

Document:-
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Summary record of the 3139th meeting

Topic:
Protection of persons in the event of disasters

Extract from the Yearbook of the International Law Commission:-
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natural catastrophes.¹⁷⁴ Several States had observed that the use of the term “duty” in draft article 9 was welcome for various reasons, especially in order to avoid any confusion with the concept of “responsibility” (*ibid.*, para. 23).

73. It appeared that Member States were concerned that the Commission might confuse the two regimes. In most cases, an affected State had a genuine interest in protecting persons in its territory, but there were extreme cases where the authorities might have the malicious intent not to seek assistance in order to defy the opposition, as had happened in Darfur, where crimes against humanity did indeed entail the “responsibility to protect”.¹⁷⁵

74. He therefore suggested that the Commission should consider adopting a different approach. First, there would be a general regime for States that were not in an extreme situation, where there was a general presumption that they had the sovereign right to seek external assistance from whom, when and as they wished. Second, for “hard core” States, the Commission would need to review carefully the provisions of draft article 10 and draft article 11, paragraph 2, as they applied to situations where the disaster exceeded the national response capacity and the State withheld its consent arbitrarily, unreasonably or maliciously. If the Commission adopted such an approach, more Member States would likely be willing to endorse the Special Rapporteur’s recommendations. It should be noted that even the ASEAN Agreement on Disaster Management and Emergency Response, cited frequently in the report, did not impose legal obligations on its members, but merely listed best practices for them to follow.

75. Mr. PARK thanked the Special Rapporteur for the introduction of his fifth report, which would undoubtedly contribute to the development of international law, in particular on the fundamental principles relating to relief and assistance, the duties of States affected by natural disasters and the right of access of various actors. It was always difficult to strike a balance between the principles of the protection of victims and the sovereignty of affected States. He would like to know which of those two principles the Special Rapporteur viewed as being of primary importance. It was also important to learn lessons from past experience, such as the reasons for the lack of success of the International Relief Union established by the League of Nations in 1927. In the future, he would also welcome some proposals on the privileges and immunities of persons involved in relief and aid work.

76. On more specific matters, he had a suggestion on how to resolve the tension between draft articles 10 and 11, which dealt with the duty to seek assistance and the requirement of consent. The key to resolving the conflict was needs assessment, as discussed in paragraph 151 of the report. In his view, the matter warranted a separate draft article. However, needs assessment should not be left to the affected State, but should be done by a neutral international institution. In that connection, he referred members to the IFRC Model Act for the Facilitation and

Regulation of International Disaster Relief and Initial Recovery Assistance,¹⁷⁶ mentioned in paragraph 190 of the report, which enshrined a similar concept.

77. With respect to the relationship between draft article 5 and proposed draft articles 12 and A, it was interesting that most States had responded negatively to the Commission’s question regarding the duty to provide assistance to States affected by disasters when requested. Draft article 12 referred to the right to offer assistance; in other words, there was a right with no corresponding duty. However, draft article 5 concerned the duty to cooperate. The Special Rapporteur had endeavoured to seek a practical solution in the form of new draft article A. Nevertheless, he would appreciate further clarification regarding the relationship between draft article 5 and new draft article A. Was the purpose merely to elaborate or was it to establish a limitation?

78. In conclusion, he wondered whether the Commission could still hold that there was no duty to provide assistance in the event of very serious natural disasters entailing such heavy casualties that there might be grounds for the Security Council to intervene.

The meeting rose at 6 p.m.

3139th MEETING

Tuesday, 3 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Al-Marri, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (continued) (A/CN.4/650 and Add.1, sect. C, A/CN.4/652, A/CN.4/L.812)

[Agenda item 4]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their examination of the Special Rapporteur’s fifth report on the protection of persons in the event of disasters (A/CN.4/652).

2. Mr. HASSOUNA congratulated the Special Rapporteur on his well-documented report, which furnished a sound basis for debating important issues of law and policy. At that stage in its work, the Commission should not have

¹⁷⁴ *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee, 21st meeting (A/C.6/66/SR.21)*, para. 85.

¹⁷⁵ See Security Council resolutions 1706 (2006) of 31 August 2006 and 1769 (2007) of 31 July 2007.

¹⁷⁶ See footnote 141 above.

reopened a substantive debate of the 11 draft articles and commentaries thereto that it had already adopted or of the draft article under consideration; it should have waited until the second reading to do so. However, since all the draft articles were interrelated and since some members of the Sixth Committee and some of the current members of the Commission had expressed their views on a number of those texts, he in turn wished to comment briefly on the main draft articles contained in the Special Rapporteur's report. He hoped that the current debate would help to lay the groundwork for the second reading.

3. In paragraph 43 of its report on the work of its sixty-third session,¹⁷⁷ the Commission had announced that it would welcome any information concerning the practice of States on the topic under consideration. The unfortunate fact that initially only three States—Austria,¹⁷⁸ Hungary¹⁷⁹ and Indonesia¹⁸⁰—and, subsequently, Belgium, had outlined their national legislation on disaster relief showed that, despite the topic's importance and urgency, most States had no legislation in that field. Most members agreed that the Commission's overall approach to the subject under discussion must strike a balance between the need to protect persons affected by disasters and respect for the principles of State sovereignty and non-interference. In order to attain that goal, humanitarian assistance to persons in need must always remain neutral and objective and should never become politicized. In addition, that assistance must be based at all times on the principles of solidarity and cooperation among the actors concerned.

4. With regard to the role of the affected State, which formed the subject of draft article 9, and its duty to seek assistance, as provided for in draft article 10, the question arose of who was responsible for determining, first, if a disaster situation requiring action existed and, second, if the affected State was meeting its obligations under the draft articles. It was also necessary to ascertain whether making that assessment was a role reserved for the political organs of the United Nations, or whether individual States were allowed to check whether a State's disaster response was adequate, and to ascertain who decided whether a disaster exceeded the national response capacity of the affected State. Those were key questions, and the answer to them could be given only by a neutral international body, or by a similar authority established for the purpose of overseeing the protection of persons in the event of disasters, as he had already said in earlier debates. His view was shared by Mr. Gaja, a former member of the Commission, and by Mr. Park, who had made a similar proposal at the previous meeting.

5. Draft article 11 stipulated that the affected State's consent to external assistance could not be withheld "arbitrarily". That term was too vague and should be clarified either in the text or the commentary. The same issues arose in connection with that draft article: Who assessed the arbitrary nature of the refusal and what consequences did it have? In addition, that draft article, by underlining the need to obtain the affected State's consent to outside assistance,

clearly presupposed the existence of a Government in the affected State. But if the natural disaster had destroyed the Government, was consent still required? In the event of an armed insurrection, whose consent took precedence? Could a State that recognized a Government in exile use the latter's consent as a basis for providing aid? Those were all questions that the Commission would have to address.

6. Draft article 12, whose purpose was to acknowledge the international community's legitimate interest in protecting persons in the event of a disaster, provided that States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations had the right to offer the affected State assistance in coping with a disaster. That assertion merely recognized a factual reality and had no real legal value. In that article, it would therefore be better to say that the international community might offer assistance to the affected State on the basis of the principles of solidarity and cooperation. With regard to the Commission's question whether States' duty to cooperate with the affected State in matters of disaster relief included a duty for States to provide assistance to the affected State at the latter's request, the Special Rapporteur's analysis of international practice confirmed that there was currently no legal duty of that kind and that the provision of assistance by one State to another, at the latter's request, was premised on the voluntary character of the assisting State's help. The Special Rapporteur had, however, highlighted the fact that, although there was no duty to provide assistance at a State's request, there might be a duty to give "due consideration" to requests for assistance from an affected State. Given that, in the Special Rapporteur's view, there was some evidence of practice to support that position, it would be appropriate to draw up an additional draft article underscoring that duty. That provision would not only be in line with the progressive development of international law, but would also bring out the need for the requested State to fulfil its duty to cooperate in accordance with the principle of good faith.

7. In the chapter of his report on elaboration on the duty to cooperate, the Special Rapporteur had attempted to outline the duty to cooperate with greater clarity and to explain its content in greater depth. Since cooperation played a central role in the context of disaster relief, it had been expressly mentioned in several United Nations resolutions, multilateral conventions and regional and bilateral agreements. For example, General Assembly resolution 57/150 of 16 December 2002 encouraged the strengthening of cooperation among States in the fields of disaster preparedness and response at the regional and subregional levels. At the Seventeenth Summit of the League of Arab States held in Algeria on 22 and 23 March 2005, the participants had advocated the creation of a mechanism for coordination and cooperation among Arab Governments and intergovernmental and non-governmental organizations. In 2008, the members of the League had agreed to set up that mechanism and to adopt a programme for its implementation at the national and regional levels.¹⁸¹

¹⁷⁷ *Yearbook ... 2011*, vol. II (Part Two), p. 20.

¹⁷⁸ *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee*, 23rd meeting (A/C.6/66/SR.23), para. 23.

¹⁷⁹ *Ibid.*, 24th meeting (A/C.6/66/SR.24), para. 58.

¹⁸⁰ *Ibid.*, para. 71.

¹⁸¹ Decision No. 295 of the Council of Arab Ministers responsible for the Environment, twentieth session, 20–21 December 2008. In 2009, members of the Arab League of States approved the development of an Arab strategy for disaster risk reduction and the establishment of an Arab regional platform for disaster risk reduction (see, among others, www.unisdr.org/arabstates).

That agreement was based on cooperation during the three phases of disaster control: preparedness, response and recovery.

8. In his analysis of the duty to cooperate, the Special Rapporteur had noted that the focus of recent conventions had shifted from a primarily response-oriented model to one resting chiefly on prevention and preparedness. At the previous meeting, he had mentioned the outcome of the United Nations Conference on Sustainable Development (Rio+20), which had been devoted to the environment, where participants had called for greater cooperation in measures to reduce the risks of disasters in developing countries, such as the establishment of early warning systems.¹⁸² Although draft article A, as proposed, on the duty to cooperate, listed various elements that were usually inherent in cooperation in disaster assistance, it did not address the issue of cooperation in disaster prevention and mitigation. While the Special Rapporteur had promised to examine those aspects in a future report, it would be appropriate to mention *ex ante* cooperation in the draft article in question.

9. In the chapter of the report on the conditions governing the provision of assistance, the Special Rapporteur had referred to reconstruction and sustainable development. When a disaster happened, it was first necessary to offer shelter to displaced persons, second to focus on rebuilding and only then to protect the environment. To be realistic, sustainable development should be no more than a long-term goal. The wording of draft article 13, on conditions on the provision of assistance, was too general and too vague; it should be more specific and precise. The reformulated text could comprise two paragraphs which would read as follows:

“1. The affected State may impose conditions on the provision of assistance, insofar as these conditions do not serve as an arbitrary or unreasonable limit on the provision of aid.

“2. Affected States should not arbitrarily or unreasonably use national law or international law as a barrier to the provision of aid, if to do so would endanger the safety or well-being of persons affected by the disaster.”

10. Draft article 14 on the termination of assistance should also consist of two paragraphs, which might read as follows:

“1. Affected States and assisting actors shall consult with each other to determine the duration of the external assistance.

“2. Termination of assistance by the affected State or assisting State should not be made arbitrarily or unreasonably.”

11. With those drafting suggestions, he was in favour of sending all the draft articles to the Drafting Committee. Lastly, with regard to the Special Rapporteur's comments at the previous meeting with regard to the chapter of his report on related developments or, more specifically,

the criticism expressed by some members and former members of the Commission of the topic under consideration or of his approach, he personally believed that members or former members of the Commission should abstain from public comment on the Commission's current draft articles, which were not a final product that had been presented to the General Assembly, but a work in progress subject to revision. He also wished that the Special Rapporteur's statement had been made in the presence of the persons concerned, since that would have afforded an opportunity for an intellectual dialogue that would probably have led to a lively debate.

12. Mr. PETRIČ said that, although it was unusual to revert to draft articles that had already been adopted, it was interesting to hear the views of new members who had not participated in the Commission's deliberations during the previous quinquennium, for those comments had been well meant and would certainly help to enhance the quality of the final product. The Special Rapporteur's fifth report contained a summary of the Commission's earlier work and of the debates and States' reactions in the Sixth Committee. It had to be remembered that the Committee had been in favour of studying the topic under consideration from the outset and that States had always shown their general approval of that work. The way in which the international community coped with disasters that did considerable damage and sometimes wiped out hundreds of thousands of lives in the space of a few days was a burning issue if ever there was one, for the international community bore collective, shared responsibility by virtue of the principles of solidarity and humanity.

13. The fact remained that it was a difficult topic. At the previous meeting, Mr. Park had noted the underlying “tension” between the sovereignty of the affected State and the protection of persons, a tension that had been palpable throughout the Commission's work on the subject. When two opposing but equally important principles were at stake—in the current context they were State sovereignty, on the one hand, and the protection of persons and their human rights, on the other—that always created a difficult situation for both those drafting the law and those applying it. The thorny question of how to arrive at a proper balance had been a constant concern of the Commission over the years. For example, it had been necessary to bear in mind the ever-present, two-way pull between State sovereignty and human rights when drafting all the international human rights instruments. Similarly, State sovereignty vied with the right of peoples to self-determination, those being two equally valid principles of international law grounded in the Charter of the United Nations; the difficulty lay in striking a balance between them in the actual texts drafted by the international community. The same was true of the principle of States' domestic jurisdiction and the international community's involvement in certain situations. Back in the thirteenth century, Thomas Aquinas had already pondered the question of balance in law. In internal law, a balance also had to be established between the protection of human rights and the protection of public order and State security, or more specifically between the right to information and the freedom of the press and the protection of human dignity. Since such competing interests were to be found over and over again in law, the Commission must always seek to achieve a proper balance.

¹⁸² General Assembly resolution 66/288 of 27 July 2012, annex, para. 187.

14. All the principles involved—sovereignty, protection, etc.—were continuously evolving. Sovereignty was no longer only Westphalian sovereignty, that is, a right of States, but was increasingly seen in terms of an obligation—primarily an obligation to protect the population of a State from violence and human rights violations and, in the case in question, from the effects of disasters and the suffering caused by them. In the 1950s, States, their legal departments and eminent legal writers had held that under Article 2, paragraph 7, of the Charter, apartheid was an internal matter for the Union of South Africa, the old name for the Republic of South Africa. However strange that might seem, that was what people who were authorities in international law had been wont to say.¹⁸³ Attitudes then changed and the view had been taken that apartheid was a problem of concern to the whole of the international community.¹⁸⁴

15. The Commission must, of course, base its work on the principle of cooperation, and the draft articles must encourage and promote cooperation among States and make it possible. If all concerned—the affected State and the States and entities supplying assistance—acted in good faith, that was to say solely in the interests of protecting persons affected by the disaster, cooperation would be smooth and effective, in which case efforts to establish a legal balance between rights and obligations might prove unnecessary. Another function of law, including international law, was, however, to regulate situations where rules or principles might be breached and where the protagonists might not necessarily act in good faith. In the event of a disaster, States and the other actors usually acted in good faith, but if their action was to be efficient some, mainly practical, rules had to be established in international law. At the previous meeting, Mr. Murase, Mr. Tladi and Mr. Park had suggested that the Special Rapporteur should reflect on the possibility of adding draft articles on some practical aspects. Since the beginning of its work on the topic under consideration, the Commission had liaised closely with IFRC, which had plainly stated that it was competent to deal with practical matters and that there was no point in the Commission doing so. Perhaps that was why the Special Rapporteur had not gone very far in that direction. To some extent, he personally agreed with those who were in favour of going further by adding draft articles on practicalities. The Commission still had time to do so, because it would complete the second reading in 2016.

16. In some cases, States and other entities acted in bad faith, *mala fide*. A further function of the law was to establish principles and rules making it possible to distinguish right from wrong, lawful from unlawful, and good faith from bad faith. When disaster struck, States generally acted in good faith and displayed solidarity, humanity and a spirit of cooperation—but that was not always true and a single major national disaster could imperil hundreds of thousands of lives. Even if such situations were rare, they had to be covered by rules specifying the rights

and duties of those concerned. Some speakers at the previous meeting had mentioned events in Myanmar and Darfur. Reference might also be made to Ethiopia, where famine had killed more than a million people between 1984 and 1986, although the Mengistu Government had maintained that there could be no such thing as famine in socialist Ethiopia. Conversely, in Sri Lanka, several “relief organizations” had had ulterior motives.

17. In the subject under consideration, it was vital to draw a dividing line between good faith and what was lawful, on the one hand, and bad faith and what was unlawful, on the other, and to define the rights and duties of the affected State and the rights and duties of the States and other entities that provided assistance. In order to draw that legal dividing line, it was obviously necessary to arrive at a balance between the existing principles of international law. That balance would depend on how far the Commission and States were prepared to go towards progressive development and it could be established only if the recognized principles of international law were respected; the principle of sovereignty of the State was still—and would always remain, despite its evolution—the foundation on which the international community relied in order to function. All the same, it was vital to respect the principle of the protection of persons, their human dignity and their human rights, which had become an integral part of international law as a result of the Martens clause and the Charter of the United Nations.

18. As far as the protection of persons in the event of disasters was concerned, the Commission had achieved a satisfactory balance, which could be summarized by saying that the affected State had the primary duty, by virtue of its sovereignty, to take measures to protect its population in the event of a disaster. In view of the principle of humanity, other States, and international and non-governmental organizations had the right to offer—as opposed to the right to provide—assistance in keeping with the principle of solidarity. The affected State was bound to seek outside assistance only when it lacked the capacity, or the will, to give effective protection to persons affected by a disaster. It did not have to accept the assistance offered and could refuse it, provided that it did not do so arbitrarily, in bad faith or in breach of its duty to protect the affected persons. The principle of sovereignty meant that entities offering assistance did not have the right to provide it without the consent of the affected State. They could provide help only if that State consented to all aspects of the assistance at all stages. The affected State could, by virtue of its sovereignty, withhold its consent to assistance or to some aspects thereof. It was simply bound not to withhold its consent arbitrarily or in bad faith. Entities offering assistance must respect the sovereignty of the affected State. The affected State and entities offering assistance had a duty to cooperate in protecting persons in the event of a disaster. When accepting and providing assistance they had to act in good faith and solely in the interest of protecting persons affected by the disaster.

¹⁸³ See, among others, the reports of the United Nations Commission on the Racial Situation in the Union of South Africa, A/2505 and Add.1, A/2719 and A/2953.

¹⁸⁴ See, among others, General Assembly resolutions 1375 (XIV) of 17 November 1959 and 1761 (XVII) of 6 November 1962 and Security Council resolution 134 (1960) of 1 April 1960.

19. On account of their well-balanced nature, the draft articles that had been provisionally adopted might shape international law on the rights and duties of those concerned, namely the affected State and the States, international organizations and non-governmental organizations offering

disaster relief in the best interests of the victims. Such codification and progressive development of the law would represent a big step forward in protecting persons, human dignity and human rights in the worst disaster scenarios and would help to ensure that international solidarity could be shown in circumstances where it was most needed.

20. Turning to draft articles 12, 13 and 14 and draft article A proposed by the Special Rapporteur, he drew attention to the fact that the Commission,¹⁸⁵ meeting in plenary session, had examined draft article 12, on the right of States and other actors to offer assistance, as proposed in the Special Rapporteur's fourth report¹⁸⁶ and had then referred it to the Drafting Committee, but the Committee had not had time to adopt it provisionally.¹⁸⁷ It therefore still had to be discussed and adopted. The wording of that draft article should clearly indicate that it concerned no more and no less than a "right to offer assistance". "Offering" assistance never meant "providing" assistance. As a result of its sovereignty, the affected State was free to accept or reject all or some of the offers of assistance that it might receive from States or other entities, international or non-governmental organizations or private bodies, no matter what form the offers took. In fact, it was debatable whether such a provision was really necessary, because it merely confirmed what happened in reality, in other words when a disaster occurred, States and other entities offered their assistance to the stricken State in accordance with the principles of solidarity and humanity. In that case, they were acting as sovereign, independent entities—unless special agreements existed (such as multilateral or bilateral treaties) under which the obligations of mutual assistance might have been accepted in advance.

21. Offers of assistance must not be regarded as interference in the internal affairs of the affected State, or as an infringement of its sovereignty. The affected State had the primary responsibility to protect persons in the event of a disaster in its territory and it could accept or reject the offers of assistance made to it, by virtue of its sovereignty. It had freedom of choice and of action. The only restriction on that freedom was set forth in draft article 11, which had been provisionally adopted and which stipulated that a State should not withhold its consent to external assistance arbitrarily, if it was unable or unwilling to provide the requisite disaster relief. The offering of assistance in the event of a disaster was a well-established and welcome practice in the contemporary world. As the Institute of International Law had confirmed in its 2003 resolution on humanitarian assistance, "States and organizations have the right to offer humanitarian assistance to the affected State".¹⁸⁸ The right to offer assistance did not therefore conflict with the principle of State sovereignty or constitute interference.

22. Devoting one provision to the right to offer assistance might act as an incentive for those in a position

to propose help. Just as the affected State could accept or decline an offer of assistance, other States could choose whether to offer assistance, according to their means and degree of solidarity. It was, however, in the interests of the entire international community to protect persons when a disaster occurred. The principles of humanity and solidarity also meant that the provision of such protection should be deemed a common responsibility. The right to offer assistance should be seen in that broader context and should be reinforced by the codification and progressive development of international law.

23. At the Commission's sixty-third session in 2011, it had been suggested that the Commission should also examine the possibility of establishing a "duty to offer assistance".¹⁸⁹ That idea had been rejected by the General Assembly's Sixth Committee, because such a duty would negate the noble principle of solidarity that was rapidly gaining ground. In his opinion, it would give rise to practical problems and pose insoluble theoretical questions, such as the scope of such a duty, the nature of the assistance to be offered, etc. On the other hand, it was true that in the contemporary world, in view of the principles of humanity and solidarity, offering assistance should be regarded as a moral duty.

24. It was unclear how international law could lay down a "duty to offer assistance" for other entities, especially international and non-governmental organizations. Nevertheless, in draft article A, on the duty to cooperate, the Special Rapporteur seemed to be heading in that direction. That was taking matters too far. There should be no legal obligation to accept or supply assistance. The draft articles should establish a balance between the duty to seek (no more than seek) assistance and the right to offer assistance. The draft articles that had already been provisionally adopted did so. However, in the context of the protection of persons in the event of disasters, either in draft article 5, paragraph 2, or in a separate article, it would be necessary to elaborate on the duty to cooperate, a general principle of international law rooted in the Charter, on the basis of the material used by the Special Rapporteur when he had drawn up draft article A.

25. As other members had already said, either the body of draft article 13 or the commentary thereto should make it plain that the conditions with which the affected State could surround the provision of assistance must comply first and foremost with national legislation and international human rights law. In addition, that draft article, perhaps in a second paragraph, should explicitly allow the affected State the possibility to derogate from its own laws and even from its international obligations, or to suspend their application, as Mr. Hassouna had suggested, in order to permit the genuine protection of affected persons and, especially, in order to ensure that foreign assistance could be rapidly channelled to the stricken population. The protection of persons, their life, their dignity and their fundamental rights should be the prime aim of that and all the other draft articles.

26. There was still time to choose what form the draft articles should take. That choice would also depend on the views expressed by States in the Sixth Committee. Work

¹⁸⁵ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/643, para. 109.

¹⁸⁶ *Ibid.*, vol. II (Part Two), paras. 278–283.

¹⁸⁷ *Ibid.*, para. 272, and *ibid.*, vol. I, 3116th meeting, para. 18.

¹⁸⁸ Institute of International Law, *Yearbook*, vol. 70, Part II, Session of Bruges (2003), p. 263, at p. 271 (para. 1 of chap. IV of the resolution on humanitarian assistance). Available from the Institute's website (<http://justitiaetpace.org>).

¹⁸⁹ *Yearbook ... 2011*, vol. II (Part Two), para. 283.

could continue along its present lines, in other words the drawing up of draft articles, pending a decision on whether to turn them into guiding principles or a legal instrument.

27. Lastly, as some members had suggested, it would be useful to introduce into the draft articles provisions concerning practical aspects of protecting persons in the event of disasters in order to facilitate the provision of rapid and effective assistance to the stricken population. The Commission had hitherto somewhat neglected those practical aspects, but the Special Rapporteur probably intended to take steps in that direction in the future.

28. Mr. WISNUMURTI congratulated the Special Rapporteur on the quality of his fifth report. Once again, the Special Rapporteur had lent impetus to the debate on the topic by proposing three new draft articles underpinned by a detailed analysis of various aspects of the draft articles as a whole and an extensive survey of bilateral and multilateral treaties and the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.¹⁹⁰ He also had to be congratulated on his accurate analysis of the views expressed by States in the Sixth Committee. In their comments on the draft articles already adopted by the Commission, as could be seen from the Special Rapporteur's report, delegations in the Sixth Committee had commended the Commission for its efforts to strike a balance between the need to protect persons affected by disasters and respect for the principles of State sovereignty and non-interference. Positive comments and suggestions had also been made with regard to draft articles 5, 6, 7 and 8. The Special Rapporteur had been congratulated on his recognition of the key role played by the principles of humanity, neutrality, impartiality and non-discrimination in the coordination and implementation of disaster relief, principles which the Commission had embodied in draft article 6. States had also expressed approval of draft article 9 (Role of the affected State), which rested on the principle of the sovereignty of the affected State and set forth the affected State's duty to ensure the protection of persons and the provision of disaster relief and assistance in its territory.

29. However, as noted in paragraph 28 of the Special Rapporteur's fifth report, the debates in the Sixth Committee on draft article 10 and on the duty of the affected State to seek assistance had revealed a wide divergence of views. Some States had been opposed to draft article 10, which placed the affected State under a legal obligation to seek external assistance. In their opinion, that obligation might infringe State sovereignty and undermine international cooperation and solidarity. Furthermore, it would be devoid of any basis in international law, customary law or State practice. Some members of the Commission shared that view, and he personally thought that imposing such an obligation would run counter to the Commission's consistent efforts to reconcile the need to protect persons affected by a disaster with respect for the principle of State sovereignty. It would also undermine

the affected State's legitimate right, as a sovereign State, to decide for itself whether it needed outside assistance and to keep all options open. Another undesirable effect of the duty to seek assistance was that a State that failed to comply with it might unjustifiably be held responsible for an internationally wrongful act. The current wording of draft article 10 therefore contradicted the provisions of draft article 11, which required the consent of the affected State to external assistance, a principle that was strongly grounded in international law.

30. In addition, it was obvious that, in practice, no affected State had ever refused outside assistance, even when it had sufficient response capacity. The only exception was, perhaps, Myanmar, which had not totally balked, since it had accepted neighbouring countries' assistance. Hence, there were grounds for serious doubts about the usefulness of draft article 10 as it stood.

31. In the light of the foregoing, he strongly encouraged the Commission to heed the objections raised in the Sixth Committee and to re-examine draft article 10 with a view to making its provisions acceptable to Member States. One solution might be to ask the Drafting Committee to replace the mandatory phrase "has the duty to seek assistance" with the hortatory expression "should seek assistance". Moreover, the concerns expressed in the Sixth Committee showed that the phrase "to the extent that a disaster exceeds its national response capacity" raised problems of interpretation and assessment. It was up to the affected State to decide whether a disaster exceeded its national response capacity, but the words "to the extent" might be interpreted differently. For that reason, it would be preferable to revert to the original wording suggested in the Special Rapporteur's fourth report, i.e. "if the disaster exceeds its national response capacity".

32. It seemed from the Special Rapporteur's analysis that there was general agreement on the wording of draft article 11 (Consent of the affected State to external assistance). The proposals put forward by some delegations warranted the Commission's attention, especially the proposal of Thailand to recast paragraph 2 to read, "Consent to external assistance offered in good faith and exclusively intended to provide humanitarian assistance shall not be withheld arbitrarily and unjustifiably",¹⁹¹ and the proposal of the Netherlands to substitute the adverb "unreasonably" for the word "arbitrarily".¹⁹²

33. As noted in paragraph 52 of the Special Rapporteur's report, many representatives in the Sixth Committee had been of the opinion that the duty to cooperate did not include a duty for States to supply assistance to the affected State when it so requested. They had argued that such a duty had no basis in international law, customary law or practice. The Special Rapporteur's reply was that the provision of assistance by one State to another State that requested it was premised on the voluntary character of the assisting State's action. He personally endorsed the Special Rapporteur's conclusion that the duty to cooperate in relief matters did not currently

¹⁹⁰ IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (Geneva, 2011). Available from [www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20\(2\).pdf](http://www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20(2).pdf).

¹⁹¹ *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee, 24th meeting (A/C.6/66/SR.24)*, para. 91.

¹⁹² *Ibid.*, 23rd meeting (A/C.6/66/SR.23), para. 48.

encompass a legal duty for States to supply assistance at the affected State's request. On the other hand, like some representatives in the Sixth Committee, he was in favour of drafting a provision that placed a requested State under an obligation to give due consideration to any request for assistance that it received.

34. He thanked the Special Rapporteur for clarifying the content of draft article 5 (Duty to cooperate) in draft article A, which rested on a thorough analysis of the relevant instruments in the United Nations system, multilateral conventions and bilateral and regional agreements. He subscribed to the idea, put forward by the Special Rapporteur in paragraph 81 of his fifth report, that States' duty to cooperate in the provision of disaster relief had to strike a balance between three important aspects: first, it must not impinge on the sovereignty of the affected State; second, it must take the form of an obligation of conduct on States offering assistance; and third, it must be relevant and limited to disaster relief assistance by encompassing the various specific elements that normally made up cooperation in that matter. Those three aspects were elucidated in the report that discussed the nature of cooperation and respect for the sovereignty of the affected State and therefore the relationship between draft article A, as proposed, and draft article 9 on the role of the affected State. Another important element dealt with in the report was the definition of categories of cooperation in the provision of emergency relief assistance.

35. The Special Rapporteur's analysis of the various aspects of the duty to cooperate required under draft article 5 had also served as the basis for draft article A. The fact that it was modelled on article 17, paragraph 4, of the articles on the law of transboundary aquifers¹⁹³ gave it even greater weight. As draft article A elaborated on the duty to cooperate, its provisions should be incorporated as a second paragraph in draft article 5.

36. Draft article 13 (Conditions on the provision of assistance), as proposed by the Special Rapporteur, was a logical extension of the principles contained in draft articles 9 (Role of the affected State) and 11 (Consent of the affected State to external assistance). For the purpose of drawing up the latter draft article, the Special Rapporteur had conducted extensive research into multilateral treaties, United Nations instruments, State practice and other sources. In that context, he had examined some exceptions to the affected State's right to condition the provision of aid on compliance with its national law. Those exceptions included the need for the affected State to waive provisions of its law in order to facilitate the prompt and effective provision of assistance in compliance with its duty to ensure the protection of persons in its territory. Although that exception was based on practice, in some circumstances a departure from the law might cause constitutional problems. Waiving rules, such as those on privileges and immunities, on visa and entry requirements, or on customs duties and tariffs, did not pose that type of problem. He therefore agreed with the Special Rapporteur's statement in paragraph 145 of his report that an absolute requirement that

the affected State should waive its laws in all circumstances would prevent it from exercising its sovereignty in order to protect its population and persons in its territory and under its authority. The affected State should therefore try to determine whether, in the circumstances, the waiver in question was reasonable and it should weigh its obligation to provide prompt and effective assistance against that to protect its population.

37. Lastly, he thought that draft article 14 (Termination of assistance), as proposed by the Special Rapporteur, would ensure legal certainty when it came to actually giving assistance. The draft article would, however, be more precise if it also spoke of the need for the affected State and the providers of assistance to agree on a termination procedure. To that end, the draft article should be amended to read, "The affected State and the assisting actors shall consult with each other to determine the duration of, and the procedure for terminating, the external assistance".

38. Sir Michael WOOD thanked the Special Rapporteur for his fifth report and said that, like many other members who had stressed the importance of the practical aspects of protecting persons in the event of disasters, he trusted that once the basic principles had been established, attention could focus on those practical issues. There was ample material, in terms of texts and empirical data from organizations that specialized in disaster relief, that should be studied in order to see what contribution the Commission could make. Simply incorporating the work already done, or referring to it, could send an important signal.

39. Mr. Tladi had said some rather harsh words about the very general provisions that had already been adopted, despite the fact that he had agreed with what he had termed the Commission's "human rights" approach to the topic. In response to those comments, he personally wished to defend the general provisions in question and to express his doubts about that description. He did not agree with the notion of "striking a balance between sovereignty and the protection of human rights". Human rights obligations already took account of the principle of sovereignty; some, such as the prohibition of torture, were absolute, but most were qualified and might even be subject to derogation in an emergency. There was therefore no need for any further balancing.

40. In the context of protecting persons in the event of disasters, the real balance that always had to be struck was not between human rights and sovereignty but, as Mr. Tladi had also put it, between the key principles underlying the provision of humanitarian assistance in disaster situations, namely respect for the sovereignty of the affected State, on the one hand, and the need to ensure adequate assistance to those affected, on the other.

41. The topic inevitably raised important issues of principle that went to the heart of debates about the nature of the contemporary international legal system. At the same time, some eminently practical questions had to be addressed that, depending on the answers to them, might quite literally mean the difference between life and death for persons caught in disasters. If the Commission was to live up to the responsibility it had taken upon itself by tackling the topic, it would have to address both issues of

¹⁹³ General Assembly resolution 63/124 of 11 December 2008, annex. The draft articles on the law of transboundary aquifers adopted by the Commission and commentaries thereto appear in *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54.

principle and practical matters. Differences of view over potentially intractable issues of principle must not stand in the way of finding solutions to practical matters, such as ways of facilitating relief efforts that could make a real difference on the ground.

42. Rights, duties and cooperation had to be dealt with simultaneously. It was likewise necessary to bear in mind the nature of the topic under consideration. One of the criteria guiding the Commission's selection of topics was that "the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments ... and pressing concerns ...".¹⁹⁴ The Commission's approach to the topic lay almost exclusively in the field of progressive development, not codification. That did not mean that it should ignore basic principles of international law, but it did suggest that the Commission should be prepared to approach those principles in a contemporary and progressive spirit.

43. The lively debate in the Sixth Committee had been evidence of the importance attached to the subject by States and other actors. States and organizations had amply commented on the draft articles adopted hitherto. The Commission must carefully study those remarks and also take account of new members' comments at the appropriate stage. It could do so during the second reading or, if the Special Rapporteur thought that it would be helpful, some suggestions could be considered even before then, as the Commission had done in the past for other topics.

44. In paragraphs 55 to 78 of his report, the Special Rapporteur considered States' responses to the question put to them by the Commission in its report on its work at its sixty-third session,¹⁹⁵ concerning a possible duty to assist. In that respect, he agreed with the Special Rapporteur and the vast majority of States that no such duty existed and that it would be unrealistic to impose one in the draft articles.

45. The Special Rapporteur devoted a chapter of his report to the duty to cooperate, which already formed the subject of draft article 5. He had done so partly in response to comments made in the Sixth Committee. He was proposing a draft article modelled rather closely on article 17, paragraph 4, of the draft articles on the law of transboundary aquifers.¹⁹⁶ That article 17 concerned emergencies that were under way, and the new draft article A also covered natural disasters that had already happened. Yet, as the Special Rapporteur had explained, contemporary texts on the subject paid equal, if not more, attention to disaster preparedness. That raised a general issue of which the Commission had already taken note, for example in the commentary to draft article 1, but which it had still not addressed properly, in other words to what extent the draft articles should cover the pre-disaster phase.¹⁹⁷ He wondered if the Special Rapporteur intended to propose any articles on that subject.

46. In draft article A, the words "cooperate" and "cooperation" did not seem to have the same meaning as in draft article 5. The latter was concerned with the duty to cooperate, an important if little understood principle of general international law, which was embodied in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹⁹⁸ But, in draft article A, the word "cooperation" seemed to mean something more specific, namely assistance that was provided or made available. For that reason, draft article A did not elaborate on the duty to cooperate, but was more concerned with the question of whether there was a duty to provide assistance and with the content of that duty. In addition, while draft article 5 concerned only the affected State's duty to cooperate, draft article A spoke of a duty incumbent on States generally and on "the other actors mentioned in draft article 5", but the nature of the duty proposed in the latter draft article was not entirely clear. The Special Rapporteur said that it sought to impose a duty of conduct and not of result. But upon whom precisely was the duty imposed? Which States were required to provide cooperation? Did all States have to do so? That would hardly make sense. Did it mean other affected States, States in the region, or States that had special ties or existing commitments *vis-à-vis* the affected State? Was it limited to States that possessed a capacity to assist? Draft article A apparently sought to impose that duty on all the "other actors mentioned in draft article 5". That was a very wide range of persons: the United Nations and other competent intergovernmental organizations, IFRC, the International Committee of the Red Cross (ICRC) and "relevant non-governmental organizations". Could the Commission really provide for obligations on all such "other actors" in the draft articles?

47. In that chapter and the one on the conditions for the provision of assistance in his fifth report, the Special Rapporteur referred to many practical aspects of cooperation and had emphasized how important it was that the affected State should not put barriers in its way. There were many anecdotal stories of relief supplies and workers being held at a border and therefore being unable to proceed although time was of the essence, of customs duties being imposed or of visas being required. Although in some cases those delays might be justified, affected States should certainly do all that they could to facilitate the delivery of relief equipment and supplies.

48. That chapter contained a detailed and well-balanced consideration of the thorny question of the conditions that the affected State might impose on the provision of assistance. It dealt with a whole range of important matters that other members had already mentioned. He had been disappointed by the corresponding draft article, draft article 13, which was set out in paragraph 181 of the report. He found it thin and uninformative. It was very short, which was not necessarily a bad thing; the Special Rapporteur had called it "simplified" and Mr. Forteau had termed it "lapidary". But, as many other members had said, it was essential that the Commission should propose a more elaborate provision on that subject, possibly with a number of separate paragraphs,

¹⁹⁴ *Yearbook ... 1997*, vol. II (Part Two), para. 238, and *Yearbook ... 2006*, vol. II (Part Two), para. 256.

¹⁹⁵ *Yearbook ... 2011*, vol. II (Part Two), paras. 43–44.

¹⁹⁶ See footnote 193 above.

¹⁹⁷ *Yearbook ... 2010*, vol. II (Part Two), paragraph (4) of the commentary, p. 185.

¹⁹⁸ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

or even separate articles, that reflected the points made in that chapter of the report. The Commission should carefully examine Mr. Murase's suggestion that it should think about drawing up a model agreement on the status of the armed forces and others engaged in disaster relief. It would be helpful if the Special Rapporteur could propose an elaborated version of draft article 13, either in plenary session when he responded at the end of the debate, or in the Drafting Committee, or in a forthcoming report. Such a proposal could include the elements suggested during the debate by Mr. Murase, Mr. Forteau, Mr. Tladi and other members, and it could also draw on the memorandum by the Secretariat on that subject.¹⁹⁹ If the Commission decided to adopt a more practical approach, it would be useful if the Secretariat could prepare a further addendum to that document describing the most recent developments, although budgetary restraints would probably prevent it from doing so.

49. The last draft article proposed in the fifth report, draft article 14, concerned the termination of assistance. That was an important practical issue and the draft article rightly placed some emphasis on consultation. However, it seemed to go too far, in that it appeared to require consultation as a condition for termination, in other words, neither the affected State nor the assisting State could unilaterally decide to terminate assistance.

50. As for the form that the final output would take, he agreed with Mr. Tladi that it would be preferable to draw up guidelines rather than draft articles.

51. He wished to make only two comments on the learned articles written by members or former members of the Commission: first, learned articles should not be taken too seriously; and second, unlike Mr. Hassouna, if he had understood him correctly, he was of the opinion that Commission members were perfectly entitled to write articles about ongoing work and those articles were even useful, provided they were accurate and respectful.

52. In conclusion, he was in favour of referring the three draft articles proposed in the Special Rapporteur's fifth report to the Drafting Committee. He asked the Special Rapporteur to indicate, even tentatively, when he spoke at the end of the debate, how he viewed future work on the topic.

53. Mr. ŠTURMA said that the purpose of the work on the topic was apparently to draft general principles that would not be self-executing and that might necessitate the adoption of specific implementing measures such as international agreements or national legislation. Their final form might therefore be that of a framework convention or of guiding principles. It would be up to the Commission to decide at a later stage.

54. While he agreed with an approach based on human rights and cooperation, to a certain extent he also subscribed to the concerns expressed by some Commission members about laying down duties and rights in the draft articles. In positive international law there was no absolute,

unqualified duty to provide or accept assistance. That was why the reference to cooperation had to be understood as an obligation of conduct and not of result. Both the affected State and the State offering assistance had an obligation to negotiate and cooperate in good faith while taking into consideration identified needs and available capacity. Cooperation also presupposed a certain level of transparency with regard to the scale of the disaster, needs and the capacity of the affected State.

55. The current draft articles seemed to strike a proper balance between State sovereignty and the necessity of protecting persons in the event of disasters. Exceptions from sovereignty must, however, be allowed in the event of large-scale disasters when the affected State did not possess the requisite capacity.

56. The Commission had been right to draw a distinction between the topic under consideration and the notion of the responsibility to protect, even if the suffering caused to many victims by a *mala fide*, arbitrary or discriminatory refusal of assistance could bring about a situation comparable to that warranting the application of the principle of the responsibility to protect. As Mr. Petrič and Sir Michael had pointed out, it could be a matter of life and death for many people.

57. Moving on to the new draft articles proposed in the report under consideration, he was of the opinion that both the form and the substance of draft article A required some amendment. Its relationship with draft article 5 and the nature of the duty to cooperate required clarification. Another drafting issue was the possible incorporation of other forms of assistance. Last but not least, it would be necessary to determine the position of draft article A. In his view, it should constitute the second paragraph of draft article 5. All those issues could be settled, however, by the Drafting Committee.

58. He agreed with Mr. Forteau that draft article 13 was justified, because it provided additional guarantees of the affected State's sovereignty, which might require the imposing of certain conditions on the provision of assistance. International law and national law should not, however, be put on the same footing, because internal law had to be in conformity with international law. An additional provision, either an article or a paragraph, appeared to be necessary in order to remind a State that requested or accepted assistance that it had a duty to adopt the appropriate legislative, administrative or other measures to facilitate the supply of assistance.

59. He concluded that the topic was not a "bad idea" and that work should continue in order to produce a result that met the international community's real needs.

60. Mr. McRAE said that, in his report, the Special Rapporteur had provided a thorough analysis of the views expressed by Governments in the Sixth Committee at the sixty-sixth session of the General Assembly in 2011. The great interest shown in the topic by the members of the Sixth Committee was certainly welcome and constituted an additional reason why the Commission should produce a useful result. At that stage of the work, States' views should not, however, be treated as a straitjacket causing

¹⁹⁹ Document A/CN.4/590 and Add.1–3; available from the Commission's website, documents of the sixtieth session (2008).

the Commission to wonder whether 6 or 10 States supported the wording of a particular draft article.

61. Before commenting on the Special Rapporteur's fifth report, in particular on the new draft articles proposed therein, he wished to make some general remarks about the topic, especially in the light of the debate at the previous meeting. In dealing with the topic, the Special Rapporteur had always had to maintain a delicate balance between trying to protect the interests of persons affected by disasters and not giving the impression that he was unduly interfering in the sovereignty of States. From the outset, the Special Rapporteur had defined the topic in terms of the protection of individuals and indeed that had been his primary focus. At the same time, he had taken great care in his reports and in the draft articles that he had proposed not to go too far in the direction of protection, so as not to arouse concerns about sovereignty. As Mr. Petrič had already said, those concerns had been at the heart of the debate from the start. A few years earlier, he had himself observed that there was a danger of the topic becoming the protection of States and not the protection of persons in the event of disasters.

62. Draft articles 10 and 11 called for some comments in that connection. They had been carefully drafted and were the result of a hard-fought compromise. The affected State had a duty to seek assistance, but had no positive obligation to accept it; its sole obligation was not to reject it arbitrarily. During the debate in the plenary session and in the Drafting Committee at the Commission's previous session, no one had been able to think of an example of a situation where a State that had been unable to respond to a natural disaster on its own had not requested or utilized external assistance. Draft article 10 therefore merely reflected practice. Similarly, no one had been able to give an example of a State that had arbitrarily refused the assistance offered to it. Mr. Petrič had mentioned a situation where a State had denied the existence of a disaster, but that situation was not covered by either draft article 10 or draft article 11. The case of Myanmar was often quoted but, as Mr. Tladi had explained at the previous meeting, a careful study of the matter had shown that that was not what had happened in Myanmar in 2008. In addition, when a State with which the affected State had substantial political divergences sent a warship to the affected State's territorial waters shortly after a natural disaster, and said that it was there to help, there was every reason to be suspicious. Saying "no" might have been unfortunate and possibly prompted by a misunderstanding of the motives of the State in question, but it could not be called arbitrary. Furthermore, he did not subscribe to the criticism that the word "arbitrary" was unclear. That term was often used in domestic law and, if it were accompanied by appropriate examples in the commentary, it would give the necessary guidance as to when a State could, or could not, refuse assistance. The delivery of assistance by a warship from a "friendly" country that there was every reason to mistrust was the type of scenario that had been envisaged by Mr. Vasciannie, who had been an eloquent and effective advocate of ensuring that sovereignty issues were not neglected. To oblige the affected State unconditionally to accept assistance would open the door to political interference disguised as disaster relief. It was precisely that threat to sovereignty that must concern Commission members.

63. In that regard, Mr. Murase's approach was much more pragmatic. He had recommended the working out of practical arrangements that could be used in the event of a disaster in order to ensure that assistance reached those who needed it, in other words, which focused on the protection of persons without too much concern for sovereignty when a disaster had already occurred. Of course, a model agreement on the status of armed forces in the event of a disaster might be very useful in that respect. The important point was that both draft articles 10 and 11 were consistent with State practice. Disaster-stricken States did ask for help. They did not fail to request or accept assistance, nor did they reject it arbitrarily, as Mr. Vasciannie had himself recognized. If there was an example of what Mr. Petrič had termed *mala fide* behaviour, it was not the sort of behaviour that the Commission should endorse by refusing to formulate draft articles. State practice showed that the obligations set out in draft articles 10 and 11 reflected what States actually did. Care therefore had to be taken not to suggest that there were no obligations in that sphere and not merely to describe cooperation and best practices. How could persons be protected in the event of a disaster if no one had any obligation to act in a way that would ensure their protection? By saying that States could do what they wanted, provided that they complied with a general obligation to cooperate, the Commission was not really filling its role. If the objective was to protect persons in the event of disasters, asking States to continue to do what they were already doing did not seem to impinge unduly on their sovereignty. The Commission's task was to identify legal obligations that existed already, or that should be formulated as progressive development. In that respect, it mattered little whether the outcome of its work took the form of draft articles or draft guidelines, since in the final analysis it would be up to Governments to decide what to do with the text that the Commission adopted.

64. Those comments, to the effect that it was undesirable for the Commission to refrain from placing the affected State under an obligation, applied equally to making it a duty of States to offer or supply assistance. The Commission had to be cautious about drawing too many conclusions from what had been said in the Sixth Committee. If States were asked if they had an obligation to do something that they were not required to do under any treaty, they would probably say "no" and would almost certainly reply as they had done to the question put to them by the Commission the previous year. What States said in the Sixth Committee was certainly important. The Special Rapporteur's analysis of those statements was helpful and the Commission must bear it in mind when adopting the draft articles at first and second reading. It was not, however, the only factor that had to be taken into consideration, because State practice was not determined by asking States for their opinions in the Sixth Committee. State practice was ascertained by rigorous research, not by conducting an opinion poll.

65. He therefore agreed with Mr. Forteau that, for consistency's sake, States must at least be placed under an obligation to supply assistance. Of course, that could not be an unqualified obligation and it could be applied only to the States that had the capacity to fulfil it. Once again, if one disregarded what States said in the Sixth Committee and looked at what they did, many of them took pride

in offering assistance and were quick to do so. Obliging States to offer or provide assistance was not incompatible with their practice, for it amounted to saying that States must do what they were already doing. If that constituted progressive development of the law—by adding *opinio juris* to States' consistent practice—then it was entirely appropriate positive development in the context of draft articles seeking to protect persons.

66. In fact, although in the provisions proposed in his fifth report the Special Rapporteur had apparently not wished to place States under an obligation to supply assistance, as several members had pointed out, that was precisely what draft article A did. It was certain that that fact had not escaped the Special Rapporteur who, by calling that obligation an obligation of conduct and not of result, was undoubtedly trying to do surreptitiously what he felt he could not do overtly. But, as Mr. Murase had said, that would not work, because the provision of the draft articles on the law of transboundary aquifers on which draft article A was based did not lay down an obligation of conduct.²⁰⁰ Why should the Commission not give States with the capacity to do so the moderate obligation of providing the assistance that they supplied in any case? Moreover, as other members had pointed out, draft article A posed another problem. Although it apparently referred to cooperation, in fact it concerned assistance. While it was useful to indicate the kind of assistance that could be provided, that provision did not elaborate on the obligation to cooperate. Perhaps it was a question of title and perhaps that draft article should simply be self-standing and not refer to draft article 5, as it did in its current wording. As draft articles 10 and 11 concerned the scope of the obligation to cooperate, draft article A could be a self-standing article on the provision of assistance. As long as the general objective of the draft article was understood, that matter could be sorted out in the Drafting Committee.

67. Like other members, he was of the opinion that draft article 13 only partly covered the chapter of the report that offered a very useful description of the various conditions governing assistance. If the current wording of draft article 13 were retained, its substance would be in the commentary and not in the body of the article itself. Essentially, the report set out what was expected of the affected State and of the other States and entities providing assistance in order to ensure that help was supplied efficiently and without undue interference in the internal affairs of the affected State. Facilitating the delivery of cross-border assistance, immigration and customs issues, the agreement on the status of armed forces to which Mr. Murase had referred, the obligation to respect local law and the identification and assessment of needs were all matters that could be covered more explicitly in draft article 13. He therefore endorsed Sir Michael's proposal that the Special Rapporteur should draw up a more comprehensive draft article addressing those questions for submission to the Commission meeting in plenary session or to the Drafting Committee.

68. As other members had commented, as it stood, draft article 14 was unsatisfactory in that it gave the

impression that the State providing assistance had some sort of veto on the termination of that assistance. That was not what the Special Rapporteur had intended, since in paragraph 182 of his report he made it clear that the affected State retained control over the duration of assistance. That should be plainly stated in draft article 14. Ultimately, it was up to the affected State to decide how long assistance should last, although in practice the precise date of its termination would be the subject of consultations between the affected State and the assisting State. There was no doubt that the purpose of those consultations should be to ascertain if the situation had improved enough to make further assistance unnecessary. Again, that was a point that could be elaborated on in the Drafting Committee.

69. Subject to those considerations, he was in favour of referring the proposed draft articles to the Drafting Committee. He also subscribed to the proposal that the Special Rapporteur should say how he thought work should continue. He encouraged the Special Rapporteur to press on and not to be sidetracked by occasional criticism of his work, or disagreement with it.

70. Mr. MURPHY said that he echoed the congratulations addressed to the Special Rapporteur on his fifth report on the protection of persons in the event of disasters, which recorded the progress made on the topic and contained some new draft articles backed by extensive research. The synthesis of the comments made by States in the Sixth Committee was very useful since in the future it might serve as a model for Commission reports on the topic under consideration and on other subjects. The topic in question was of extraordinary importance, because every month, if not every week, terrible disasters occurred in various parts of the world. Some were caused by nature—earthquakes, tsunamis, volcanic eruptions, droughts or epidemics—or others by humans—the mismanagement of resources or the intentional infliction of deprivation as a means of securing or maintaining governmental power. If the Commission were able to provide useful rules or guidance that would help to promote cooperation among States to enable them to cope with those disasters, its efforts would have been worthwhile.

71. He would confine himself to some very general comments on the new draft articles proposed in the fifth report, which should be referred to the Drafting Committee. He looked forward to discussing them in detail once the Committee had examined them. Like the other new members of the Commission, he wished to say a few general words about the draft articles as a whole.

72. First, he concurred that States had no duty under existing international law to provide assistance in response to a request from an affected State. The Special Rapporteur stated in paragraph 53 of his fifth report that such a binding obligation would constitute "unacceptable interference in a State's sovereign decision-making". He was personally more of the opinion that, since that obligation was not supported by any consistent State practice or *opinio juris*, it would be misguided to assert such a duty in a draft article. At the same time, he endorsed other members' reservations about framing some articles

²⁰⁰ See footnote 193 above.

in terms of States' "rights" or "duties", especially in the context of seeking assistance (draft article 10), offering assistance (draft article 12) or accepting assistance (draft article 11). Although the terms "right" and "duty" did not appear in the new draft article A, it laid down that States "shall provide" certain forms of cooperation, which in reality was tantamount to establishing a duty. An approach based on the notions of a "right" or a "duty" was problematical because, as the Special Rapporteur's impressive research had shown, the existence of rights or duties was scarcely borne out by State practice or supported by *opinio juris*. States certainly did regularly seek, offer or accept assistance in the event of a disaster, and various international instruments (most of which were not binding) did promote and facilitate it. Nevertheless, it did not seem that, either in their statements in the Sixth Committee or generally speaking, States considered that the seeking, offering or accepting of assistance reflected rights or duties flowing from international law. Of itself, consistent State practice did not create rights or duties under international law, and it would be inadvisable to tell States that the fact of voluntarily offering assistance in disaster situations created a binding obligation under international law to do so in the future. Establishing such a duty might dissuade them from offering assistance, which was not the Commission's objective. It was also doubtful whether those "rights" and "duties" also applied to international organizations or non-State actors, as provided for in draft article A. That being his position regarding *lex lata*, he disagreed with Sir Michael and thought it unwise to abandon any concern with State practice. While the Commission certainly had a mandate to pursue the progressive development of international law, it should not ignore *lex lata* if it wanted States to regard its work as useful and acceptable.

73. Another problem related to the identification of "duties" was the consequences for a State if it failed to abide by them. Normally, failure to perform a duty had some kind of repercussion. In the context of the topic under consideration what would be the consequences if an affected State refused outside assistance and other States considered that its decision was "arbitrary" within the meaning of draft article 11? How could the States concerned react if the affected State failed to abide by its duty to accept such assistance? It was hard to see how the existence of a duty to provide assistance could be asserted, if that question could not be answered. In any case, he doubted that it was useful to identify such rights and duties in the sphere of disaster relief. The affected States normally would seek and accept assistance. In short, it would be better not to focus unduly on determining rights and duties and to opt for wording that simply encouraged States to offer and accept the requisite assistance at times of disaster.

74. He joined with the other members of the Commission who had thought that the draft articles should include more practical measures. He fully supported the suggestion put forward by Mr. Murase at the previous meeting that a model agreement on the status of armed forces should be drawn up. Such an agreement might serve as a basis for affected States to consent to the presence of foreign military forces in their territory for disaster relief operations. If the Commission were able to produce a template making it

possible to reach rapid agreement on such an agreement, it would provide a much more useful service than if it formulated abstract rights and duties. Taking Mr. Murase's proposal one step further, he noted that, while the use of military units was of major importance at the time of a disaster, non-military relief also had a significant role to play. Both military and civilian efforts could be paralysed by the lack of a ready-made agreement with the affected State on the status of such personnel and its equipment within the country. If the Commission were to draw up a standard agreement on the status of armed forces, it should therefore take care to include provisions covering non-military relief efforts.

75. Lastly, although to the best of his knowledge there was no precedent for doing so, the Commission should complete its work by drafting a two-part text. The first would consist of a series of guidelines or principles of the kind found in the current draft articles, modified as appropriate, and the second would comprise several model agreements that would serve as templates in order to help assisting and affected States quickly to reach bilateral agreements on practical arrangements when a disaster arose.

76. Mr. HASSOUNA said that he wished to clarify one point in his statement that had, perhaps, been misunderstood by Sir Michael. He had not meant to suggest that members and former members of the Commission should not publish articles or comments in public. On the contrary, such action should be welcomed, because it helped to publicize the Commission's role and important contribution to international law. He had simply meant that members and former members should wait until the Commission had decided on the outcome of its work, especially in the case of preliminary deliberations and while the different approaches to, trends in and possible options for dealing with a topic were still being ironed out in meetings, be they private or public. If that were not done, members' conclusions would be based on the wrong premises, would distort the image of ongoing work and would run counter to the Commission's efforts to improve its working methods.

77. Sir Michael WOOD thanked Mr. Hassouna for his clarification and agreed with him that members or former members of the Commission should abstain from drawing conclusions in public with regard to questions that had been debated in the Drafting Committee or, more generally, in private meetings. On the other hand, he did not see why they should not comment on matters that had been debated in public meetings on which there were summary records.

78. The CHAIRPERSON said that it was up to each member to express himself or herself in such a way as not to jeopardize the objectives of the Commission's current work and to decide how far to go when referring to the Commission's public deliberations in learned articles.

The meeting rose at 12.55 p.m.