrase “cover a range of legal realities”, before footnote marker 115, was not clear. He proposed that it should be replaced with “cover a range of legal meanings”.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (10)

Paragraphs (7) to (10) were adopted.

Paragraph (11)

84. Mr. NOLTE drew attention to a mistranslation in the English text of the final sentence: the words “will set out to describe” should be replaced by “described”.

Paragraph (11) was adopted with that amendment to the English text.

Paragraphs (12) to (14)

Paragraphs (12) to (14) were adopted.

Paragraph (15)

85. Mr. PELLET (Special Rapporteur) said that footnote 131 should refer to guideline 1.3.2, not 1.3.1.

With that amendment, paragraph (15) was adopted.

Paragraphs (16) to (23)

Paragraphs (16) to (23) were adopted.

Paragraphs (24) and (25)

86. Mr. PELLET (Special Rapporteur) said that in the French text, the footnotes to these paragraphs had been left blank: they should be filled in with a translation of the corresponding footnotes in the English text.

It was so decided.

Paragraphs (24) and (25), subject to this amendment, were adopted.

Paragraphs (26) to (29)

Paragraphs (26) to (29) were adopted.

Paragraph (30)

87. Mr. NOLTE proposed that in the final sentence, the word “anarchical” should be replaced with “undesirable”.

Paragraph (30), as amended, was adopted.

Paragraph (31)

88. Sir Michael WOOD proposed that in the second bullet point after the *chapeau*, the words “such laxity” should be replaced with “this”, since the term “laxity” was rarely used in English. In the third bullet point, the English text should be aligned on the French by replacing the phrase “that an estoppel has not been raised against them” with “have created an estoppel in their favour”.

89. Mr. PELLET (Special Rapporteur) said that the problem with Sir Michael’s first proposal was that it stripped away some of the substance in the commentary, but he would not oppose it.

It was so decided.

90. Mr. NOLTE proposed that in the second bullet point, the word “reality” should be replaced with “existence”.

It was so decided.

91. Mr. NOLTE questioned the use of the word “invoked” in the third bullet point: the declarations in question could in fact be “invoked”, even if they had been expressly accepted.

92. Mr. PELLET (Special Rapporteur) said that the problem was essentially one of translation and could be resolved by replacing the word “invoked” with “formulated”. However, the text would be even clearer in French if it read: “*être formulées à tout moment et modifiées seulement*” ...

It was so decided.

Paragraph (31), as amended, was adopted.

Paragraph (32)

93. Sir Michael WOOD said that the reference in paragraph (32) should be to Part 2, not chapter II, of the Guide to Practice, and that in general, the Guide would be easier to read if the various parts were referred to by name.

94. Mr. PELLET (Special Rapporteur) said that Sir Michael's remark was entirely justified and that the parts could be referred to by name throughout the Guide.

Paragraph (32), as amended, was adopted.

Paragraphs (33) and (34)

Paragraphs (33) and (34) were adopted.

The commentary to guideline 1.2, as amended, was adopted.

The meeting rose at 1.05 p.m.

3105th MEETING

Thursday, 14 July 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Present: Mr. Adoke, Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (continued) (A/CN.4/638, sect. D, A/CN.4/643, A/CN.4/L.794)

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Ms. ESCOBAR HERNÁNDEZ said that the Special Rapporteur's handling of the sensitive questions of who could offer assistance in the event of a disaster and the legal nature of that offer, on the one hand, and, on the other, the role of the affected State in seeking, accepting and providing assistance, suggested a means of reconciling both facets of assistance by safeguarding the balance between the sovereignty of the affected State and the protection of fundamental human rights. That was the right approach, since only by preserving that balance could the Commission help to solve a problem which, as recent events such as those in Japan had shown, had to be addressed by the international community as a matter of urgency.

2. In the fourth report on the protection of persons in the event of disasters, the Special Rapporteur attempted to

provide a rigorous and exhaustive analysis of the various international instruments pertaining to the topic, yet he had sometimes drawn conclusions that were not entirely justified. First, he had inferred from some of the instruments that there were some indisputable rights and duties relating to the offer or acceptance of assistance in the event of disasters. However, some of the instruments deserved a more thorough examination in view of the fact that work in that area of international law tended more towards progressive development than codification. Secondly, the terms "responsibility", "obligation" and "right" needed clarification and their usage ought to be harmonized. Thirdly, she agreed with the Special Rapporteur's approach to the relationship between the State receiving assistance and other States or institutions that were, or wished to be, part of the relief effort. The references in the report to international cooperation and respect for human rights as the cornerstone of assistance were correct and formed a sound basis for the Commission's work.

3. The Special Rapporteur had been wise not to include the responsibility to protect among the grounds for assistance. The discussion of the theoretical aspects had been instructive, but the issue was becoming increasingly politicized. The Commission should refrain from becoming immersed in that or related debates (for example, concerning the right or duty to intervene), since that would only hamper its work on the subject.

4. Commenting on the draft articles presented in the fourth report, she said that she agreed with the underlying idea of draft article 10. While the phrase "has the duty" might generate debate about a possible adverse impact on the affected State's sovereignty, in reality the risk was non-existent, especially in view of the safeguards contained in draft articles 6 and 9 and the recognition, implicit in draft article 11 and explicit throughout the report, of the central importance of the affected State's consent to assistance. In addition, in the context of disaster relief, sovereignty entailed the duty of the State to adopt the requisite measures to protect persons in its territory and to guarantee their enjoyment of their basic human rights. The use of the term "seek" rather than "request" was appropriate and constituted a further guarantee of the affected State's sovereignty. However, for the Spanish text, consideration should be given to whether to use the term "*recabar*" or "*buscar*", since the two words had very different implications.

5. For draft article 11, she agreed that it might be better to replace the term "arbitrarily" with "unreasonably" and, instead of speaking of an affected State that was "unable or unwilling" to provide the assistance required by the population, to employ a neutral phrase such as "does not" provide assistance. Draft article 11 simply set forth a principle without specifying either the consequences of failure to abide by it or the mechanisms and procedures for effectively delivering assistance in the event of arbitrary or unreasonable refusal. That whole issue needed to be dealt with in the draft articles, however.

6. She endorsed the comments made by Mr. Hmoud and others concerning the reference to NGOs in draft article 12. While they did play a very important role in supplying humanitarian assistance, the textual