

Document:-
A/CN.4/3333

Summary record of the 3333rd meeting

Topic:
Draft report of the International Law Commission on the work of its sixty-eighth session

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/>)*

one another with a view to finalizing the text of the second sentence of paragraph (29).

It was so decided.

Paragraph (30)

Paragraph (30) was adopted.

Paragraph (31)

83. Mr. NOLTE said that, when reading the definition of the term “equipment and goods”, he had been surprised to note that software was not mentioned. He therefore proposed inserting the words “physical and electronic” before “tools” in the first sentence of paragraph (31).

Paragraph (31), as amended, as adopted.

The meeting rose at 1 p.m.

3333rd MEETING

Wednesday, 3 August 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, Mr. Huang, 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. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER IV. Protection of persons in the event of disasters (continued) (A/CN.4/L.882 and Add.1)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.882/Add.1, specifically paragraph (29) of the commentary to draft article 3 (f), which had been left in abeyance.

E. Text of the draft articles on the protection of persons in the event of disasters (continued)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (continued)

Commentary to draft article 3 (Use of terms) (concluded)

Paragraph (29) (concluded)

2. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he had redrafted the second sentence on the basis of written proposals made by Mr. Forteau and Mr. Murphy. The resultant wording read: “The Commission decided against making a reference to ‘acting on behalf of’ in

order not to prejudge any question of the application of the rules of international law on the attribution of conduct to States or international organizations, given the primary role of the affected State, as provided for in draft article 10, paragraph 2.” The intention in redrafting the sentence had been to avoid using the word “applicability”.

3. Mr. FORTEAU suggested replacing “of the application of” by “related to the application of”.

It was so decided.

4. Sir Michael WOOD said that the wording after “international organizations” was unnecessary and perhaps somewhat questionable; it should simply be deleted.

5. Mr. PARK said that either the final part of the sentence should be deleted as suggested by Sir Michael or the words “and draft article 15, paragraph 1 (a)” should be inserted at the end of the sentence, since that subparagraph referred to privileges and immunities.

6. Mr. SABOIA supported the proposal to delete the final part of the sentence.

7. Mr. MURPHY said that he would be prepared to accept either the proposal read out by the Special Rapporteur or the one just made by Sir Michael.

8. Mr. McRAE requested an explanation of the reasoning behind the proposal to replace “applicability” with “application”. The latter term assumed that international law applied, whereas the former made no such assumption.

9. Mr. SABOIA said that he agreed with those comments on the term “applicability” and endorsed the proposal by the Special Rapporteur, as amended by Mr. Forteau.

10. Mr. VALENCIA-OSPINA (Special Rapporteur) said that in draft article 10, paragraph 2, the role of the affected State was characterized by four prerogatives, of which only two, direction and control, were part of the rules of international law on the attribution of conduct to States, as described in article 8 of the articles on the responsibility of States for internationally wrongful acts.⁴⁹⁰ He would, however, be prepared to agree to the omission of the final part of the sentence, after “international organizations”, as had been proposed by Sir Michael.

11. Sir Michael WOOD said that in the light of the discussion, he was prepared to go along with the text as put forward by the Special Rapporteur and amended by Mr. Forteau.

Paragraph (29) was adopted as proposed by the Special Rapporteur and as amended by Mr. Forteau.

The commentary to draft article 3, as a whole, as amended, was adopted.

⁴⁹⁰ 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.

Commentary to draft article 4 (Human dignity)

Paragraph (1)

12. Mr. MURPHY said that it would be useful to explain the paragraph's drafting history by indicating in the final sentence that many of the sources for the draft article on human dignity that were cited in paragraph (2) came from preambular clauses to treaties. He therefore proposed inserting the following words at the beginning of the final sentence: "Although general references to human dignity are often contained in preambular clauses to human rights treaties, the Commission considered".

13. Sir Michael WOOD, referring to the second sentence, said that the point could be made more strongly by omitting the words "The Commission recognizes" and stating simply: "Human dignity is a core principle that informs and underpins international human rights law."

That amendment was adopted.

14. Mr. NOLTE, supported by Mr. KAMTO, said that he did not agree with Mr. Murphy's proposal, as it might suggest to the reader that the fact that human dignity was mentioned in preambular paragraphs made it less important than hard law.

15. Mr. McRAE said that Mr. Murphy's proposal contradicted the amendment proposed by Sir Michael and which had just been adopted.

16. Mr. KITTICHAISAREE suggested that Mr. Murphy's proposal was an attempt to reflect the discussions in the plenary meeting: perhaps it could simply be worded differently.

17. Mr. SABOIA said that the wording of commentaries should not be used to reflect what had been said in the debates; a commentary was an explanation and an interpretation of the texts drafted by the Commission.

18. Mr. MURPHY said that, although he considered his proposal useful, he was prepared to withdraw it, since it was not supported by the other members of the Commission.

19. Sir Michael WOOD said that there were many occurrences throughout the commentary of the phrase "the Commission recognizes" or similar wording; they could well be omitted, to avoid repetition and to give the text greater force. The secretariat could work with the Special Rapporteur to that end.

20. Mr. TLADI said that while it was possible for the secretariat and the Special Rapporteur to remove such repetitions in the present text, such an approach should not be adopted universally, because it could have substantive implications.

Paragraph (1), as amended, was adopted.

Paragraph (2)

21. Sir Michael WOOD said that, if the list of treaties was intended to be exhaustive, it should include the

Convention on the Rights of Persons with Disabilities, article 3 of which mentioned respect for inherent dignity.

That amendment was adopted.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

22. Mr. KAMTO said that, to eliminate an apparent contradiction, he proposed replacing the part of the second sentence that read: "While such a reference is appropriate in the context of States, the matter is less clear with 'other assisting actors', where different legal approaches exist" with "It could be considered that it applies only to States, but not necessarily to 'other assisting actors', given that different legal approaches exist" [*On pourrait considérer qu'il s'adresse uniquement aux États, et pas nécessairement aux « autres acteurs prêtant assistance », étant donné qu'il existe différentes approches juridiques*] and deleting "Nonetheless" [*néanmoins*] in the subsequent sentence, as the intention was actually to reinforce the meaning of the previous sentence.

23. Mr. SABOIA said that, as he understood it, Mr. Kamto's proposal did not mean that the need to respect human dignity was not applicable to non-State actors: that would be an incorrect message to send, especially as State functions were frequently delegated to non-State actors.

24. Mr. KAMTO said that Mr. Saboia had correctly summarized his intention in proposing the amendment.

25. Mr. PETRIČ, referring to the suggestion made earlier by Sir Michael that excessive occurrences of the phrase "The Commission recognizes", or similar, should be removed from the text by the Secretariat in consultation with the Special Rapporteur, said that so doing in paragraph (5) would have significant implications; the suggestion was therefore not acceptable as a general measure.

26. Mr. VALENCIA-OSPINA (Special Rapporteur), supported by Mr. HMOUD, asked to see a written version of Mr. Kamto's proposal.

27. The CHAIRPERSON said that adoption of the paragraph would be deferred until a written version of the text was made available.

Paragraph (6)

28. Mr. MURPHY proposed that the fourth sentence should be made less prescriptive through the replacement of the word "requires" with "may require".

29. Mr. NOLTE proposed the replacement, in the final sentence, of the word "should" with "shall".

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

The commentary to draft article 4, as a whole, as amended, was adopted.

Commentary to draft article 5 (Human rights)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

30. Sir Michael WOOD, referring to the first sentence, proposed that the words “reflected in” be replaced with “those in”; the words “as well as assertions of” deleted; and a full stop inserted after “customary international law”. The second and third sentences should be combined to read: “Best practices for the protection of human rights included in non-binding texts at the international level, including, *inter alia*, the Inter-Agency Standing Committee Operational Guidelines on the Protection of Persons in Situations of Natural Disasters, as well as the Guiding Principles on Internal Displacement, serve to contextualize the application of existing human rights obligations to the specific situation of disasters.”

Paragraph (2), as thus amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

31. Sir Michael WOOD said that the paragraph was superfluous and should be deleted.

Paragraph (4) was deleted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

32. Mr. MURPHY suggested that the paragraph be streamlined through the deletion of the phrase “applicable rights for the simple reason that it was not possible to consider” and the replacement of the words “out of concern” with “was concerned”.

Paragraph (6), as amended, was adopted.

Paragraph (7)

33. Mr. MURPHY said that the first sentence made an important point – that the International Covenant on Civil and Political Rights had been used as a model for the Commission’s draft article 5, on human rights – but that point needed to be made more clearly. He therefore proposed that the first sentence read: “Nonetheless, it is contemplated that a potentially applicable right is the right to life, as recognized in draft article 6, paragraph 1, of the International Covenant on Civil and Political Rights, if a State is arbitrarily refusing to adopt positive measures to prevent or respond to disasters that cause a loss of life.”

34. Mr. NOLTE, supported by Mr. VALENCIA-OSPINA (Special Rapporteur), proposed that in Mr. Murphy’s amendment, the words “potentially applicable” be replaced with “particularly relevant” and that the term “arbitrarily” be deleted.

Mr. Murphy’s amendment, as further amended by Mr. Nolte, was adopted.

35. Mr. KITTICHAISAREE pointed out that the word “draft” before the phrase “article 6, paragraph 1, of the International Covenant on Civil and Political Rights” should be deleted, since that instrument was no longer in draft form.

That amendment was adopted.

36. Mr. KITTICHAISAREE said he would prefer the phrase “a loss of life” to read “losses of life” to indicate that it was not merely one loss of life that was meant.

37. Mr. MURPHY, supported by Mr. SABOIA, said that the best solution would be to delete the word “a” before “loss of life”.

It was so decided.

38. Sir Michael WOOD suggested that the words “Nonetheless, it is contemplated that” be deleted.

That amendment was adopted.

Paragraph (7), as amended, was adopted.

Paragraph (8)

39. Mr. NOLTE said that in the first sentence, the word “open” should be inserted after “question” and in the second sentence, the term “latitude” should be replaced with “discretion”.

40. Mr. MURPHY said that in the second sentence, the phrase “extent of the impact” should be replaced with “severity”.

41. Mr. KAMTO said that in the third sentence, it would be better to refer simply to “rights”, rather than “substantive” rights.

With those amendments, paragraph (8) was adopted.

Paragraph (9)

Paragraph (9) was adopted.

The commentary to draft article 5, as a whole, as amended, was adopted.

Commentary to draft article 6 (Humanitarian principles)

Paragraph (1)

42. Sir Michael WOOD proposed that the second sentence, which was somewhat unwieldy, be replaced by the following: “The humanitarian principles covered by the article underlie disaster relief assistance.” The third sentence should be replaced with “The draft article recognizes the significance of these principles to the provision of disaster relief assistance.”

43. Mr. MURPHY suggested that the second sentence simply be deleted, together with the first words in the third sentence (“On this basis”). The rest of the paragraph would remain unchanged, save for the amendment to the third sentence just proposed by Sir Michael.

Paragraph (1), as thus amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

44. Sir Michael WOOD proposed that the final part of the fourth sentence, starting with “elementary considerations of humanity”, be amended to cite in full the famous dictum of the International Court of Justice in the *Corfu Channel* case. It would thus read: “among general and well-recognized principles are ‘elementary considerations of humanity, even more exacting in peace than in war’”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

45. Sir Michael WOOD, supported by Mr. VALENCIA-OSPINA (Special Rapporteur), proposed that in the first sentence, the phrase “the Commission considers that” be deleted. The second and third sentences should be combined to read: “In the context of humanitarian assistance, the principle of neutrality requires that the provision of assistance be independent of any given political, religious, ethnic or ideological context.” The final sentence should be deleted.

46. Ms. JACOBSSON proposed that in the first sentence, the phrase “the context of an armed conflict” be replaced with “the law of armed conflict”.

With those amendments, paragraph (4) was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

47. Mr. MURPHY proposed that, for the sake of consistency with an amendment made earlier by Sir Michael, the word “disability” be inserted at the end of the second sentence and a reference to the Convention on the Rights of Persons with Disabilities added to the footnote.

Paragraph (6), as amended, was adopted.

Paragraph (7)

48. Sir Michael WOOD suggested that in the first sentence, the phrase “The Commission noted” be deleted. In the third sentence, “The Commission considered” should be deleted and the words “to encompass” replaced with “encompasses”. In the fifth sentence, the words “adopted by the Commission” should be replaced with “used”.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

49. Mr. NOLTE, referring to the third sentence, which said that women and girls were “more likely” to suffer the effects of disasters, said that in many traditional societies,

men were expected to allow women and girls to flee to safety in the event of wars and disasters. For that reason, boys and men could also be disproportionately affected by disasters. He would therefore prefer to replace the phrase “more likely to be” with the adverb “often”.

50. Mr. MURPHY endorsed that proposal and suggested that, in the same sentence, the phrase “exposed to risks” be followed by the word “including”. In the second sentence, a comma should be inserted after the word “contexts” and in the final sentence, “gender approach” should read “gender-based approach”.

51. Mr. FORTEAU suggested that in the first sentence, the word “frequently” be inserted between the words “disasters” and “affect”. The French version of the entire paragraph needed to be reviewed and harmonized with the English version.

Paragraph (9), as amended, was adopted.

The commentary to draft article 6, as a whole, as amended, was adopted.

Commentary to draft article 7 (Duty to cooperate)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

52. Mr. MURPHY said that, in the first sentence, it might be advisable to replace the word “law” with the phrase “obligations that have been undertaken by States”. In the final sentence, after the reference to the Convention on the Rights of Persons with Disabilities, the phrase “is, *inter alia*, applicable” should be replaced with “reaffirms existing international obligations in relation to persons with disabilities”, in order to better capture the sense of article 11 of the Convention.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

53. Sir Michael WOOD said that it would be preferable, in the first sentence, for “of a sovereign State” to read “of the affected State” and for the phrase “within the limits of international law” to be deleted, to bring the wording into line with that of draft article 10, paragraph 2.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

54. Mr. MURPHY proposed the deletion of the phrase “It was understood, however, that” at the beginning of the third sentence.

55. Sir Michael WOOD suggested that in the second sentence, the word “establishes” be replaced with “reflects”. He proposed the deletion of the fourth sentence, since the duty to cooperate was not always necessarily reciprocal. He queried the accuracy of the final sentence, because the phrase “as appropriate” in draft article 7 seemed to qualify both the level of cooperation and the actors with whom it should take place.

56. Mr. NOLTE endorsed the point that the duty to cooperate was not always reciprocal. Moreover, the draft article referred solely to the duty of States to cooperate, not to such a duty on the part of international organizations. He therefore supported Sir Michael’s proposal to delete the fourth sentence.

57. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he agreed with the proposals to replace “establishes” with “reflects” and to delete the fourth sentence and the beginning of the third sentence. In response to Sir Michael’s final remark, he said that the phrase “as appropriate” in draft article 7 did not qualify the level of the cooperation or imply that there had to be cooperation at a certain level; it referred to the various actors with which the State could cooperate.

Paragraph (6) was adopted with the amendments accepted by the Special Rapporteur.

Paragraph (7)

58. Sir Michael WOOD suggested the deletion of the words “and among” in the first sentence, as the draft article did not deal with cooperation among assisting actors; it dealt with cooperation among States and of States with assisting actors.

59. Mr. VALENCIA-OSPINA (Special Rapporteur) agreed to that amendment.

Paragraph (7), as amended, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

The commentary to draft article 7, as a whole, as amended, was adopted.

Commentary to draft article 8 (Forms of cooperation in the response to disasters)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

60. Mr. MURPHY said that the first sentence was so long and complicated that it would be wise to end it with the words “transboundary aquifers”; to delete the word “which”; and to begin a new sentence, starting “That paragraph explains”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

61. Mr. MURPHY said that in the final sentence, “technological transfer” should read “technology transfer”. The phrase “covering, among others, satellite imagery” should be transposed to follow the words “information sharing”.

62. Mr. KITTICHAISAREE, supported by Mr. FORTEAU and Mr. SABOIA, asserted that the amendment proposed by Mr. Murphy completely changed the meaning of the sentence.

63. The CHAIRPERSON suggested that the paragraph be left in abeyance to permit a suitable formulation to be found.

It was so decided.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were adopted.

Commentary to draft article 9 (Reduction of the risk of disasters)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

64. Sir Michael WOOD questioned the need for the first sentence and suggested its deletion. In the second sentence, he would prefer the words “State sovereignty” to read “sovereign equality”. He took it that the third sentence was stating the well-known distinction between the negative obligation not to kill and the positive obligation to prevent killing. It might therefore be wise to reword it.

65. Mr. MURPHY said that it was not immediately obvious what bearing the second sentence had on States’ duty to reduce the risk of disaster. He assumed that what the sentence was trying to say was that, while the Commission accepted the fundamental principle of State sovereignty, the latter resulted in an obligation to take certain action to reduce disaster risk. In that sentence, it might be wise to replace the words “States’ obligation” with the phrase “the obligations undertaken by States”. The third sentence should be simplified to read, “Protection entails a positive obligation on States to take the necessary and appropriate measures to prevent death and other harm from impending disasters.” That wording established a link with the fourth sentence, which mentioned two cases that had been concerned with the duty to take preventive measures. In the final sentence, the word “inspiration” should be inserted after the word “draws”.

66. Mr. NOLTE, supported by Mr. SABOIA, drew attention to the fact that the text of paragraph (4) of the commentary had already been adopted on first reading. Only minor modifications should be made to it now.

67. Mr. MURPHY said that in their reactions to paragraph (4) as adopted on first reading, Governments had expressed the view that the phrase “no matter the source of the threat”, in the third sentence, was a totally inaccurate description of the decisions in the two cases cited in the fourth sentence. The statement in the fourth sentence

that “This is confirmed by the decisions of international tribunals” was patently wrong.

68. The CHAIRPERSON suggested that the Commission suspend the discussion of paragraph (4) until a new text could be prepared.

It was so decided.

Paragraph (5)

69. Mr. NOLTE proposed that, in the second sentence, the phrase “Many States have concluded” be replaced with “States and international organizations have adopted”.

70. Sir Michael WOOD proposed the deletion, in the second sentence, of the words “the Fourth Asian Ministerial Conference on Disaster Risk Reduction (2010), leading to” and the inclusion of a footnote referring to that Conference, which did not belong in a list of multilateral instruments.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (12)

Paragraphs (6) to (12) were adopted.

Paragraph (13)

71. Sir Michael WOOD suggested replacing the word “qualifier” with “word”.

Paragraph (13), as amended, was adopted.

Paragraph (14)

72. Sir Michael WOOD proposed the deletion of the second sentence.

73. Mr. VALENCIA-OSPINA (Special Rapporteur) suggested that instead, the word “Since” and the words “singling them out in the text of paragraph 1 could have led to a lack of clarity” be deleted.

With those amendments, paragraph (14) was adopted.

Paragraph (15)

74. Mr. MURPHY said that the phrase “hazard’s characteristics” in the first sentence was awkward; he suggested replacing it with the words “potential hazards”.

75. Mr. SABOIA said that it was worth retaining the word “characteristics” in relation to hazards, because the measures that States were to take during the pre-disaster phase depended on the nature or characteristics of the risk concerned.

76. Mr. VALENCIA-OSPINA (Special Rapporteur) proposed the replacement of the expression “hazard’s characteristics” with the phrase “the characteristics of hazards”.

Paragraph (15), as amended by the Special Rapporteur, was adopted.

Paragraph (16)

77. Sir Michael WOOD proposed reformulating the first sentence to read: “The *Terminology on Disaster Risk Reduction* prepared by the United Nations Office for Disaster Risk Reduction in 2009 illustrates the meaning of each of the three terms used, prevention, mitigation and preparedness.”. In the final sentence, the word “refined” should be deleted.

78. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the final sentence was simply intended to recall that the *Terminology on Disaster Risk Reduction* might be subject to further refinement by the General Assembly.

79. Mr. McRAE proposed the replacement of the words “refined interpretation” with the word “refinements”.

80. Mr. FORTEAU suggested that, in the French version of the text, the words *d’une interprétation plus poussée* might be replaced with *d’aménagements et de précisions*.

Paragraph (16), as thus amended, was adopted.

Paragraphs (17) to (23)

Paragraphs (17) to (23) were adopted.

Commentary to draft article 10 (Role of the affected State)

Paragraph (1)

81. Mr. MURPHY said it was unclear why the phrase “in accordance with international law” should be included in the third sentence, which referred to paragraph 1 of the draft article, but not in the fourth sentence, which referred to paragraph 2. He therefore proposed that the phrase be deleted.

82. Mr. NOLTE said that paragraph 1 referred to a duty, which was legal in nature, and paragraph 2, to a role, which was not. He was concerned that deleting the phrase “in accordance with international law” would take away the emphasis on the legal nature of the provision contained in paragraph 1 of the draft article.

83. Mr. HMOUD, endorsing Mr. Murphy’s proposal, said that, if the Commission retained the phrase “in accordance with international law” in the commentary, that would give the impression that the duty referred to in draft article 10, paragraph 1, was circumscribed by international law as it currently stood. However, the intention, during the Commission’s discussions over the past few years, had been for the provision to generate a new duty.

84. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he had no objection to the proposal to delete the phrase “in accordance with international law” in the third sentence, as the meaning was clear enough without it.

With those comments, paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

85. Mr. FORTEAU, supported by Mr. NOLTE, proposed the deletion of the final sentence, which was confusing.

86. Mr. MURPHY said that, contrary to what was stated in the first sentence of paragraph (3), draft article 10, paragraph 1, did not recognize that the State's duty to ensure protection stemmed from its sovereignty. He proposed recasting the first sentence to read: "The duty held by an affected State to ensure the protection of persons and the provision of disaster relief assistance in its territory, as recognized in paragraph 1, stems from its sovereignty."

87. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he had no objection to the amendments proposed by Mr. Forteau and Mr. Murphy.

Paragraph (3), as amended, was adopted.

Paragraph (4)

88. Mr. FORTEAU proposed the insertion, in the first sentence, of the words "among others" [*en particulier*] next to the words "Judge Álvarez": the conception of a bond between sovereign rights and concomitant duties upon a State had not been expressed by Judge Álvarez alone.

Paragraph (4), as amended, was adopted.

Paragraph (5)

89. Mr. MURPHY, supported by Mr. PETRIČ, said that, in the final sentence, the words "given its use as a term of art elsewhere within and beyond the Commission's work" might be viewed as characterizing the term "responsibility" in a way that was not helpful; he therefore proposed their deletion.

90. Mr. NOLTE, echoing Mr. Murphy's concern, suggested that the final sentence simply be deleted. In the first sentence, he proposed the deletion of the words "which benefits from the principle of non-intervention", as affected States did not benefit from that principle with respect to every territory that was covered under draft article 10.

91. Ms. JACOBSSON agreed with Mr. Nolte's proposal to delete the final sentence, since it simply explained a term that the Commission had chosen not to use.

92. Mr. KITTICHAISAREE said that he endorsed Mr. Nolte's proposal concerning the first sentence. As to the second and third sentences, he proposed merging them into one, to read: "The Commission determined that the term 'duty' was more appropriate than that of 'responsibility', which has been used with different meanings within and beyond the Commission's work."

93. Mr. McRAE said that he did not agree with the deletion of the entire phrase "given its use as a term of art elsewhere within and beyond the Commission's work" and suggested instead that it be replaced by "given its use elsewhere". The sentence then explained why the use of the term "responsibility" could give rise to confusion.

94. Mr. KAMTO said that he could accept the proposals by Mr. McRae and Mr. Murphy but did not agree with Mr. Kittichaisaree's proposal. The second and third sentences were both needed in order to explain what meaning the Commission gave to the term "duty" in draft article 10, given that it was used to refer to an obligation in other draft articles of the text. In many provisions of the project, the words "duty" and "obligation" had both been translated into French using the word *obligation*, thereby failing to reflect the distinction made between the two terms in English.

95. Mr. SABOIA said that the amendments proposed by Mr. Kittichaisaree and Mr. McRae were an attempt to convey a subtle message: the notion of responsibility was implicit in the use of the term "duty" in draft article 10. Mr. McRae's proposal perhaps best reflected the very cautious approach the Commission wished to take.

96. Mr. MURASE endorsed Mr. McRae's proposal and further proposed to place a footnote after the word "elsewhere" to refer to principle 21 of the Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration"),⁴⁹¹ which provided that States had the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States. He recalled that the translation of the word "responsibility" as *devoir* in the French version of the Stockholm Declaration had elicited a lengthy debate in the Commission on the distinction between the terms "duty" and "responsibility" and which of the two was the most appropriate for use in draft article 10.

97. Mr. FORTEAU said he supported the amendment proposed by Mr. Kittichaisaree.

98. The CHAIRPERSON suggested that paragraph (5) be left in abeyance until the next meeting.

It was so decided.

The meeting rose at 1.10 p.m.

3334th MEETING

Wednesday, 3 August 2016, at 3 p.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, Mr. Huang, 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. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

⁴⁹¹ *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.