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Summary record of the 3103rd meeting

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In short, the best way for the affected State to avoid being accused of failing in its duty not to arbitrarily withhold its consent was to respond in a transparent manner. Draft article 11 was thus both prudent and realistic, and it, too, was headed in the right direction. As for draft article 12 (Right to offer assistance), one could perhaps even speak of a “duty of solidarity”, but at least the text enunciated the right to offer assistance—which, of course, had nothing to do with interference in a State’s internal affairs.

59. The Special Rapporteur had noted in his fourth report that the topic of natural disasters had aroused significant interest within the international community, and that was quite understandable. Indeed, the view that the international community should take action when people were victims of natural disasters like those mentioned was gaining ground, while the older notion of sovereignty, according to which no one should under any circumstances intervene in the internal affairs of a State, was gradually losing ground. The Commission should not move too far in that direction, however, at the risk of being counterproductive. He concluded by congratulating the Special Rapporteur on his fourth report, which was a significant step forward on a topic that was important, sensitive and timely. The report struck the proper balance between the recognized principles of international law relating to the protection of persons in the event of natural disasters and the need to assist disaster victims and to ensure that their dignity and human rights were respected at a time when that mattered the most.

The meeting rose at 5.55 p.m.

3103rd MEETING

Tuesday, 12 July 2011, at 10 a.m.

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

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

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

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

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

disasters (A/CN.4/643). She welcomed the new member, Mr. Adoke, and said that his colleagues looked forward to working with him.

2. Mr. NOLTE thanked the Special Rapporteur for his rich and balanced fourth report, which provided an excellent basis for the Commission’s deliberations. It recalled the dramatic situations that underlay the abstract term “disaster” and the Commission’s responsibility to formulate appropriate and balanced rules to deal with them.

3. The way Commission members responded to the fourth report depended to some extent on the final formulation to be given to the role of consent, a question that was still before the Drafting Committee in the context of draft article 8, paragraph 2. While he agreed in principle with the requirement of consent by the affected State to the provision of humanitarian assistance by other States or actors, he was not in favour of formulating such a requirement in an absolute way: for example, there might be exceptional situations in which the affected State could not give its consent.

4. He endorsed the basic approach taken by the Special Rapporteur in draft articles 10 to 12, in particular the premise that an affected State had a duty to seek assistance, a duty arising from its primary responsibility to ensure the protection of all persons in its territory. The reference in paragraph 33 of the report to General Comment No. 12 (1999) of the Committee on Economic, Social and Cultural Rights on the right to provide adequate food²⁹⁸ was pertinent in that regard. However, the statement by the Special Rapporteur in paragraph 40 of his fourth report that “where the national capacity of a State is exhausted, seeking international assistance may be an element of the fulfilment of an affected State’s primary responsibilities” was somewhat weak; where national capacity was exhausted, seeking international assistance was the duty of an affected State. The Special Rapporteur ultimately seemed to recognize that fact, yet in draft article 10 he indicated that the affected State had the duty to seek assistance “as appropriate”. The words “as appropriate” should be used only with reference to the mode of implementation of the duty to seek assistance.

5. The duty to seek assistance embodied in draft article 10 could not and should not be separated from the corollary duty, expressed in draft article 11, not to withhold consent, and the right to offer assistance set out in draft article 12. Where a disaster exceeded the capacity of a State, that State had the duty to seek assistance from other States and relevant actors, which had the collateral right to offer such assistance; in both cases, the affected State had the duty not to withhold consent arbitrarily. Separating those interrelated and collateral rights and duties could lead to artificial distinctions in practice and to formalistic arguments in emergency situations.

6. If it was true, as the Special Rapporteur suggested in paragraph 44 of his report, that “a duty to ‘seek’ assistance implies the initiation of a process through

²⁹⁸ *Official Records of the Economic and Social Council, 2000, Supplement No. 2 (E/2000/22-E/C.12/1999/11), Report on the twentieth and twenty-first sessions of the Committee on Economic, Social and Cultural Rights, annex V, p. 102.*

which agreement may be reached”, then not withholding agreement arbitrarily must be a duty during that process, and not only upon its completion.

7. The reference in draft article 12 to the right to offer assistance should be accompanied by encouragement to offer assistance on the basis of the principles of cooperation, international solidarity and human rights. While it would be going too far to recognize a specific legal obligation of third States or organizations to give assistance, recent debates had yielded at least an acceptance of the responsibility of other States and organizations to protect all human beings whose life or basic human rights were immediately threatened. Without wishing to reopen the divisive debate on the responsibility to protect, he felt it was important to emphasize the common ground on that concept that existed within the international community.

8. Turning to draft article 11, paragraph 2, he suggested that the words “notify all concerned of its decision regarding such an offer” should be replaced by the words “give reasoned responses”. That would better capture the purpose, which was to ensure that the observance of the duty not to withhold consent arbitrarily could be objectively assessed. As currently worded, paragraph 2 seemed not to take account sufficiently of the broader, negotiated approach to the provision of international aid advocated in paragraph 44 of the report. A more process-oriented version of the duty to give reasons for not accepting an offer of assistance would thus be preferable, in his view.

9. He agreed with Mr. Pellet that the Commission should not consider situations in which a State was unwilling to use its available resources in the context of the duty not to withhold arbitrarily its consent to offers of assistance. The primary duty of every affected State to “ensure the protection of persons and provision of disaster relief and assistance on its territory”, established in draft article 9, implied that such a State must use its available resources to ensure the protection of persons.

10. For those reasons, he suggested that draft articles 10 to 12 should be merged to form the following new draft article:

“1. In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations have the right to offer humanitarian assistance to the affected State, and are encouraged to do so in the spirit of the principles of cooperation, international solidarity and human rights.

“2. The affected State has the duty to seek humanitarian assistance from among other States, competent international organizations and relevant non-governmental organizations, if a disaster exceeds its national response capacity.

“3. The affected State shall not withhold consent to external assistance arbitrarily, and give reasoned responses to offers of assistance.”

11. His proposal was formulated in the holistic spirit suggested by the Special Rapporteur. It commenced with the general rule whereby the right to offer assistance

existed in every disaster situation, irrespective of the ability of the affected State. It continued with the special rule that the duty of the affected State to seek assistance arose in the event that it was unable to provide the necessary assistance. It ended with rules that applied to both the general and the special rule, articulating the obligations not to withhold consent arbitrarily and to give reasoned responses to offers of assistance.

12. The rationale behind his proposal was not disagreement with the Special Rapporteur’s basic approach and reasoning, but rather a desire to find a formulation that better expressed the Special Rapporteur’s intentions. He agreed that draft articles 10 to 12 should be referred to the Drafting Committee.

13. Mr. VASCIANNIE thanked the Special Rapporteur for his thought-provoking report on an important and sensitive issue. States had commented on the timeliness of the project, and the Special Rapporteur had advanced the work at a commendable pace.

14. At the risk of methodological incorrectness, he would comment first on draft article 12, which asserted the right of States, the United Nations and other entities to offer assistance to a State affected by a disaster. While the provision was acceptable and could be sent to the Drafting Committee, one might quibble about the definition of “relevant non-governmental organizations”. On the other hand, it was correct to say that general international law accorded States the right to offer assistance to another State that was facing a disaster. Under the Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, for example, the capacity to enter into international relations was one of the defining features of the State; it would therefore be rather peculiar if a State could not approach another State merely to offer assistance. Draft article 12 could therefore be regarded as superfluous or, at most, as merely playing a confirmatory role.

15. Taking things a little further, one could say that in the absence of a specific prohibition applicable, for example, during wartime, all legal persons, including multinational corporations or even very wealthy individuals, might have the right to offer assistance to an affected State. As long as draft article 12 was limited to a right to offer help, its scope could be widened to confirm that all legal persons had that right.

16. On the other hand, draft article 12 did not imply permission to interfere in the internal affairs of the affected State: it merely set out a right to offer assistance, which the affected State could refuse. As Hohfeldian analysis of legal relationships between rights and duties suggested,²⁹⁹ the right of one State to offer assistance corresponded to a duty or obligation of the affected State to consider the offer, but not necessarily to accept it.

17. Draft articles 10 and 11 were, from his standpoint, more controversial than draft article 12. In essence, draft article 10 placed upon the affected State a duty to seek

²⁹⁹ W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, Yale University Press, 1919, reprinted in 1920, p. 36.

assistance if the disaster exceeded its national response capacity. The Special Rapporteur emphasized the “margin of appreciation” left to the affected State in assessing whether a disaster in fact exceeded its response capacity. On the positive side, draft article 10 required the affected State to accord importance to the human rights of victims during times of disaster. The Special Rapporteur’s line of argument in paragraph 33 of the report was that the International Covenant on Economic, Social and Cultural Rights proclaimed a right to food, and States were duty-bound to exercise every effort to satisfy that right. Thus, where a disaster occurred and the right to food was compromised, the affected State had a duty to seek assistance to satisfy that right.

18. However, that approach was somewhat problematic. To begin with, the provision of the International Covenant on Economic, Social and Cultural Rights on the right to food was regarded by several States as largely programmatic or hortatory. It indicated that States would take “appropriate steps” to ensure the right to food, but that was qualified by the reference to “international co-operation based on free consent”. The broad terms of the Covenant could not be translated into a specific commitment on the part of the affected State to “seek assistance” in times of disaster, if necessitated by its national capacity. That subtle but important distinction was highlighted by the following questions.

19. Why did the right to food under the International Covenant on Economic, Social and Cultural Rights impose a duty on the affected State to seek assistance but not a duty on non-affected States to give assistance? How could the relevant provision of the Covenant impose a specific commitment on the affected State but no commitment on other States parties to the Covenant? If the answer was that non-affected States were free to give consent in the granting of assistance, then, logically, affected States were free to give consent to the seeking of assistance. The right to food set out in the Covenant had apparently not been intended by States to form the basis of a duty to seek assistance in times of disaster. The extension of that right was difficult to justify as a matter of legal interpretation: draft article 10 was therefore vulnerable to the accusation of problematic extrapolation from rules not intended for disaster relief.

20. Furthermore, the Special Rapporteur’s approach in draft article 10 might raise an issue of classification, namely whether the rule proposed therein represented the codification of international law or its progressive development. In the former case, more numerous and unequivocal instances of treaty and other State practice should have been offered in support. The Special Rapporteur had emphasized the number and significance of recent instances of disaster in his introduction to the report. However, before accepting that there was a rule requiring States to seek assistance, the Commission should ascertain whether those recent instances gave support to or weakened the view that such a rule existed *de lege lata*. In that regard, Mr. Pellet’s criticisms of the methods and use of sources in the report were cogent.

21. To be fair, the Special Rapporteur did take into account some elements of State practice, but they were

limited and did not reach the level of generality required for recognition of a rule of customary law. By the same token, certain broad concepts relating to aid, such as humanity, cooperation and the “internal” aspect of sovereignty, were not sufficiently specific to provide the basis for a binding rule of law.

22. Alternatively, perhaps framing a duty to seek assistance might constitute an instance of progressive development, worthy of support on policy grounds. One virtue of the rule set out in draft article 10 was that it emphasized the protection of human rights in difficult situations and afforded certainty to the affected States about their duty to seek assistance *a priori*.

23. However, there were also disadvantages with draft article 10 as progressive development. First, it seemed contrary to State sovereignty to require or compel a State to seek assistance if it did not want to do so. It had been suggested that the term “duty” was not as strong in law as “obligation”, but that was debatable: both terms indicated that the addressee of the duty or the obligation was compelled, as a matter of law, to seek assistance. That type of compulsion seemed not to be consistent with the will of States at the current stage of development of international law: most States were unlikely to agree to have their freedoms limited in that manner.

24. Secondly, if a legal requirement such as that in draft article 10 was imposed, the affected State would have not only the burden of trying to cope with a disaster, but also the duty of deciding whether it must seek help. If it did not seek help, based on a rather vague “margin of appreciation”—a concept not yet crystallized in disaster law—the State would be subject to State responsibility. Thus, in the midst of a disaster, a State would need to worry about possibly breaking the law by choosing not to receive assistance from certain countries. Developing countries had long complained about “tied” aid; draft article 10 would introduce the new concept of legally “required” aid, which could be counterproductive.

25. He was therefore not in favour of draft article 10 in its current form and would suggest that the mandatory phrase “has the duty to seek assistance” should be replaced with the words “should seek assistance”. That would highlight the desirability of having affected States seek assistance and remove the controversial compulsory requirement.

26. There were at least three major problems with draft article 11, paragraph 1. First, it seemed contrary to existing law, under which States could withhold consent to external assistance. Secondly, the mandatory character of the provision went against established notions of State sovereignty. Thirdly, even as *lex ferenda*, the rule could create difficulties for States that might wish to refuse assistance from States or other entities that they regarded with disdain, whether their reasons for doing so were valid or not. The affected State might perceive external assistance as a kind of Trojan horse that opened it up to unwanted pressure.

27. In the circumstances, and to ensure a balance between human rights protection and State sovereignty,

he would again suggest that the mandatory component should be removed by replacing the words “shall not” with “should not”, so that the provision read: “Consent to external assistance should not be withheld arbitrarily if the affected State is unable or unwilling to provide the assistance required.”

28. Draft article 11, paragraph 2, could remain as proposed by the Special Rapporteur, because the requirement that an affected State specify its decision without delay was reasonable and helped to emphasize the urgency associated with disaster relief, without compromising significantly the rights of the State over its territory.

29. In most cases, affected States would act reasonably and seek assistance in the face of disaster. Similarly, donor countries and other entities would provide assistance without ulterior motives. Perhaps the difference of opinion on the issues in that area of the law was really about cases in which States acted in ways that were not terribly logical. He would prefer to come down on the side of existing law, with some marginal adjustments, primarily because existing law protected weaker countries from the possibility of abuse. If States wished the law to evolve in the light of changing realities, it was up to them to promote that development, whether through the concept of the responsibility to protect or by other means.

30. Mr. NOLTE requested clarification of Mr. Vasciannie’s use of the term “compulsion”: he had understood him to say that the duty to seek assistance implied compulsion. It was an important question in the light of his underlying concern about the protection of weaker States against abuse. If by “compulsion” Mr. Vasciannie meant the use of force, then there was clearly a misunderstanding, because the Special Rapporteur had not intended the concept of a duty to seek assistance as authorization to force aid on an unwilling State.

31. Mr. VASCIANNIE said that he had by no means wished to suggest that compulsion implied the use of force. He had been referring to compulsion in the legal sense, meaning that failure to uphold the duty to seek assistance would give rise to State responsibility under draft article 10 as currently worded.

32. Mr. PETRIČ said that Mr. Vasciannie’s statement had alerted the Commission to a serious problem. The main issue at stake was the protection of victims of disasters, not the sovereignty of States. The Commission seemed generally to agree on the desirability of regulation, possibly codification or even progressive development, so that assistance could be provided to persons in situations of disaster. Under normal circumstances, States would cooperate, ask for help or offer help. Nevertheless, as Mr. Vasciannie had observed, irregular situations would also arise, in which, indifferent to the need to protect human life, States did not take action, ignoring or refusing help. It was precisely the purpose of the law to regulate irregular situations, and it was on that aspect of the topic that the Commission should concentrate.

33. Mr. VASCIANNIE, recalling Mr. Petrič’s remark at the previous meeting about Ethiopia in the 1980s, said that even if the Commission had formulated articles

that would have required Ethiopia to seek assistance, the Government of Ethiopia would have disregarded those provisions. The existence of a provision stipulating that a State must seek assistance would thus have been of no immediate practical significance. It would have been of legal significance, however, and therein lay the problem. If Ethiopia did not seek assistance when disaster struck and five months later, a powerful State accused it of violating international law and suggested action to remedy the situation, it was then that the prospect arose of compulsion taking the form of the use of force. If the Commission followed that route, it might lead to a situation in which a State that had decided not to seek assistance because the offering State was known to have ulterior motives could end up facing the barrel of a gun for reasons that had nothing to do with disaster relief. The use of the phrase “should seek assistance” would indicate that the Commission regarded it as desirable that an affected State should seek help, but did not open up the prospect of legal liability being incurred by a State that chose not to accept the assistance offered.

34. Mr. MELESCANU said that draft article 9 had already established the obligation of a State, by virtue of its sovereignty, to ensure the protection of persons and the provision of disaster relief in its territory. That meant that if a State’s own possibilities were exhausted, it should look for outside support. That logical premise had nothing to do with a right or duty of interference, but was based on the principle that a State was under an obligation to take care of its citizens. Thus, once it had no means of doing so, it was entitled to seek assistance, which could be refused, although not arbitrarily. He urged the Commission not to revisit the fundamental principles underpinning the draft articles.

35. Mr. DUGARD concurred with Mr. Vasciannie that, even if the Commission had produced a text on the protection of persons in the event of disasters prior to the disaster in Ethiopia, the Government of Ethiopia would have ignored it. The possibility that a Government might not abide by an instrument it drafted should not, however, deter the Commission from doing the right thing. Since it was the Commission’s function to codify and progressively develop international law, it could set forth guidelines indicating how States ought to behave. Some of the Commission’s projects clearly had some impact on the conduct of States: witness the articles on State responsibility for internationally wrongful acts,³⁰⁰ even though they did not yet exist in treaty form.

36. Mr. HMOUD said that the draft articles would act as a deterrent insofar as they would make a State think twice before rejecting an offer of assistance. The legal provisions drafted by the Commission entailed consequences, because they were usually cast in mandatory language. He would not have agreed to the drafting of the current draft articles if he had thought that they might permit the use of force; however, as Mr. Wisnumurti had said at the previous meeting, the responsibility to protect could be invoked only when a violation of international

³⁰⁰ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

humanitarian law had occurred. It might nevertheless be advisable for the articles to contain some assurances that the principles of State sovereignty and non-interference would be respected.

37. Mr. VASCIANNIE said that Mr. Melescanu's suggestion that draft article 10 was a logical extension of draft article 9, because the duty to ensure protection implied the duty to seek assistance, reflected a somewhat teleological approach. While States had a duty to protect the right to life, a violation of the right to life did not automatically give rise to a duty to seek assistance from another country. Although the two rights were related, they were separate and distinct. His own acceptance of a duty to ensure protection did not necessarily mean that he accepted a duty to seek external assistance.

38. In reply to Mr. Dugard, Mr. Vasciannie explained that he was not suggesting that the mere fact that Ethiopia might have disregarded a provision signified that the Commission should not adopt that provision. In addressing the difficult question raised by Mr. Petrič, his own answer was that, by accepting the rule currently being discussed, the Commission might raise the prospect of the rule's abuse. Not only might the duty to seek assistance be disregarded, it might also give rise to other problems in international law. Mr. Petrič seemed to be trying to minimize that difficulty by saying that the Commission was not discussing State sovereignty but the protection of human beings. The truth was, however, that the two notions went hand in hand, or were perceived to be interrelated by States. The Commission could not therefore completely ignore the link. The report contained several statements about the need for consent, non-intervention and State sovereignty that should be integrated in the text of the draft articles rather than placed in the commentary.

39. He agreed with Mr. Hmoud that rules laid down by the Commission could serve as a deterrent, but he still thought that they might be subject to abuse. The General Assembly and the Secretary-General of the United Nations had been of the opinion that the responsibility to protect did not justify the right to intervene in the context of disaster relief. That finding should be reflected in the draft articles.

40. Mr. GALICKI said that draft articles 9 and 10 dealt with a very delicate issue. Accordingly, the commentary should make it clear that they constituted progressive development rather than codification and represented an attempt to reconcile two opposing trends. Laying down an unconditional legal duty in draft article 10 might cause that draft article to remain a dead letter, whereas making it less rigid might prove beneficial to the whole codification exercise. The Commission had to remember that the draft articles had to be applied in practice and had to be useful to States.

41. Mr. WISNUMURTI said that he agreed with Mr. Murase's comment at an earlier meeting that the Commission should not draw up articles establishing across-the-board legal obligations that were not supported by international practice. He also agreed with Mr. Melescanu that draft article 9 was very important because it embodied the principle of the responsibility of an affected State and

established a balance between State sovereignty and the protection of human rights. However, it was inappropriate to cite that provision in support of the use of the term "duty" in draft articles 10 and 11. By suggesting the replacement of "shall" with "should", Mr. Vasciannie had proposed a compromise that might offer some common ground in addressing a very sensitive issue.

42. Mr. SABOIA said that while he agreed with the views expressed by Mr. Petrič, he also shared Mr. Vasciannie's concern that a rule requiring States to accept assistance might be abused, especially in the case of weaker countries. In his introduction to the fourth report and in the report itself, the Special Rapporteur had emphasized that affected States retained a wide margin of choice with regard to the source of assistance and could opt for a reliable source. A qualifying phrase might be introduced indicating that the offer of assistance had to be "made in accordance with the principles of the present draft articles", since that would reinforce the idea that the assistance must be impartial and neutral.

43. Another argument in favour of the Special Rapporteur's approach was that, if the affected State was unable to provide relief and refused to accept external assistance, the extent of the disaster and its effects in terms of the loss of human life might be so great as to enable the United Nations to invoke human rights principles and other potent arguments. After the floods in Myanmar, for example, it had taken a visit from the Secretary-General to convince the Government to accept outside relief.

44. Mr. NOLTE observed that Mr. Vasciannie had criticized the Special Rapporteur for not having presented enough practice in support of the duty to seek assistance. He was sure that the Special Rapporteur could point to many cases where States that had been overwhelmed by a disaster had asked for assistance and where that request had demonstrably been made out of a sense of legal obligation. Conversely, Mr. Vasciannie might be asked to give examples of State practice where the pretext of supplying relief in a natural disaster had been used for illicit purposes.

45. Mr. VASCIANNIE said that there were many instances of countries having sought assistance, although out of a sense of legal obligation: States had simply known that they had the right, not a duty, to seek assistance. Japan and Myanmar afforded examples in that context.

46. Mr. FOMBA, said that, as Mr. Pellet had remarked at an earlier meeting, the fourth report had not mentioned the responsibility to protect. However, that responsibility deserved attention, even if such an approach would imply somewhat bolder progressive development. The philosophy underlying the topic was certainly that of the responsibility to protect. Appropriate answers to the questions of who should protect victims in the event of a disaster, on what legal basis and subject to what conditions and limitations had to be sought both *de lege lata* and *de lege ferenda*. The responsibility to protect comprised two obligations: on the one hand, the obligation of the affected State to protect and assist the stricken population and, on the other, the obligation of the international community to assist the weakened affected State or, where necessary,

to compel it to accept assistance. The following scenarios were possible: the affected State was able and willing to act, in which case the problems and the legal implications were minimal; the affected State was willing but unable to act, in which case the main legal issue was determining the basis for as well as the ways and means of providing assistance to the affected State; the affected State was able but unwilling to act, in which case it was necessary to decide how to define that situation in legal terms. Was there any foundation in international law for the idea of refusal of assistance to an endangered population, and, if so, what were the legal consequences? Could the State be compelled to accept assistance, directly or through an intermediary? The door was wide open to the progressive development of international law there, the point being to distinguish what was desirable from what was feasible. He was sure the Special Rapporteur had not lost sight of those complex questions. He had wisely opted for an objective, realistic approach, proposing a balanced, acceptable set of draft articles, and he himself was in favour of their referral to the Drafting Committee.

47. He wished to draw attention to a text not mentioned in the fourth report, namely the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). Article 1 (*k*) thereof defined “internally displaced persons” as persons who had become displaced, *inter alia*, as a result of natural or human-made disasters. Article 5, paragraph 1, spoke of a primary duty and responsibility for providing protection and humanitarian assistance to internally displaced persons. Article 5, paragraph 4, made it incumbent upon States to take the necessary measures to protect and assist persons who had been internally displaced owing to natural or human-made disasters, including climate change. Article 5, paragraph 2, laid down the obligation to cooperate on the basis of the concerned State’s consent. Article 5, paragraph 12, safeguarded the principles of the sovereignty and territorial integrity of States. Article 12, paragraph 3, made States liable for making reparation to internally displaced persons for damage when a State party refrained from protecting and assisting internally displaced persons in the event of natural disasters.

48. Mr. HUANG said that first-hand experience of disasters in his own country had given him a deep understanding of the issues involved. In that connection, he could recommend a Chinese film entitled “Aftershock”, which depicted events surrounding two major earthquakes in China and provided new perspectives on disasters, disaster assistance and the protection of affected persons. The film showed that in the face of a major catastrophe, values such as morality, love and tradition were more powerful than abstract talk of duties, rights and responsibilities.

49. Turning to the substance of the report, he said that it was important to clarify the key questions involved. In his view, there were three basic issues that needed to be addressed: the definition of disasters, the provision of assistance and the question of rights, duties and responsibilities.

50. To begin with, there were three entirely different types of disaster: those that were unpredictable, sudden and large-scale, such as earthquakes, tsunamis and floods;

those that were the result of climate change, desertification and ecological degradation, such as drought and famine; and, lastly, those that were caused by social strife, such as famine and refugee influx. It was the first type of disaster that the Commission should be discussing. Disasters of that nature could strike any country, regardless of its wealth or resources, whereas the second type occurred only in poor and underdeveloped countries, a development issue that should be addressed by the Millennium Development Goals. The third type related more to issues of peace and security and called for political solutions.

51. Clearly, different disasters required different responses. The response to sudden disasters involved three stages. During the first stage, when the overwhelming requirement was to save lives, talk of human rights was meaningless. During the second stage, the key priority was the resettlement of victims, an effort that required vast amounts of external material assistance. The third stage focused on post-disaster reconstruction, which was a development issue requiring long-term input.

52. Secondly, with regard to the provision of assistance, he wished to mention two successful Chinese models. The first, based on self-reliance, was exemplified by the response to the devastating earthquake that had struck the city of Tangshan in 1976. Disaster relief and reconstruction had been carried out using solely local resources, and within 30 years a prosperous new city had emerged. The second model was based on a combination of self-help and international assistance and was illustrated by the reaction to the major earthquake that had hit the city of Wenchuan in 2008. The Government of China had immediately triggered its emergency response mechanism, committed large sums to the relief operation and mobilized the entire country. As part of its disaster relief and reconstruction efforts, it had also accepted assistance from international sources. Reconstruction work had been completed ahead of schedule, and economic development had surpassed pre-earthquake levels. Nevertheless, the primary responsibility for disaster relief lay with the affected State, and the critical factor in the success of disaster-relief efforts was the assistance provided by the affected State, not international assistance.

53. The third issue that must be considered was that of duties, rights and responsibilities. He noted that draft article 10 indicated that the affected State had the duty to seek external assistance if the disaster exceeded its national response capacity, while draft article 12 stated that the international community had the right to offer assistance to the affected State. In his view, however, the relationship between the affected State and the international community should not be defined in terms of rights and duties, but should be considered from the perspective of international cooperation. The assistance provided by a large number of countries to Japan following the recent earthquake there was a display of humanitarian spirit and not an indication that the disaster exceeded the country’s response capacity. At the same time, an affected State had the right to opt for self-reliance; the rejection of external assistance should not be viewed as erroneous or contrary to human rights. Furthermore, offers of assistance to affected States should also take into account those States’ capacity to receive and utilize such assistance. A number of States had expressed

their willingness to provide help following the Wenchuan earthquake, but the local conditions were such that it had not been possible to accept all the international assistance offered. No accusations should be made against affected States on that basis.

54. The provision of assistance should be viewed as a responsibility rather than a right. In reality, many of the problems confronting African States were not the result of a failure to seek assistance but rather of a failure on the part of developed countries to provide adequate assistance. At the same time, some countries had imposed political conditions on disaster relief with a view to subverting the Governments of affected countries. Such behaviour was tantamount to intervening in the domestic affairs of those States and ran counter to the humanitarian spirit. It was for that reason that Ethiopia and Myanmar had rejected assistance.

55. In his view, affected States had a right but not a duty to seek assistance. Other States or the international community as a whole should have a moral responsibility or duty to provide assistance. On the basis of that understanding, he proposed that draft articles 10 and 12 be amended to indicate that affected countries had the right to seek assistance from the international community if the disaster exceeded their capacity to respond to it and that other States and the international community should have the responsibility to help affected countries, but should not attempt to interfere in their domestic affairs.

56. Mr. DUGARD said that Mr. Huang had raised a number of interesting issues. As far as he himself was concerned, the mere mention of the principle enshrined in Article 2, paragraph 7, of the Charter of the United Nations—namely, non-interference in the internal affairs of States—was like a red rag to a bull. Under the apartheid regime in South Africa, that article had been a central feature of government foreign policy and had been used to support the argument that no State should be allowed to interfere in its racial policies. He had been under the impression that mention of Article 2, paragraph 7, was no longer fashionable, but he had been proved wrong. He would be interested in hearing Mr. Huang say more about the politicization of the famines in Ethiopia and Myanmar. It was his recollection that in both those cases the assistance offered by the international community had been rejected out of hand. The events of that time needed to be clarified: one should not say that those disasters had been politicized without providing further evidence.

57. Mr. VASCIANNIE said he wondered whether, in the light of Mr. Dugard's comments concerning Article 2, paragraph 7, of the Charter of the United Nations, Mr. Huang or Mr. Dugard could elaborate on whether there was a duty for non-affected States to give assistance in the event of disasters.

58. Mr. DUGARD said that Mr. Vasciannie had raised an interesting point that required further consideration. He hoped that the Special Rapporteur would take it up.

59. Mr. NOLTE said that the corollary of the duty to seek assistance was the duty to consider such a request, not the duty to provide assistance.

60. Mr. PETRIČ said he hoped that at some time in the future, non-affected States would have a duty to provide assistance and not simply the right to do so. At present, however, the issue under discussion was the duty of affected States not to reject assistance arbitrarily. That was a modest first step in the right direction.

61. Mr. HMOUD thanked the Special Rapporteur for his well-researched fourth report, which tackled several of the core issues that needed to be addressed. While other entities existed to address the operational aspects of relief, the Commission was the appropriate body to determine the norms to be applied when the legal protection of persons was challenged by the positions of certain actors. A balance needed to be struck between the rights and obligations of the different actors in order to enhance that protection, but a balance meant that there were no absolute rights and that actors could not advance their rights in order to escape their obligations towards others. The overarching aim of the Commission's task was to secure legal protection for affected individuals during a disaster situation, and the balance of rights and obligations must be established in the light of that objective.

62. A second general point to bear in mind was that a violation of the obligations contained in a legal instrument triggered the legal responsibility of certain actors. Such violations of international law should not be ignored in a disaster situation. When a State or an international organization realized that its international responsibility would be incurred as a result of such a violation and that it could not benefit from a lack of legal clarity, that realization should serve as a deterrent to the commission of a violation and an incentive to adhere to the law.

63. A third consideration was that the principles of State sovereignty and non-intervention were well established in international law, and the current exercise should not be viewed as derogating from those principles. Sovereignty entailed not only rights for States but also obligations, including in the context of disaster situations. As asserted in draft article 9, an affected State, by virtue of its sovereignty, had the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory. Furthermore, the principles of neutrality and impartiality enunciated in draft article 6 protected the affected State against intervention not only by actors who might incur international responsibility but by non-State actors as well. An affected State could curtail the rights of a certain actor if the latter violated the principle of non-intervention or any humanitarian principle. In fact, the report overemphasized the assurances given to affected States against potential infringement of their sovereignty or of the principle of non-intervention by other actors.

64. A strong basis existed for developing in the draft articles a rule relating to the duty of the affected State to seek assistance. The existing international legal framework seemed oriented towards the creation of such an obligation, but it was simply a fact that when a State was unable to fulfil its primary responsibility for protecting the individuals in its territory in the event of a disaster, it had to seek outside assistance. Failure to establish the duty to seek assistance would result in a legal vacuum, thereby defeating the aim of the draft articles,

which was to ensure legal protection. While it might be argued that the duty to cooperate encompassed the duty to seek assistance, the former was more concerned with the operation and management of the affected State's disaster response, which was a mutual relationship, than with the specific obligation to seek assistance, which was an individual undertaking.

65. He agreed with the Special Rapporteur that there was a margin of appreciation for the affected State to determine the nature and content of the assistance it sought, which implied that the affected State had the right to choose the actors from whom it sought assistance. As with any other sovereign right, its enjoyment was conditional on its non-abuse by the affected State.

66. Turning to the text of draft article 10, he said that he agreed with the Special Rapporteur's preference for the word "seek" over "request", since a request for assistance suggested that the affected State might be inclined to accept whatever offer of assistance was made to it, while "seek" implied a more proactive approach.

67. With regard to draft article 11, he agreed with the premise that the affected State had the right, when offered assistance, to determine the type of assistance to which it would consent, irrespective of whether its capacity to provide relief had been exhausted. Nevertheless, that right was not absolute, and there was ample legal basis for developing the duty of the affected State to consent to assistance when it had no strong reasons, such as reasons of national security, to withhold such consent. It should be pointed out, however, that the interest of the international community in the protection of persons in the event of disasters had not yet developed to the point that the duty covered by draft article 12 constituted an *erga omnes* obligation.

68. There appeared to be some confusion in the report between the unwillingness of the affected State to assist individuals who were in its territory when a disaster occurred and the unwillingness of the affected State to accept external assistance. Draft article 11 stipulated that a State could not arbitrarily withhold its consent to external assistance when it was unable or unwilling to provide the assistance required. An affected State that was unwilling to provide assistance in its territory to affected individuals might, by virtue of its human rights obligations, incur international responsibility for wrongful acts. Under draft article 11, it would incur additional international responsibility if it arbitrarily rejected an offer of assistance.

69. In that case as well, the State had sovereign discretion in assessing the nature of the offer of assistance to which it would consent and in determining the actors from whom it would accept such an offer. That was of practical importance, since in certain situations States might reject an offer of assistance from actors whose motives were other than humanitarian in nature.

70. With regard to draft article 12, he noted that, while there was not a sufficient basis in international law for imposing a general obligation on donors to provide assistance, the duty to cooperate embodied in draft article 5 could provide a basis for the establishment of such an obligation. However, that was not the subject of

draft article 12, which appeared to have been drafted with a view to imposing an obligation on the affected State that would arise from the establishment of a right accorded to third-party actors. He did not agree that all third-party actors should be given equal treatment in the formulation of that right. The treatment in draft article 12 of NGOs as subjects of international law with direct rights *vis-à-vis* States would give rise to legal difficulties and cause major practical problems for the implementation of the draft articles. Such treatment could, for example, trigger the responsibility of an affected State that rejected an offer of assistance from an NGO. There was no rule—not even an emerging rule—in international law that pointed in that direction. In emergency situations, where the response, including offers of assistance, had to be rapid, and where a large number of "relevant" NGOs were present to assist with the disaster, such a rule could put the affected State in a difficult position. In such cases, the affected State would first have to ensure that the offer of assistance from the NGO was genuinely humanitarian in nature, which it did not have the luxury of time to investigate; then, if it declined the offer, it would have to risk committing an internationally wrongful act. As currently worded, draft article 12 would undermine the ability of the State to protect the individuals in its territory, thus defeating the purpose of the draft articles. Consequently, he did not support extending to NGOs the right to offer assistance. As an alternative, he suggested that the wording of draft article 12 might be amended to eliminate the concept of a right altogether, providing instead that third-party actors "may" offer assistance, thus constituting an authorization rather than a right.

71. In conclusion, he recommended referring draft articles 10, 11 and 12 to the Drafting Committee.

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

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

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

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

(b) Text of the guidelines and the commentaries thereto (continued)*

72. The CHAIRPERSON invited the Commission to resume its consideration of chapter IV of the draft report and drew attention to the portion of the chapter contained in document A/CN.4/L.783/Add.3.

1.1.1 Statements purporting to limit the obligations of their author (concluded)* (A/CN.4/L.783/Add.3)

*Commentary (continued)**

Paragraphs (10) to (12)

Paragraphs (10) to (12) were adopted.

The commentary to guideline 1.1.1, as a whole, as amended, was adopted.

* Resumed from the 3101st meeting.

1.1.2 *Statements purporting to discharge an obligation by equivalent means*

73. Mr. CANDIOTI proposed that the pronoun “it” [*il*] be replaced with “the author” [*l’auteur*], in order to avoid confusion.

74. Mr. PELLET (Special Rapporteur) suggested that, in that case, the amended text should be “the author of the declaration” and not just “the author”. The problem in French of choosing between the pronouns “*il*” and “*il ou elle*”, when they referred to States and international organizations, had arisen with regard to other guidelines as well. It had not seemed appropriate to use the politically correct phrase “*il ou elle*” to refer to a State or an international organization.

Guideline 1.1.2, as amended, was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

75. Mr. NOLTE proposed that the word “probably”, which he considered redundant, be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

76. Sir Michael WOOD proposed that, in the final sentence, the word “must” be replaced with “may” or “should”, depending on the meaning the Special Rapporteur wished to convey.

77. Mr. PELLET (Special Rapporteur) said that as States had the obligation to settle their disputes peacefully, he saw no problem with the word “must” in the English version. To avoid confusion, he suggested replacing the phrase “must resort to a means of peaceful settlement” with “must settle their disputes in accordance with general international law” [*devront régler leur différends conformément au droit international général*].

78. Sir Michael WOOD said that, in the English version, it would be sufficient to replace the word “must” with “should”.

79. Mr. CAFLISCH said that to replace “must” with “should” would be a mistranslation of the French term “*devront*”. The French text should remain as currently worded. The English translation, on the other hand, was not limited to the word “must”: “*devront*” could be translated as either “may” or “shall”, but definitely not as “should”.

80. Sir Michael WOOD said that there might well be an obligation on States to settle disputes that could pose a threat to international peace and security, but it was hard to believe that there was an obligation on them to settle any difference of opinion they might have concerning a reservation to a treaty. For that reason, he would prefer the word “should”, which fit the context very well.

81. Mr. CAFLISCH said that by that reasoning, the French text should employ the word “*devraient*”. Regardless of the term chosen, the two language versions should not differ markedly from each other.

82. Mr. PELLET (Special Rapporteur) suggested that the final sentence should be reformulated to read: “Where assessments differ, the usual rules to resort to means of peaceful settlement apply.”

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to guideline 1.1.2, as amended, was adopted.

1.1.3 *Reservations relating to the territorial application of a treaty*

Guideline 1.1.3 was adopted.

Commentary

Paragraph (1)

83. Mr. PELLET (Special Rapporteur) suggested that paragraph (1) be amended to read: “As its title indicates, this guideline concerns unilateral statements by which a State purports to exclude the application of certain provisions of a treaty *ratione loci*: the State consents to the application of certain provisions *ratione materiae* except in respect of one or more territories to which the excluded provisions of the treaty would otherwise apply under article 29 of the Vienna Conventions.”

Paragraph (1), as amended, was adopted.

Paragraph (2)

84. Mr. PELLET (Special Rapporteur) suggested that, in the first sentence of the French text, the word “*seront*” should be replaced by “*seraient*”.

Paragraph (2) was adopted with that minor drafting amendment to the French text.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

85. Mr. KEMICHA proposed that, in the French text, the word “*lequel*” should be replaced with “*laquelle*”.

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

Paragraphs (6) to (10)

Paragraphs (6) to (10) were adopted.

Paragraph (11)

86. The CHAIRPERSON said that paragraph (11), which had already been deleted in an earlier version of

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

Paragraph (11) in the French text was deleted.

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

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

Guideline 1.1.4 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

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

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

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

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

Paragraph (6)

Paragraph (6) was adopted.

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

The meeting rose at 1 p.m.

3104th MEETING

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

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

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

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

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

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

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

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

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

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

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