

Document:-
A/CN.4/3310

Summary record of the 3310th meeting

Topic:
Protection of persons in the event of disasters

Extract from the Yearbook of the International Law Commission:-
2016, vol. I

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

on the topic of the identification of customary law (A/CN.4/L.872), said that the report should be read together with the interim report²⁵⁰ that the Chairperson of the Drafting Committee had presented at the Commission's meeting on 7 August 2014²⁵¹ and the report²⁵² that the Chairperson of the Drafting Committee had presented at the Commission's meeting on 29 July 2015,²⁵³ which described the work of the Drafting Committee on the topic at the sixty-sixth and sixty-seventh sessions of the Commission, respectively. It would be recalled that the Drafting Committee had provisionally adopted a set of 16 draft conclusions in 2014 and 2015, of which the Commission had taken note at its previous session.²⁵⁴ The current report reproduced the text of all the draft conclusions that had been provisionally adopted by the Drafting Committee.

2. At the present session, the Drafting Committee had devoted one meeting, on 27 May 2016, to its consideration of the draft conclusions on the topic. It had considered the amendments to the draft conclusions which had been proposed by the Special Rapporteur in his fourth report (A/CN.4/695), in light of the suggestions and reformulations made by the Special Rapporteur. In order to respond to suggestions made, or concerns raised, in the plenary debate, the Special Rapporteur had suggested that the Drafting Committee confine itself to the changes proposed in the fourth report that were uncontroversial, since a number of other proposals might need more thorough discussion and would be best addressed at the second reading stage.

3. The only amendments made by the Drafting Committee at the current session to the draft conclusions provisionally adopted by the Committee in 2014 and 2015 concerned draft conclusion 3, paragraph 2, as well as the title of that draft conclusion. Draft conclusion 3, paragraph 2, now read: "Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element." The text of draft conclusion 3, paragraph 2, as provisionally adopted in 2014, had referred to "Each element", while the text now adopted by the Drafting Committee referred to "Each of the two constituent elements". The change was of a purely editorial character and did not affect the substance of that provision. The purpose of referring to "[e]ach of the two constituent elements" was to clarify the link between draft conclusions 2 and 3. The same amendment had been made in the title of draft conclusion 3, which accordingly read: "Assessment of evidence for the two constituent elements".

4. He sincerely hoped that the Commission would be in a position to adopt the draft conclusions on first reading, as set out in document A/CN.4/L.872.

²⁵⁰ The interim report of the Drafting Committee is available in the Analytical Guide to the Work of the International Law Commission, from: https://legal.un.org/ilc/guide/1_13.shtml.

²⁵¹ See *Yearbook ... 2014*, vol. I, 3242nd meeting, pp. 217–218, paras. 36–47.

²⁵² Document A/CN.4/L.869, available from the Commission's website, documents of the sixty-seventh session.

²⁵³ See *Yearbook ... 2015*, vol. I, 3280th meeting, pp. 277–284, paras. 1–51.

²⁵⁴ See *ibid.*, vol. II (Part Two), pp. 27–28, para. 60.

Draft conclusions 1 to 16

5. The CHAIRPERSON said that he took it that the Commission wished to adopt the draft conclusions on the identification of customary international law, as a whole, as contained in document A/CN.4/L.872

It was so decided.

Draft conclusions 1 to 16 were adopted.

6. The CHAIRPERSON said that it was his understanding that the Special Rapporteur would prepare commentaries for inclusion in the report of the Commission on the work of its sixty-eighth session.

The meeting rose at 10.20 a.m.

3310th MEETING

Friday, 3 June 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Al-Marri, Mr. Cafisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kitichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (concluded)* (A/CN.4/696 and Add.1, A/CN.4/697, A/CN.4/L.871)

[Agenda item 2]

REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the report of the Drafting Committee on "Protection of persons in the event of disasters" (A/CN.4/L.871).

2. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that he wished to pay tribute to the Special Rapporteur, whose constructive approach, flexibility and patience had once again greatly facilitated the work of the Drafting Committee, and to thank the other members of the Drafting Committee, as well as the secretariat and the interpreters, for their valuable assistance.

3. The Drafting Committee had held 10 meetings from 11 to 24 May 2016. It had considered the revised draft articles, prepared by the Special Rapporteur, taking into account the comments and suggestions made in plenary.

* Resumed from the 3296th meeting.

As the Special Rapporteur had proposed merging particular provisions, the numbering of the draft articles had changed. For each draft article adopted on second reading, he would indicate the corresponding number for the draft article adopted on first reading.²⁵⁵ It should be noted that the Drafting Committee had sought to make the text more coherent, including by harmonizing the definitions set out in draft article 3 with the concept of disaster risk reduction, which, it should be recalled, had been introduced into the text after several provisions had already been adopted.

4. While the draft preamble came at the beginning of the report of the Drafting Committee, it had in fact been discussed last, after the rest of the draft text had been adopted, so that it could be considered in the light of the draft articles as a whole. The Drafting Committee had considered the revised draft preamble, submitted by the Special Rapporteur, which contained seven paragraphs. It had settled on a draft preamble containing five paragraphs, as set out in its report. The first preambular paragraph recalled the mandate of the General Assembly under Article 13, paragraph 1 (a), of the Charter of the United Nations. The second called attention to the frequency and severity of natural and human-caused disasters and their damaging impact. The Drafting Committee had deleted the word “increasing”, which had been used to qualify the nouns “frequency” and “severity”, judging that assertion too factual. The third preambular paragraph, which dealt with the essential needs of persons affected by disasters, reiterated the need for the rights of those persons to be respected in the circumstances covered by the draft articles. The Drafting Committee had rejected the proposal to make reference to human dignity in the preamble, as human dignity was already the subject of draft article 4. The fourth preambular paragraph recalled two basic principles of the protection of persons in the event of disasters, namely, solidarity in international relations and the importance of strengthening international cooperation in all phases of a disaster. The fifth and final preambular paragraph stressed the principle of the sovereignty of States and reaffirmed a core element of the draft articles, namely the primary role of the affected State in the provision of disaster relief assistance. After considering a number of different formulations, including the terms “by virtue of their sovereignty” and “sovereign equality of States”, the Drafting Committee had decided to retain “the sovereignty of States”, considering that this formulation contributed to the balance in the draft articles and thereby reflected the principle underlying the provisions as a whole. It had also considered adding the words “function and” before “role”, but had decided on the current wording, which corresponded to that of draft article 10. It should be noted that it had not retained the proposal to introduce a paragraph recalling the mandate of the Commission under its statute, which was not usual practice, nor the proposal to add a paragraph reaffirming the applicability of the rules of customary international law to questions not covered by the draft articles, as the relationship between the text under review and other rules of international law was already the subject of draft article 18.

5. With regard to draft article 1 on the scope of application of the draft articles, the Drafting Committee had not made any changes to the text adopted on first reading, which it considered as having been generally supported by the Commission.

6. Draft article 2 dealt with the purpose of the draft articles, which the Drafting Committee had considered as meriting the inclusion of a provision in its own right. The Drafting Committee had retained the text adopted on first reading, the only change being the inclusion of a reference to the “reduction of the risk of disasters”. It had initially considered the wording “reduction of risk of, and response to, disasters”, but had ultimately decided on “facilitate the adequate and effective response to disasters, and reduction of the risk of disasters”, which served to confirm that, while the main emphasis of the draft articles was on the provision of adequate and effective response to disasters, they also dealt with the reduction of the risk of disasters. The phrase “reduction of the risk of disasters”, a well-established formulation also used in draft article 9, also served to recall the importance of risk reduction, as evidenced by the recently adopted Sendai Framework for Disaster Risk Reduction 2015–2030.²⁵⁶ The words “that meets” had been replaced with “so as to meet” because the Drafting Committee wished to express more clearly the goal underpinning the provision. Lastly, the phrase “so as to meet the essential needs of the persons concerned, with full respect for their rights” should be understood to apply to both disaster response and risk reduction. Accordingly, depending on the context, the “persons concerned” were the victims of a disaster that had already occurred or individuals who would potentially be affected by a future disaster.

7. The Drafting Committee had decided to retain the phrase “with full respect for their rights” adopted on first reading because it allowed the text to refer to both the needs-based and rights-based approaches. It had considered the argument that the adjective “full” was superfluous and did not reflect the fact that some treaties provided for derogation of human rights, but had nevertheless decided not to delete that word, considering that doing so could lead to the misconception that the final text was less focused on the importance of respect for human rights than that adopted on first reading. It should be noted that the term “rights” was to be understood to be broader than just human rights and must be interpreted in the light of draft article 5, which referred to the need to respect human rights in accordance with international law. That point would be developed in the commentary.

8. Lastly, the title of the draft article, “Purpose”, was the same as that adopted on first reading.

9. Regarding draft article 3, the Drafting Committee had merged two provisions adopted on first reading: draft article 3, on the definition of the term “disaster”, and draft article 4, which contained the definition of other terms. The possibility of merging those provisions had been considered during the first reading, but a decision had been deferred until the second reading. The possible merger had been viewed favourably in the comments received and

²⁵⁵ The draft articles and the commentaries thereto adopted by the Commission on first reading are reproduced in *Yearbook ... 2014*, vol. II (Part Two), pp. 61 *et seq.*, paras. 55–56.

²⁵⁶ General Assembly resolution 69/283 of 3 June 2015, annex II.

had been supported during the plenary debate. Accordingly, the definition of “disaster” was now to be found in subparagraph (a) of draft article 3 and the other subparagraphs of the former draft article 4 had been renumbered.

10. Concerning draft article 3, subparagraph (a), the Drafting Committee had focused on the proposed changes to the text adopted on first reading, as reflected in the revised text submitted by the Special Rapporteur.

11. The first proposal was to specify that “disaster” referred to a calamitous “physical” event. The Special Rapporteur’s intention was to address the concerns expressed in the plenary debate that the existing definition of disasters was too broad and might be understood to cover events such as the collapse of stock markets or other financial shocks that could also lead to the consequences referred to in the draft article, to which the Special Rapporteur had proposed the addition of “economic” damage. The Drafting Committee had decided not to include a reference to “physical” so as to avoid limiting the scope of application of the draft article, as it was not always easy to determine whether an event was physical or not.

12. The Special Rapporteur had also proposed the addition of a reference to “displacement” to the list of the possible consequences of disasters. The Drafting Committee had decided to refer to “mass displacement” so as to make clear that the draft articles applied only to displacement on a large scale. Accordingly, the phrase “widespread loss of life, great human suffering and distress, mass displacement” sought to reflect the impact on the persons affected by the disaster.

13. Lastly, the Special Rapporteur had proposed the addition of a reference to economic damage caused by disasters, as had been suggested in some of the comments received from States and international organizations. However, the Drafting Committee had considered that such a clarification was not necessary and might even cause confusion because the term “material damage” already included economic damage. Furthermore, the focus should be placed on the immediate damage caused by the disaster. The expression “economic damage” could also imply long-term loss, including structural damage to the economy, which was not within the scope of the draft articles. That position was in line with the view the Commission had taken on first reading, in that the draft articles did not apply in principle to economic damage. If necessary, the commentary would make clear that the expression “material damage” also covered economic damage, as indicated by the phrase “thereby seriously disrupting the functioning of society”, and that the draft articles did not apply to events leading exclusively to widespread economic loss.

14. Draft article 3, subparagraph (b), dealt with the definition of “affected State”, which was central to the draft articles. Of all the definitions adopted on first reading, it was the one that had undergone the most revision. The Drafting Committee had primarily sought to determine whether to take up the proposal to extend the scope of “affected State” to include cases where a disaster took place in territory over which a State exercised jurisdiction or control, as the Commission had done in 2001 in the

draft articles on prevention of transboundary harm from hazardous activities.²⁵⁷

15. The Drafting Committee had sought to reformulate the subparagraph to avoid any ambiguity regarding which States could be considered “affected States” for the purposes of the draft articles. It had particularly wanted to ensure that the provision could not be interpreted too broadly, since some respondents had commented that the text adopted on first reading could be understood to mean that a State of nationality could be considered an “affected State” if any of its nationals happened to be on the territory where the disaster had occurred. It had therefore considered several formulations to make the territorial link clearer. It was worth noting that the sole purpose had been to define the scope of application of the draft articles and that the formulation adopted was without prejudice to the possibility that a State might exercise jurisdiction over its nationals in the territory of another State for the purposes of the application of other rules of international law, including international human rights treaties.

16. The Drafting Committee had begun by specifying that the term “affected State” referred to the State in whose territory the disaster had occurred. It had also replaced the word “the State” with “a State” in order to clarify that in situations where a disaster occurred in the territory of multiple States, each one was an “affected State”.

17. The phrase “in the territory or otherwise under the jurisdiction or control of which persons, property or the environment are affected by a disaster” had been deleted and replaced with “in whose territory, or in territory under whose jurisdiction or control, a disaster takes place”, a simpler and clearer formulation, which also had the advantage of being in line with the definition of “disaster”.

18. The Drafting Committee was conscious that if “affected State” was understood to refer to States where the effects of the disaster were felt, the term could apply to a number of States. However, retaining only the territorial component, namely determining that the affected State was only that State on whose territory the disaster took place, would exclude from the definition the neighbouring State or States that might also suffer the consequences of the disaster, even though it had not taken place on their territory or on territory under their jurisdiction or control. The Drafting Committee had therefore decided that the definition of “affected State” needed to reflect the fact that the term “disaster” in subparagraph (a) referred to both the event and its effects. It had taken the view that the best solution was to use the phrase “in whose territory ... a disaster takes place”, thereby limiting the applicability of the draft articles to States in which the effects of the disaster caused serious disruption to the functioning of society.

19. In subparagraph (c), which contained the definition of the “assisting State”, the Drafting Committee had deleted the phrase “at its request”, which was considered

²⁵⁷ The draft articles on prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm and the commentaries thereto adopted by the Commission at its fifty-third session are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98. See also General Assembly resolution 62/68 of 6 December 2007, annex.

superfluous in the light of the reference to the consent of the affected State. While it agreed that the definition of the principle of assistance would be better placed in the operative provisions rather than in the draft article on the use of terms, the Drafting Committee nevertheless considered it important to clarify that, by definition, assistance required the consent of the affected State, as provided for in draft article 13.

20. Subparagraph (d) reflected the evolution of the concept of “other assisting actor”. Having considered the revised wording proposed by the Special Rapporteur, the Drafting Committee had decided to retain the reference to NGOs, but not to draw a distinction between those organizations and international organizations, considering that it was more appropriate to do so in the draft articles on other assisting actors.

21. The new wording also differed from that adopted on first reading in that it made no reference to “individual external to the affected State”. In his summing up of the debate, the Special Rapporteur had recommended deleting the phrase “other entity or individual external to the affected State” on the basis that the rights and obligations of States and international organizations could not be extended to other entities or individuals. The Drafting Committee agreed with that position with regard to individuals and had considered a number of options, including indicating that the list of actors mentioned in the draft article was not exhaustive by inserting the word “includes” before the list, but had decided that this approach would undermine the internal consistency of the text. The possibility of individuals providing assistance would therefore be mentioned in the commentary. However, the Drafting Committee had decided to retain the reference to external entities in order to ensure that the term “other assisting actor” covered entities like the IFRC. It had also considered including specific mention of “components of the Red Cross and Red Crescent Movement”, as found in draft article 7, but had decided not to, given that the Red Cross was not the only entity that was not, strictly speaking, an NGO that might be involved in the provision of assistance to a State. It would be explained in the commentary that companies were not regarded as entities for the purposes of the draft articles.

22. The deletion of the phrase “external to the affected State” did not mean that the Drafting Committee had reversed its decision on the exclusion of internal actors, such as domestic NGOs, from the scope of application of the draft articles; instead, it had chosen to address the issue in the commentary rather than in the draft article.

23. In draft article 3, subparagraph (e), which defined “external assistance”, the Drafting Committee had made only one amendment. As proposed by the Special Rapporteur, it had deleted the reference to disaster risk reduction that had appeared in the text adopted on first reading. As the Special Rapporteur had argued, the reference to risk reduction had been misleading since, in the draft articles, the term “other assisting actor” was used to refer to actors at the response stage.

24. With regard to subparagraph (f), which contained the definition of “relief personnel”, the only amendment

to the text adopted on first reading had been the removal of the reference to “disaster risk reduction”, since “relief personnel” were by definition involved in relief activities undertaken during the response phase. It should be recalled that, in his eighth report (A/CN.4/697), the Special Rapporteur had proposed the addition of a reference to the use of military assets; he had withdrawn that proposal in his summing up of the debate in plenary, on the understanding that the issue would be addressed in the relevant substantive provision, namely draft article 15, on the facilitation of external assistance.

25. Subparagraph (g) contained the definition of the term “equipment and goods”. In addition to the deletion of the reference to disaster risk reduction for the same reasons as in subparagraphs (e) and (f), a reference to “telecommunications equipment” had been inserted following a proposal in the comments received.

26. The title of draft article 3, “Use of terms”, was the same as that adopted on first reading for the corresponding draft article.

27. With regard to draft article 4, on human dignity, the first issue that the Drafting Committee had needed to address was whether that concept should appear in the draft articles as an autonomous provision or be included in the preamble. The Drafting Committee had decided that, since respecting and protecting the human dignity of affected persons was central to the draft articles, it warranted being retained in a separate provision. A proposal to merge the draft article with what had become draft article 5, on human rights, had also been considered. The Drafting Committee had not accepted that proposal, considering that the same result could be achieved by placing the two draft articles one after the other. Keeping the two provisions separate also made it possible to indicate that they should not be treated on the same level.

28. As the Commission would recall, the Special Rapporteur, in summing up the debate in plenary, had proposed that the text be aligned with that adopted in the draft articles on the expulsion of aliens, which referred only to the “obligation to respect”,²⁵⁸ without mentioning protection. The Drafting Committee had, however, rejected that proposal and preferred to retain the wording adopted on first reading, which was a standard formulation for references to “human dignity”.

29. The difficulty, however, had lain in linking the reference to protection to the entities involved, namely States and other assisting actors, as the text adopted on first reading had, and to the Special Rapporteur’s subsequent proposals. While such a link was appropriate for States, it was less so for “other assisting actors” because of differences of opinion regarding the obligation of non-State entities, under international law, to protect the human dignity of affected persons. It was therefore necessary to find language that did not specify the entities responsible for respect and protection, and the draft article had thus been formulated in the passive voice, focusing solely on respect for and protection of human dignity. The words “in the event of disasters”, which

²⁵⁸ See *Yearbook ... 2014*, vol. II (Part Two), p. 36 (draft article 13).

mirrored draft article 1, were intended to confirm that, in accordance with the purpose of the draft articles defined in draft article 2, the provision applied to both disaster response and disaster risk reduction. The Drafting Committee had also decided not to limit the scope of application of the draft article by specifying that the persons involved were those in the affected State, in order not to restrict the scope of a fundamental concept that was central to the draft articles. The title of the draft article, “Human dignity”, was the same formulation as that adopted on first reading.

30. With regard to draft article 5, on the human rights of persons affected by disasters, two main changes had been made to the text adopted on first reading. First, where the first reading text had “respect for” human rights, the text now read “the respect for and protection of” human rights. The Special Rapporteur had proposed aligning the wording of the draft article with that typically found in international human rights treaties and including the word “fulfillment”, but had withdrawn the proposal in the light of the views expressed in plenary. The Drafting Committee had worked on a revised proposal by the Special Rapporteur, which maintained the concepts of respect and protection, and had adopted it in its current formulation. It had also considered whether it was necessary to align the text with that adopted for draft article 4, on human dignity, by adding the words “in the event of disasters”, but ultimately had decided that such a parallel was not strictly necessary.

31. The second question had been how to formulate the reference to human rights. The text adopted on first reading simply referred to “their human rights”, which the Special Rapporteur had retained in the text proposed in his eighth report. However, in response to several statements during plenary, he had amended the proposal to read “rights under international human rights law”, the idea being to make reference to the entire body of international human rights law, including the possibility of suspension and derogation, which remained applicable in the event of a disaster. The Drafting Committee, however, had not considered it necessary to refer specifically to international human rights law, taking the view that the text adopted on first reading had a broader scope of application because it included human rights protection under the national law, for example constitutional law, of many States. It also considered that it was not wise to make a formal determination as to whether a particular “body” of law existed or not.

32. It should be recalled that the commentary adopted on first reading already indicated that the general reference to “their human rights” encompassed both substantive rights and limitations that existed in the sphere of international human rights law, in particular the affected State’s right of derogation under existing treaties.²⁵⁹ The Drafting Committee had nevertheless decided to make the point clearer by adding the words “in accordance with international law”, based on a similar provision in the draft articles on the expulsion of aliens. The clarification acted as a reminder that the draft articles operated within the framework of the rules of international law which, as

had already been indicated, provided for the possibility of suspension or derogation. The addition was also useful in that it recalled that other rules of international law, such as those dealing with refugees and displaced persons, might apply in the situations covered by the draft articles. Lastly, the Drafting Committee had decided to retain the title “Human rights”, which was the same formulation as that adopted on first reading.

33. With regard to draft article 6, on the applicable humanitarian principles, the Drafting Committee had decided to retain the text adopted on first reading. It was nonetheless worth recalling, for the record, the various proposals that had been made. In his eighth report, the Special Rapporteur had proposed inserting references to the principles of “no harm” and “independence”, but, in the light of the views expressed during the plenary debate, had subsequently proposed to revert to the text adopted on first reading. The Drafting Committee had agreed with the Special Rapporteur’s proposal, including to retain the reference to the principle of “neutrality”. In the view of the Drafting Committee, that principle should not be understood in the sense applied in the context of armed conflict, but rather in the more specific sense that it had acquired within the context of humanitarian assistance, as indicated in the commentary to the text adopted on first reading, namely that the “provision of assistance [should] be independent of any given political, religious, ethnic or ideological context”.²⁶⁰ The Drafting Committee had also decided to retain the structure of the relationship between impartiality and non-discrimination, which had been carefully negotiated during the first reading, so that in the draft articles the essence of impartiality was non-discrimination.

34. The Drafting Committee had further considered the possibility, on the basis of a proposal made in plenary, of including a reference to “applying a gender-based perspective” and had also considered using the term “gender sensitive”, but had decided against including any such indication in the draft article itself, since the legal implications of doing so, and the relationship with the other principles mentioned, were unclear. Furthermore, it was concerned that such a reference within the article would expose the compromise text to proposals to include other sensibilities. It had decided to retain the approach adopted on first reading, which was to capture many such considerations by using the words “particularly vulnerable”. The commentary would nonetheless emphasize the importance of adopting a gender-based approach and would also explain that the position of women was not necessarily to be dealt with under the reference to “particularly vulnerable”, but rather under the principle of non-discrimination.

35. The title of draft article 6 remained “Humanitarian principles”. In his eighth report, the Special Rapporteur had proposed that the title of the draft article be changed to “Principles of humanitarian response”, but had withdrawn that proposal following the comments made in plenary.

36. Regarding draft article 7, on the duty to cooperate, the first issue had been that of the scope *ratione materiae*

²⁵⁹ See *ibid.*, p. 70 (para. (3) of the commentary to draft article 6).

²⁶⁰ *Ibid.*, p. 71 (para. (4) of the commentary to draft article 7).

of the provision. In the revised proposal submitted to the Drafting Committee, the Special Rapporteur had recommended incorporating into the draft article, as a second subparagraph, draft article 10, as adopted on first reading, on cooperation for disaster risk reduction. However, the Drafting Committee had decided that this was not necessary, since placing the two paragraphs side by side made it clear that the scope of draft article 7 was broad enough to cover cooperation for disaster risk reduction during the pre-disaster phase. In other words, the deletion of draft article 10, as adopted on first reading, should not be interpreted as indicating that the Drafting Committee had changed its mind, but rather was the result of the second reading process, which involved the integration of the various provisions, which had been adopted over several years during the first reading. Other effects of such streamlining included the fact that forms of cooperation during the response phase were covered by draft article 8 and that the various disaster risk reduction measures envisaged within the international cooperation mentioned in article 7 were detailed in draft article 9, paragraph 2. The matter was further clarified by a modification to the English text: the opening phrase “In accordance with the present draft articles” had been aligned with the French text to read “In the application of the present draft articles”. That modification had also been motivated by the need to make clearer the link between the provision and the purpose of the cooperation. The Drafting Committee had also considered using the formula “For the purposes of the present draft articles” but had decided against it.

37. A series of amendments had been made to align the text with the wording adopted in other draft articles. In particular, the term “other assisting actors” served to refer to the definition of that concept contained in draft article 3 (*d*) and included competent intergovernmental organizations, relevant NGOs and any other assistance-providing entities. The draft article had been streamlined by deleting the explicit references that had appeared in the text adopted on first reading, with one exception. The Drafting Committee had felt that, given the important role played by the International Red Cross and Red Crescent Movement in international cooperation in the context of the situations covered by the draft articles, a specific reference to it should be maintained even if it was technically one of the “entities” covered by the term “other assisting actor”, as defined in draft article 3. The reference had become “International Red Cross and Red Crescent Movement”, at the express request of the entity in question. The modifications had been intended simply to refine the formulation of the provision, not to limit the scope of the cooperation envisaged.

38. It was also important to recall for the record that the Special Rapporteur had, in the proposal in his eighth report, recommended including a specific reference to the United Nations Special Coordinator for Emergency Relief; however, that reference had no longer appeared in the revised version of the draft article placed before the Drafting Committee. The Drafting Committee had agreed that the reference to the United Nations necessarily encompassed the United Nations Special Coordinator for Emergency Relief, whose role would be dealt with in the commentary.

39. The Drafting Committee had also considered a proposal to replace the words “as appropriate” with “within their capacity”, so as to strengthen the obligation to cooperate. However, it had decided against that proposal, as the reference to “as appropriate” did not qualify the level of cooperation, but rather the entities with whom the cooperation should take place in any particular disaster, and as such, continued to qualify the entire draft article. The phrase had the effect of modifying the nature of the cooperation envisaged, depending on which entities were involved. The Drafting Committee had also considered placing the words “as appropriate” elsewhere in the draft articles, but had decided against it. The title of draft article 7, “Duty to cooperate”, was the same as that adopted on first reading.

40. With regard to draft article 8, on forms of cooperation in the specific context of disaster response, the text adopted on second reading was substantively the same as that adopted on first reading. The opening phrase, “For the purposes of the present draft articles”, had been deleted, as it was no longer necessary since, in the new text, the words “Cooperation in the response to disasters” clarified the context. That addition had been intended to align the text more clearly with the understanding reached for draft article 7, namely that draft article 8 would expand on the duty to cooperate in the specific context of response to disasters.

41. The Drafting Committee had also considered the possibility of adding a reference to the provision of financial support to the forms of cooperation, but had decided against doing so for fear of reopening the debate on the consensus text adopted on first reading, on the understanding that the commentary, as adopted on first reading, would indicate that the list of forms of cooperation contained in the draft article was not exhaustive and that other forms existed, including the provision of financial assistance.

42. The title of draft article 8 had become “Forms of cooperation in the response to disasters”, so as to reflect the understanding reached at the current session regarding the scope of the draft article, as indicated above.

43. Regarding draft article 9, on the duty to reduce the risk of disasters, the Commission would recall that the Special Rapporteur had proposed expanding the text adopted on first reading to include a reference to the creation of new risk and the reduction of existing risk. Since the proposal had not met with general approval in the plenary debate, the Special Rapporteur had presented a revised proposal, which reverted to the wording adopted on first reading.

44. In the light of the proposals made in plenary to modify the obligation, the Drafting Committee had considered the possibility of adding the words “taking into account the means at their disposal”, so as to anticipate the differing capacities of States. It had decided against doing so, out of concern that making such a specific reference in draft article 9 might induce an *a contrario* interpretation of other draft articles, such as draft article 7, which contained no such qualification. It had decided that the matter would be dealt with by retaining the explanation in the commentary adopted on first reading and streamlining the text adopted on first reading by deleting the words “necessary and”, so

that the provision could not be interpreted as requiring the taking of all measures. Accordingly, the phrase “taking appropriate measures” was intended to indicate the relative nature of the obligation. The Drafting Committee had also recalled that it had been agreed on first reading that the obligation envisaged was one of conduct and not of result, in other words, not an obligation to fully prevent or mitigate disasters, but an obligation to reduce the risk of the harm caused thereby. Some flexibility was therefore inherent to the concept of disaster risk reduction, and the commentary would reinforce that point.

45. With respect to paragraph 2, the Drafting Committee had considered a proposal to include a reference to the reduction of vulnerability, but had decided against doing so for fear of introducing confusion. Reducing vulnerability and building resilience were not risk reduction measures *per se*, but rather the goal of the measures envisaged in paragraph 2. The Drafting Committee had therefore adopted the text of paragraph 2 as adopted on first reading, without modification.

46. The title of draft article 9 was “Reduction of the risk of disasters”, as proposed by the Special Rapporteur in his eighth report. It no longer contained a reference to “duty”, thereby reflecting the flexibility of the obligation contained in the article.

47. Regarding draft article 10, on the role of the affected State, amendments had been made in paragraph 1 only. The first modification had been to add the words “or in territory under its jurisdiction or control” at the end of the paragraph, in order to align the text with the expanded scope of the term “affected State”, contained in draft article 3 (b). It would be recalled that the disparity in the text adopted on first reading between the provision dealing with the role of the affected State and the definition of the term “affected State”, which was attributable to the fact that the latter had been adopted several years after the former, had been noted in some of the comments received.

48. As a consequence of the decision by the Drafting Committee to clarify what was to be understood by “affected State”, in relation to territory under jurisdiction or control, the reference in the text adopted on first reading to the affected State having a duty “by virtue of its sovereignty” no longer fully accorded with the legal position. In particular, the Drafting Committee was concerned that treating that obligation as a function of the exercise of sovereignty would be difficult to sustain. At the same time, it was conscious of the fact that the words “by virtue of its sovereignty”, which emphasized the link between sovereign rights and concomitant duties, had been key to the compromise adopted on first reading. A number of options had been considered as a way to reconcile the need to broaden the scope of the draft article and the need to refer to sovereignty in the standard case of the protection of persons on the territory of the affected State. One possibility had been to add a paragraph 1 *bis*, dealing solely with the protection of persons on territory under the jurisdiction or control of the affected State.

49. The Drafting Committee had ultimately decided to delete the words “by virtue of its sovereignty” in paragraph 1, but that decision should not be understood to

indicate that it had changed its mind as to the origin of the duty of the affected State to protect persons on its territory: instead, it was simply motivated by the need to take into account the expanded definition of the term “affected State”, as had already been indicated. The commentary would retain the important clarifications regarding the sovereignty of the affected State included in the commentary adopted on first reading. It should also be recalled that the principle of sovereignty had been included in the draft preamble, which applied to the entire set of the draft articles. That solution also took into account another proposal to refer to both the duty and the right of the affected State. Just as it was difficult to refer to sovereignty in the new wording of paragraph 1, the text of paragraph 2 would have been legally complex if it had provided that a State was acting by virtue of a “right” with regard to territory under its jurisdiction or control. Consequently, the Drafting Committee had retained paragraph 2, as adopted on first reading, with the technical amendment of deleting the word “and” between the words “relief” and “assistance”.

50. The title of draft article 10 was “Role of the affected State”, as adopted for the corresponding draft article on first reading. It should be noted for the record that the Special Rapporteur, in his revised proposal, had recommended that the title of the draft article be “Function of the affected State” in order to reflect a point made during the plenary debate, namely that the content of the article dealt with the function of the affected State. The Drafting Committee had also considered various other proposals that covered, *inter alia*, the “Duty” of the affected State, but it had not adopted any of them and had ultimately retained the formulation adopted on first reading.

51. Regarding draft article 11, on the duty of the affected State to seek external assistance, three amendments had been made to the text. The first had been to insert the word “manifestly” before the words “exceeds its national response capacity”, thereby establishing a threshold. The Commission would recall that, in his eighth report, the Special Rapporteur had, in response to some of the comments received, proposed a more subjective standard, namely that the affected State itself would “determine that a disaster exceeded its national response capacity”, but that, in the light of the opposition expressed in plenary, he had modified the proposal and proposed inserting the more objective reference to “manifestly”. That proposal had met with support in plenary and had been adopted by the Drafting Committee.

52. The second amendment had been to streamline the reference to other assisting actors, who in the text adopted on first reading had been referred to as “other competent intergovernmental organizations and relevant non-governmental organizations”. On second reading, the Drafting Committee had sought to integrate the various terms defined in draft article 3, including “other assisting actor”; the new reference at the end of the paragraph to “other potential assisting actors” should be understood in the light of the definition in draft article 3. Such actors were referred to as “potential” assisting actors because they were not yet providing assistance, but might do so.

53. The amendment relating to assisting actors meant that the words “as appropriate” were no longer best placed

at the end of the draft article. Accordingly, the Drafting Committee had moved them to an earlier position in the paragraph, placing them after the words “has the duty to seek assistance from” to qualify the list of potential actors from whom the affected State should seek assistance. The Drafting Committee had also decided that the word “among” was no longer necessary, since the words “as appropriate”, in their new location, now served substantially the same function as the word “among” had in the text adopted on first reading.

54. Draft article 11 had been adopted by the Drafting Committee on the understanding that the draft articles would include an appropriate provision on the obligation of potentially assisting States. He would return to that point during his presentation of draft article 12.

55. Draft article 11 had the same title, “Duty of the affected State to seek external assistance”, as the corresponding provision adopted on first reading.

56. Regarding draft article 12, on offers of external assistance, he wished to make two preliminary points. First, the Commission might recall that the corresponding provision had been adopted on first reading as draft article 16. The Drafting Committee had decided to place that provision between draft article 11, on the duty of the affected State to seek external assistance, and draft article 13, on the consent of the affected State to offers of external assistance. Second, it was the only provision that included new text not based on wording adopted on first reading. The provision consisted of two paragraphs: the first was based on the text of draft article 16, as adopted on first reading, and the second was new.

57. With respect to paragraph 1, the phrase “In responding to disasters”, adopted on first reading, had been replaced with “In the event of disasters”, so as to avoid confusion between the concept of “response”, which had a technical meaning in the draft articles, and the more colloquial reference to an offer of assistance as a response to a disaster. The second amendment concerned the word “may”. The text adopted on first reading had indicated that actors “have the right to offer” assistance, and the Special Rapporteur had proposed retaining that wording. However, the Drafting Committee had decided to replace it with the words “may offer”, since an explicit reference to acting on the basis of right introduced complexity, including with regard to assistance being offered by other potential assisting actors, who, according to the definition contained in draft article 3, could include non-governmental actors. That change had in turn led to the elimination of the need for the additional sentence that had appeared in the text adopted on first reading.

58. As already indicated, paragraph 2 was new. The Drafting Committee had decided to adopt it on the basis of a proposal made by the Special Rapporteur following concerns expressed in plenary, when some members had considered that the draft articles did not sufficiently cover the obligations of potentially assisting States and other assisting actors. The addition of the paragraph had therefore been motivated by a desire to introduce a greater balance within the text, by providing a parallel obligation to that set out in draft article 13, paragraph 3, namely the

obligation of the affected State to make known its decision regarding an offer in a timely manner. The Drafting Committee had considered various formulations before settling on the text under consideration.

59. Paragraph 2 had three components. First, a request for external assistance by the affected State would trigger the application of the provision. While draft article 11 assigned to the affected State a general duty to “seek” assistance, the paragraph dealt with the scenario where the affected State had done so “by means of a request addressed to” the list of potential assisting actors. The Drafting Committee had understood that clarification to be important because it limited the application of the provision to specific requests, without extending it to general requests for assistance. Second, the provision referred to the constellation of addressees of a request for assistance, including other States, the United Nations and other potential assisting actors, thereby cross-referencing the definition in draft article 3. The United Nations had been singled out for special mention given the central role it played in receiving requests for assistance. Third, the Drafting Committee proposed imposing on the addressee or addressees of the specific request a dual obligation to give due consideration to the request and to respond to the affected State. The addressee should fulfil its dual obligations “expeditiously”, in other words, in a timely manner. The reference to the obligation to give due consideration to the request had been based on similar wording used in article 19 of the articles on diplomatic protection,²⁶¹ adopted in 2006. The word “due” referred more to the substance of the request than to the notion of timeliness, which was already covered by the words “expeditiously”.

60. The Drafting Committee had also considered aligning the language of the draft article with that used in draft article 13 to define the obligation of the affected State. However, it recognized that the position of an affected State in the wake of a disaster falling within the scope of the present draft articles differed from that of an assisting State or other assisting entity, thereby justifying the formulation of a different obligation.

61. The title of draft article 12 remained “Offers of external assistance”. The use of the plural form in the title should be understood broadly as covering not only spontaneous offers, but also offers made in response to a request.

62. Regarding draft article 13, on the consent of the affected State to external assistance, paragraphs 1 and 2 had been adopted without amendment to the text adopted on first reading.

63. With respect to paragraph 2, the proposal of the Special Rapporteur had made reference to the arbitrary “withdrawal” of consent. The Drafting Committee had decided not to use the word “withdrawal” for fear of reopening the debate on a delicately balanced provision adopted on first reading.

²⁶¹ The draft articles on diplomatic protection adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), pp. 24 *et seq.*, paras. 49–50. See also General Assembly resolution 62/67 of 6 December 2007, annex.

64. With regard to paragraph 3, it should be recalled that the Special Rapporteur, in his eighth report, had proposed the inclusion of a reference to the making of a “good faith” offer of assistance. However, that reference had been considered superfluous in plenary and had not been included in the revised version that the Special Rapporteur had submitted to the Drafting Committee for consideration. Two changes had been made to paragraph 3. First, the word “extended” in the version adopted on first reading had been replaced with the word “made”, out of concern that it might be wrongly interpreted as suggesting a duration. Second, the expression “in a timely manner” had been added at the end of the paragraph, as had been proposed by the Special Rapporteur in his eighth report and supported in plenary. The Drafting Committee had decided to accept the additional requirement in order to emphasize the importance of receiving timely responses when a disaster had occurred. However, it should be kept in mind that this requirement should be observed “whenever possible”, a general qualification, which, in the view of the Drafting Committee, made it possible to retain the flexibility inherent to the provision.

65. The title of the draft article, “Consent of the affected State to external assistance”, was the same as that of the provision adopted on first reading.

66. As to draft article 14, entitled “Conditions on the provision of external assistance”, the title and the text were the same as those adopted on first reading.

67. Regarding draft article 15, on the facilitation of external assistance, the text remained substantially the same as that adopted on first reading, with only a technical modification to paragraph 1 (*a*). With a view to harmonization with the provision on the use of terms, contained in draft article 3, the words “civilian and military relief personnel”, which had appeared in the text adopted on first reading, had been simplified to become “relief personnel”, thereby including a reference to the definition in draft article 3 (*f*).

68. The title of the draft article, “Facilitation of external assistance”, was the same as that adopted on first reading.

69. Draft article 16, on the protection of relief personnel, equipment and goods, had been adopted substantially in the same form as that adopted on first reading, including in the same spirit of flexibility expressed by the adjective “appropriate”, which also made reference to the possibility of the affected State to perform the measures envisaged. That point would be elaborated on in the commentary.

70. The only textual changes consisted of harmonizing the reference to territory, as had been done in the draft articles as a whole, by adding the phrase “or in territory under its jurisdiction or control”, and replacing the words “of relief personnel, equipment” with “relief personnel and of equipment”.

71. The title of draft article 16 remained that adopted on first reading, “Protection of relief personnel, equipment and goods”.

72. Draft article 17, on the termination of external assistance, had been the subject of extensive debate in the Drafting Committee. The Commission would recall that, in his eighth report, the Special Rapporteur had proposed that a further precision be added to the draft article by adding an express reference to the right of the actors concerned to terminate external assistance at any time. The Drafting Committee had proceeded on the basis of a revised proposal by the Special Rapporteur, which took into account the views expressed in plenary. It had considered a number of proposals, including making an express reference to prohibiting the arbitrary withdrawal of consent to the provision of relief assistance. Ultimately, it had chosen to refine the Special Rapporteur’s revised proposal and retain much of the text adopted on first reading to formulate a draft article consisting of three sentences.

73. The first sentence, the wording of which had been based on the Special Rapporteur’s proposal, confirmed the basic right of the actors concerned, namely the affected State, the assisting State, the United Nations or other assisting actors, to terminate external assistance at any time. It was understood that the reference to termination of assistance included termination both in whole or in part. The Drafting Committee had not made an express reference thereto in the text, since it was understood that the possibility of termination in whole also assumed that of termination in part.

74. The second sentence reproduced the text of the last sentence of draft article 19, as adopted on first reading, establishing the requirement of notification, except that the word “intending” had been substituted for the word “wishing”. It had been further streamlined to refer to “[a]ny such State or actor”.

75. The third sentence reproduced, in substance, the first sentence of the text adopted on first reading, requiring consultation between the actors involved. The wording had been reworked, with the expression “as appropriate” being moved to the earlier part of the sentence so that it applied to assisting States, the United Nations and other assisting actors. The provision was intended to clarify that the anticipated consultations would take place between the affected State, on the one hand, and, on the other hand, any other entity (whether an assisting State, the United Nations or any other actor) providing the assistance.

76. The Drafting Committee had also added an explicit reference to the United Nations among the potential assisting actors, given its central role in the provision of relief.

77. The title of draft article 17, “Termination of external assistance”, was the same as that adopted on first reading.

78. Draft article 18, on the relationship between the draft articles and other rules of international law, was the successor to draft articles 20 and 21, as adopted on first reading. The Drafting Committee had proceeded on the basis of a proposal by the Special Rapporteur, which merged the two provisions into a single draft article. It had accepted the general approach of having only one provision governing the relationship with other applicable rules and the rules of humanitarian law, but had preferred to draft two separate paragraphs.

79. Accordingly, paragraph 1 dealt with the relationship between the draft articles and other rules of international law, such as existing treaties dealing with disaster response or disaster risk reduction. The Drafting Committee had adopted substantially the same approach as that taken on first reading in draft article 20, in that it had agreed to depict the relationship in the form of a “without prejudice” clause. However, it had simplified the text, replacing the phrase “special or other rules of international law applicable in the event of disasters”, adopted on first reading, with the phrase “other applicable rules of international law”, which covered both regional and bilateral treaties applicable to the protection of persons in the event of disasters. The wording was intentionally flexible, without referring to other rules as being “special” in relation to the draft articles, since that designation depended on their content.

80. Paragraph 2 dealt with the specific question of the relationship with the rules of international humanitarian law. The Commission would perhaps recall that the issue had been discussed extensively in the comments and observations received. Draft article 21 of the text adopted on first reading had excluded the application of the draft articles to the extent that the rules of international law applied. In response to the comments and suggestions made, the Special Rapporteur, in his eighth report, had proposed depicting the relationship in the form of a “without prejudice” clause, as had been done with the relationship to other applicable rules. In his revised proposal, he had suggested presenting the rules of international humanitarian law as a subcategory of special rules of international law in a general “without prejudice” clause.

81. However, the Drafting Committee had decided to retain, in substance, the approach taken on first reading, namely indicating the relationship between the draft articles and the rules of international humanitarian law, as opposed to providing a simple saving clause. It had drawn inspiration from article 55 of the 2001 articles on the responsibility of States for internationally wrongful acts²⁶² in depicting the relationship with the rules of international humanitarian law in the formulation “do not apply to the extent that the response to a disaster is governed” by such rules. Based on that outcome, the draft articles could conceivably apply in the context of armed conflict, to the extent that the rules of international humanitarian law did not apply. That would also enable the parallel application of the draft articles in the context of complex emergencies. The commentary and the text of the draft article would be aligned, and a reference to the position taken in draft article 18 would also be included in the commentary on the definition of “disaster” set forth in draft article 3 (a) in order to further delineate the scope of application of that provision.

82. The Drafting Committee had not included a reference to disaster risk reduction in paragraph 2, since risk reduction measures were taken, by definition, in advance of the onset of a disaster, and would not involve recourse to the rules of international humanitarian law.

²⁶² The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 et seq., paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

83. The title of draft article 18, “Relationship to other rules of international law”, was that adopted on first reading, on the understanding that the reference to “other rules” included the application of the principle of *lex specialis*.

84. In conclusion, he said that the Drafting Committee recommended to the Commission the adoption on second reading of the draft articles on the topic “Protection of persons in the event of disasters”.

85. The CHAIRPERSON invited the Commission to adopt on second reading the titles and texts of the draft articles on the protection of persons in the event of disasters, as contained in document A/CN.4/L.871.

86. Ms. JACOBSSON said that she regretted that draft article 6 did not include a clear reference to a gender-based approach, as she had requested in plenary. She had noted that it would be mentioned in the commentary.

87. Mr. KITTICHAISAREE said that, while he was not opposed to the adoption of draft article 13, he wished to put on record that the expression “whenever possible” meant “as appropriate” or “where appropriate”. An affected State could refuse to respond to an offer of assistance from a State it regarded as an enemy, since relations between the two States could worsen if the affected State was obliged to respond and had to refuse the offer from the other State.

Draft articles 1 to 18

Draft articles 1 to 18 were adopted.

88. The CHAIRPERSON said that he took it that the Commission wished to adopt on second reading the titles and texts of the draft articles on the protection of persons in the event of disasters, as contained in document A/CN.4/L.871.

The draft articles on the protection of persons in the event of disasters, contained in document A/CN.4/L.871, as a whole, were adopted.

89. The CHAIRPERSON said that it was his understanding that the Special Rapporteur would prepare commentaries to the draft articles, for inclusion in the Commission’s report to the General Assembly on the work of its sixty-eighth session.

The meeting rose at 11.30 a.m.

3311th MEETING

Tuesday, 7 June 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase,