

Provisional

**For participants only**

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## **International Law Commission**

### **Sixty-fifth session (second part)**

#### **Provisional summary record of the 3179th meeting**

Held at the Palais des Nations, Geneva, on Friday, 12 July 2013, at 10 a.m.

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***Present:***

*Chairman:* Mr. Niehaus  
*later:* Mr. Šturma  
*Members:* Mr. Caflisch  
Mr. Candiotti  
Mr. Comissário Afonso  
Mr. El-Murtadi  
Ms. Escobar Hernández  
Mr. Forteau  
Mr. Gevorgian  
Mr. Hassouna  
Mr. Hmoud  
Ms. Jacobsson  
Mr. Laraba  
Mr. Murase  
Mr. Murphy  
Mr. Nolte  
Mr. Park  
Mr. Peter  
Mr. Petrič  
Mr. Saboia  
Mr. Singh  
Mr. Tladi  
Mr. Valencia-Ospina  
Mr. Vázquez-Bermúdez  
Mr. Wisnumurti  
Sir Michael Wood

***Secretariat:***

Mr. Korontzis Secretary to the Commission

*The meeting was called to order at 10.05 a.m.*

**Tribute to the memory of Ian Sinclair, former member of the Commission**

**The Chairman** said that he had received the sad news of the death, on 8 July, of Ian Sinclair. Mr. Sinclair had been a member of the Commission from 1982 to 1986. He had served as legal adviser to the Foreign and Commonwealth Office of the United Kingdom and to the British delegation at numerous international conferences. He had also been a member of the Institute of International Law and had published many books on public international law, including one highly regarded book on the Vienna Convention on the Law of Treaties and another on the International Law Commission. He proposed that the meeting of 17 July should be dedicated to the memory of Ian Sinclair.

*It was so decided.*

*At the invitation of the Chairman, the members of the Commission observed a minute of silence.*

**Protection of persons in the event of disasters** (agenda item 4) (*continued*) (A/CN.4/662)

**Mr. Petrič** said that he agreed with Mr. Peter that the topic under consideration was important and urgent. The central concern was the protection of persons, although there were many other related elements, such as State sovereignty, certain general aspects of human rights, protection of the environment and sustainable development. In essence, therefore, the draft articles and related commentaries should be concerned with the protection of persons. It was in the light of that core element that the Special Rapporteur, in his report, had recommended the adoption of a dual-axis approach, which had provoked a number of reactions. Whatever name it was given, the approach should continue to be based on the horizontal rights and obligations of the affected State and the assisting States or entities, such as international organizations, and on the vertical rights and obligations of the State *vis-à-vis* the persons to be protected – in fact, it could be considered to be a triangular approach, since the affected State and the assisting entities should act jointly and in good faith for the benefit of those affected, namely the victims of the disaster, who were at the top of the triangle.

The Special Rapporteur's sixth report was excellent and well structured. In chapter II, section B, the Special Rapporteur had compiled the sources of international law on which the "duty to prevent" was based. In that connection, he considered that the title of draft article 16 should be reworded and he supported the suggestion made by Mr. Murphy in that regard. The sources for the draft article were to be found in human rights law, as had been mentioned by several members, but also in the practice of States and in their sovereign responsibility to provide for the well-being and security of their citizens. There was therefore no need to refer to international environmental law and the law relating to transboundary harm, as that would be an unnecessary deviation from the protection of persons, even though environmental degradation did, of course, have an impact on the lives, rights and dignity of persons.

At the outset, the draft articles had focused on protection at the time of a disaster; the Commission had then, logically, gone on to the pre-disaster phase, which covered preparedness and preventive measures, and would later deal with the post-disaster phase, while ensuring there again that it did not move too far away from its original purpose. Possibly in draft article 16 and the commentaries thereto, emphasis should be placed on local circumstances, initiatives and resources, both human and material. The most effective preventive and remedial measures in the event of disasters often proved to be those that took account of local experience, knowledge, resources and participation.

In conclusion, he believed that draft article 16 was well balanced and solidly based on State practice, although paragraph 2 was perhaps not necessary, as it would be preferable to include the measures it mentioned in the commentary. At the same time, draft article 5 *ter* could more appropriately be included in draft article 5 *bis* on forms of cooperation. Of course, it would be for the Drafting Committee, to which he recommended referring the two proposed draft articles, to decide.

**Mr. Singh** said that, in addition to the efforts of the Association of Southeast Asian Nations, the Asia-Pacific Economic Cooperation forum and the South Asian Association for Regional Cooperation, referred to in paragraphs 94 to 96 of the report, mention could be made of the Regional Integrated Multi-Hazard Early Warning System for Africa and Asia set up in 2009, in the aftermath of the 2004 Asian tsunami, to generate and exchange early warning information and build capacity for preparedness and response to transboundary hazards.

With regard to chapter II, section B, about which several members had expressed doubts, he shared the concerns expressed regarding the dual-axis approach to the topic and the emphasis on horizontal rights and obligations. He agreed with Mr. Park on the need to distinguish between natural and industrial disasters, to which different rules and principles applied, as the legal regimes applicable to natural disasters were based on the humanitarian perspective rather than the principle of legal responsibility. Similarly, in the post-disaster phase, different levels of protection would be required in the case of natural and industrial disasters. The preventive measures required must also take into account the capabilities of States, depending on the availability of the necessary resources and expertise.

He also shared the doubts raised by Mr. Murase with regard to the Special Rapporteur's assertion in paragraph 57 that the principle of prevention stemmed from the precautionary principle and that the latter qualified as a State "obligation". Admittedly, in the *Gabčíkovo-Nagymaros Project* case and the case concerning *Pulp Mills on the River Uruguay*, the State had not taken the necessary measures to stop transboundary harm, but that was not directly relevant in the case of disaster prevention. He agreed with Sir Michael Wood that sections A, C and D of chapter II were sufficient to justify the draft articles, and that there was no need to cover, in the commentaries, the issues addressed in section B of that chapter, which were not central to the topic. Further, draft article 6, entitled "Humanitarian principles in disaster response", which had been adopted by the Commission on first reading, was already the basis for the duty to cooperate in all phases of a disaster.

In conclusion, while he believed that the two texts required some drafting changes, in particular draft article 16, paragraph 1, in which the words "undertake to" at the beginning of the sentence should be replaced with a clearer verb, and the phrase "to ensure that responsibilities and accountability mechanisms be defined and institutional arrangements be established" should be deleted, he supported referring the two draft articles proposed by the Special Rapporteur to the Drafting Committee.

**Mr. Vázquez-Bermúdez** said that the work undertaken under the Hyogo Framework for Action was continuing at the international level in the context of preparations for the Third World Conference on Disaster Risk Reduction, which was to be held in Japan in 2015. The obligation of States to adopt appropriate measures to reduce the risk of disasters, which the Special Rapporteur had recalled in draft article 16, was based entirely on recent developments in the international community, within the United Nations framework. There had also been new developments at the bilateral, regional and multilateral levels, as many cooperation agreements related to the prevention and reduction of disaster risk had been developed, particularly the 2000 Framework Convention on Civil Defence Assistance. There were also international instruments on industrial accidents and nuclear safety that required the adoption of appropriate measures to prevent accidents and

mitigate their consequences. The Special Rapporteur had commendably recognized States' due diligence obligations in terms of preventing accidents that could turn into disasters.

That said, he believed that the issue of environmental protection was not at all extraneous to the topic under consideration. Even though the title of the topic placed emphasis on the protection of persons, as pointed out by Mr. Murphy, the fact remained that protection of the environment often reduced disaster risk – given that environmental damage could increase disaster risk. Furthermore, the definition of disasters adopted by the Commission also covered large-scale environmental damage, such as forest fires and oil spills like the one in the Gulf of Mexico, as recalled by Mr. Peter. Therefore, there should be no confusion between catastrophic events that could bring about a disaster and disasters themselves. Thus, a volcanic eruption was not a disaster but rather a catastrophic event, since if the population living in the vicinity of the volcano was evacuated in time, the event was not a disaster. Prevention therefore consisted not of ensuring that a catastrophic event did not take place, but rather of ensuring that it did not result in a disaster such as large-scale loss of life.

International and regional initiatives, the many binding and non-binding instruments and State legislation and practice in adopting measures and implementing systems for disaster risk reduction appeared in fact to constitute a rule of customary international law concerning the obligation to take appropriate measures to prevent disasters. The Special Rapporteur had mentioned that rule in draft article 16, the title of which should, as noted by Mr. Murphy, be amended so as better to reflect the content of the provisions. Although certain members had expressed doubts with regard to the meaning or scope of draft article 16, paragraph 1, it seemed clear to him that the phrase “by adopting appropriate measures to ensure that responsibilities and accountability mechanisms be defined” did not refer to the international responsibility of the State but to the responsibilities and accountability of institutions within States before, during and after disasters. However, the phrase could certainly be amended to make it clearer. Lastly, draft article 5 *ter* was amply justified and could be made into a new paragraph of draft article 5 *bis* within the more general framework of the duty to cooperate. He therefore supported referring the two draft articles to the Drafting Committee.

**Mr. Gevorgian** noted that the issues addressed in section B had generated some controversy. For instance, the precautionary principle, far from being a universal principle of international law, was rather a principle of a sector of law, specifically environmental law. However, that branch of law mainly governed transboundary harm rather than the protection of persons. State practice hardly seemed to recognize the precautionary principle as a principle of customary law or even general international law. The appropriateness of the Special Rapporteur's dual-axis approach was therefore open to question. There was most certainly a horizontal obligation to prevent transboundary harm, but customary international law did not confirm an equivalent obligation with respect to the protection of persons, which fell rather within the scope of cooperation. The vertical obligation to prevent, meanwhile, derived from the principle of national sovereignty. With regard to due diligence, while the foreseeability criterion was important, the quality of the measures taken by States should also be taken into account.

Turning to draft article 16, he said that the reference to accountability mechanisms and institutional arrangements in paragraph 1 could be deleted. The list of examples in paragraph 2 seemed ill-advised, given the risk of excluding other important measures. As mentioned by other members, the title would have to be reconsidered. Draft article 5 *ter* could be merged with draft article 5 *bis* as there was no need to devote a specific article to cooperation in the area of prevention. Nevertheless, he supported referring the two draft articles to the Drafting Committee.

**Ms. Escobar Hernández** said that the pre-disaster phase was crucial. The protection of persons could be ensured all the more efficiently if States undertook serious efforts in terms of risk prevention, preparedness for disasters and mitigation of their effects. However, those three aspects — prevention, preparedness and mitigation — were not analysed with the requisite clarity in the sixth report, nor were they sufficiently differentiated, from the legal standpoint, in terms of whether the disaster was natural or man-made, since those two types of scenario implied differences in scope for action and therefore different obligations. Nor was their position in international law clear. When it related to the protection of persons under the jurisdiction of a State, the “duty to prevent” was a vertical obligation that did not yet have any basis in international law. While the analysis of States’ legislative practice showed a trend towards the establishment of prevention and response mechanisms, and there were also expressions of the duty to prevent in international environmental law and international human rights law, a general duty to prevent that would entail a duty to prevent natural disasters could not be inferred from those sector-specific obligations. It would seem more appropriate to link prevention to the duty to cooperate, even though that duty was only horizontal.

She endorsed the content of draft article 5 *ter*, although it could simply be made an additional paragraph of the more general article on cooperation. As to draft article 16, not only should the title be reconsidered, but a distinction should be drawn between individual and collective measures to be taken by States, and the three areas of such action should be more clearly differentiated by standardizing the measures that came under each area. Nonetheless, the two proposed draft articles could be referred to the Drafting Committee.

**Mr. Hassouna** said that he would address several issues that had not received sufficient attention. In line with the purpose of the draft articles, mention should be made of the important role that communities could play in designing prevention strategies. Under international environmental law, notably in the Aarhus Convention, there was an increasing focus on public participation in environmental decision-making. It was true that the Special Rapporteur had referred to the need for information sharing to reinforce prevention, but only in terms of the flow of information from the State to the people. Under the principle of due diligence, States had to carry out environmental impact assessments before undertaking any project, which often involved consultations with the affected communities. Accordingly, there could be a reference to the need to consult with affected communities in designing prevention strategies. It could thus be stated in draft article 16, paragraph 2, that the appropriate measures should be taken in consultation with all relevant actors and stakeholders.

Some members had argued that respect for the precautionary principle should not be considered a component of prevention, as it did not amount to an obligation. There was no consensus on the issue in international jurisprudence. However, it was interesting to note that, in the *Southern Bluefin Tuna Cases*, the International Tribunal for the Law of the Sea had ordered provisional measures on the ground that they were urgently required despite the prevailing scientific uncertainty with regard to the situation at issue; the Tribunal had thus applied the precautionary principle without explicitly using the term. More recently, in its advisory opinion on the *Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area*, the Seabed Disputes Chamber had stated that the “precautionary approach”, which was being recommended in a growing number of international treaties, was developing into a norm of customary international law. There was thus room for progressive development of the law in that regard. The Special Rapporteur would, however, have to explain the difference between the “precautionary approach” and the “precautionary principle”, which had a more binding character.

It had also been argued that the precautionary principle was primarily applied in its horizontal dimension, and that there was no basis in customary international law for its

vertical application. However, jurisprudence and treaty law showed that there was extensive implementation by States, in practice, of the obligation of prevention *vis-à-vis* their populations. Again, in the absence of any confirmed rule of customary law, one possible solution lay in the progressive development of the law. Doubts had been expressed about whether it was appropriate to include climate change within the scope of the topic. While it was true that the phenomenon required different forms of action, in terms both of prevention and mitigation of its effects, climate change was the disease, so to speak, and its symptoms were natural disasters. There was a cause and effect relationship between the two, and prevention of climate change contributed to reducing disasters.

Turning to draft article 16, he said that the three phases of prevention would have to be clarified, at least in the commentary. Emphasis should also be placed on the obligation of due diligence, which was mentioned only with reference to “appropriate measures”, and it should be made clear in the commentary that it was not an obligation of result – States must only exert their best efforts to prevent disasters. In paragraph 1, it was unclear whose responsibility and whose accountability was being described. It also seemed to be implied that institutional arrangements were necessary prerequisites to taking prevention measures. Only three examples of measures were listed in paragraph 2, although there were many others, such as awareness-raising and improvement of construction standards, which could usefully be mentioned, at least in the commentaries. The content of the draft article was broader in scope than its title. In the light of draft article 5 *ter*, draft article 1 should be amended on second reading to include the pre-disaster phase in the scope of the draft articles. In conclusion, he said that he supported referring the two draft articles to the Drafting Committee.

**Mr. Murase**, referring to the *Southern Bluefin Tuna Cases*, said that it should be borne in mind that the International Tribunal for the Law of the Sea had later overturned the decision on the provisional measures to which Mr. Hassouna had referred, so that it could hardly be invoked in support of the strict application of the precautionary principle.

*Mr. Šturma (Vice-President) took the Chair.*

**Mr. Nolte** congratulated the Special Rapporteur on his impressive, broad-based analysis and said that the two draft articles he had presented were on the right track. However, he shared the scepticism of other members of the Commission with regard to the proposition that international law recognized a general principle of prevention. The title of draft article 16 referred very generally to the “duty to prevent”, but the body of the text was much more specific. It would therefore be preferable, as had already been suggested, to refer to the “duty to take measures for disaster risk reduction”, perhaps with a supplementary reference to mitigation. The title of draft article 16 could then be “Duty to take measures for disaster risk reduction and mitigation”.

He considered that it was not solely the practice of States and organizations with respect to disasters that underpinned the duty to reduce risks but that the human rights dimension of the topic under consideration deserved the importance rightly attached to it by the Special Rapporteur. Unlike some other members of the Commission, he did not believe that the specific duties to prevent risks that were established in human rights law and jurisprudence concerned only foreseeable disasters. As early as 1982, the Human Rights Committee had emphasized, in its general comment No. 6 on the right to life, that the protection of that right required that States adopt positive measures. Today, it was widely recognized that that requirement also applied to other human rights. Of course, the scope and content of that obligation depended to a large extent on the economic possibilities and legitimate policy choices of States. However, the importance of certain rights, such as the right to life, meant that positive protection measures could and must be expected from all States, including measures to reduce the risk of events that were not specifically foreseeable. Drawing a parallel with national legislation on the risks of fire or murder,

which covered abstract (not specifically foreseeable) risks, he said that while States had a wide margin of appreciation in terms of specific measures to be taken in those areas, they could not dispense with them entirely. As appeared to have been mentioned earlier, the fundamental duty of the State to take measures to protect the lives of persons under its jurisdiction derived not only from the right to life but also from the very purpose of the State.

He also believed that the strongest source for the duty to take risk reduction measures was the “supreme” human right, the right to life, and that source was complemented by the duty to protect that also derived from other fundamental rights. The practice referred to by the Special Rapporteur appeared therefore in fact to constitute a form of implementation of those human rights, thus serving to put into clear perspective the difference between natural and man-made disasters.

On the other hand, he agreed that international environmental law was a secondary source for the general duty to take measures for disaster risk reduction, and that the basic concepts of damage, harm, risk, prevention and precaution should be clearly defined. However, while international environmental law was a secondary aspect of the topic under consideration, which was focused on the protection of persons, it was pertinent as far as disasters with a transboundary dimension were concerned, and by reason of its function of protecting the collective assets of humanity.

Draft article 16 should not focus too narrowly on certain specific means of disaster risk reduction, but rather should present them as examples which “in particular” might be “appropriate measures” to be taken by States.

In conclusion, he agreed with Mr. Forteau that it was necessary to adopt wording which, while establishing a uniform standard, left enough space for States to determine their priorities and the “appropriate” measures they intended to take.

**Mr. Candioti**, commending the quality of the Special Rapporteur’s work and his detailed analysis of practice, agreed with other members that the topic was highly specific and of immediate concern to the international community. He fully supported the inclusion of the principle of prevention and welcomed the way it was presented in the draft articles. The analysis of the link between the topic under consideration and international human rights law seemed particularly pertinent, as did the analysis of the link between the topic and international environmental law, which, quite rightly, was not limited simply to the issue of transboundary harm.

The definition of disasters agreed by the members of the Commission covered natural and man-made disasters, and it was essential to take account of that dual dimension, as illustrated by the issue of climate change. Examples of recent disasters showed that natural contributing factors were very often supplemented by human factors.

He believed that it was essential to consider whether the principle of prevention was a general principle of law or merely a principle of environmental law. There were two aspects to the implementation of that principle, both of which were dealt with in the report: one related to the occurrence of the disaster itself and the other to its prevention or the mitigation of its effects. The work that the Commission intended to undertake on the protection of the atmosphere, a topic included in its long-term programme of work, would be particularly relevant in terms of disaster risk reduction.

He approved the substance of the draft articles as a whole. However, he suggested rewording article 16, paragraph 1, so as to address not only States specifically or potentially affected by disasters but all States in general. The concept of “accountability” also seemed to raise some questions in that it could not be translated into Spanish or French without reference to the idea of “responsibility”, which covered a variety of aspects, including



aspects of a moral nature. While the term “accountability” should not necessarily be excluded, its scope should therefore be defined in the context of draft article 16. In fact, it might be preferable to refer to the concept in the context of the measures mentioned in paragraph 2 of the article, which in any case could be complemented by additional examples of prevention measures drawn from the report.

The wording of article 5 *ter* on cooperation should also be clarified and prevention and preparedness should be mentioned in addition to risk reduction.

In conclusion, he suggested that the time had perhaps come to organize the draft articles into chapters so as to make subsequent work easier.

*The meeting rose at 12.35 p.m.*