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Summary record of the 3105th meeting

Topic:
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Paragraph (32)

93. Sir Michael WOOD said that the reference in paragraph (32) should be to Part 2, not chapter II, of the Guide to Practice, and that in general, the Guide would be easier to read if the various parts were referred to by name.

94. Mr. PELLET (Special Rapporteur) said that Sir Michael's remark was entirely justified and that the parts could be referred to by name throughout the Guide.

Paragraph (32), as amended, was adopted.

Paragraphs (33) and (34)

Paragraphs (33) and (34) were adopted.

The commentary to guideline 1.2, as amended, was adopted.

The meeting rose at 1.05 p.m.

3105th MEETING

Thursday, 14 July 2011, at 10 a.m.

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

Present: Mr. Adoke, Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, 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. Ms. ESCOBAR HERNÁNDEZ said that the Special Rapporteur's handling of the sensitive questions of who could offer assistance in the event of a disaster and the legal nature of that offer, on the one hand, and, on the other, the role of the affected State in seeking, accepting and providing assistance, suggested a means of reconciling both facets of assistance by safeguarding the balance between the sovereignty of the affected State and the protection of fundamental human rights. That was the right approach, since only by preserving that balance could the Commission help to solve a problem which, as recent events such as those in Japan had shown, had to be addressed by the international community as a matter of urgency.

2. In the fourth report on the protection of persons in the event of disasters, the Special Rapporteur attempted to

provide a rigorous and exhaustive analysis of the various international instruments pertaining to the topic, yet he had sometimes drawn conclusions that were not entirely justified. First, he had inferred from some of the instruments that there were some indisputable rights and duties relating to the offer or acceptance of assistance in the event of disasters. However, some of the instruments deserved a more thorough examination in view of the fact that work in that area of international law tended more towards progressive development than codification. Secondly, the terms "responsibility", "obligation" and "right" needed clarification and their usage ought to be harmonized. Thirdly, she agreed with the Special Rapporteur's approach to the relationship between the State receiving assistance and other States or institutions that were, or wished to be, part of the relief effort. The references in the report to international cooperation and respect for human rights as the cornerstone of assistance were correct and formed a sound basis for the Commission's work.

3. The Special Rapporteur had been wise not to include the responsibility to protect among the grounds for assistance. The discussion of the theoretical aspects had been instructive, but the issue was becoming increasingly politicized. The Commission should refrain from becoming immersed in that or related debates (for example, concerning the right or duty to intervene), since that would only hamper its work on the subject.

4. Commenting on the draft articles presented in the fourth report, she said that she agreed with the underlying idea of draft article 10. While the phrase "has the duty" might generate debate about a possible adverse impact on the affected State's sovereignty, in reality the risk was non-existent, especially in view of the safeguards contained in draft articles 6 and 9 and the recognition, implicit in draft article 11 and explicit throughout the report, of the central importance of the affected State's consent to assistance. In addition, in the context of disaster relief, sovereignty entailed the duty of the State to adopt the requisite measures to protect persons in its territory and to guarantee their enjoyment of their basic human rights. The use of the term "seek" rather than "request" was appropriate and constituted a further guarantee of the affected State's sovereignty. However, for the Spanish text, consideration should be given to whether to use the term "*recabar*" or "*buscar*", since the two words had very different implications.

5. For draft article 11, she agreed that it might be better to replace the term "arbitrarily" with "unreasonably" and, instead of speaking of an affected State that was "unable or unwilling" to provide the assistance required by the population, to employ a neutral phrase such as "does not" provide assistance. Draft article 11 simply set forth a principle without specifying either the consequences of failure to abide by it or the mechanisms and procedures for effectively delivering assistance in the event of arbitrary or unreasonable refusal. That whole issue needed to be dealt with in the draft articles, however.

6. She endorsed the comments made by Mr. Hmoud and others concerning the reference to NGOs in draft article 12. While they did play a very important role in supplying humanitarian assistance, the textual

reference to them should be amended. She had serious doubts that the phrase “right to offer assistance” was the most apposite way to describe the basis on which States, international organizations and NGOs could offer assistance. The underlying idea was of an act not prohibited by international law and which could not be regarded under any circumstances as hostile or internationally wrongful. Describing that as a right could have substantial implications for the relationship between the receiving and donor States. The term should be examined thoroughly in the Drafting Committee.

7. In conclusion, she said she was in favour of referring draft articles 10, 11 and 12 to the Drafting Committee.

8. Mr. WISNUMURTI said that the fourth report on the topic showed that the Special Rapporteur had made consistent progress in the discharge of his mandate. With regard to the responsibility of the affected State to seek assistance where its national response capacity was exceeded, he said that the key question was how to construe the “responsibility” of the affected State. In giving substance to that notion, the Commission should bear in mind the need for a proper balance between the core principles mentioned in paragraph 31 of the report, namely sovereignty and non-intervention and the requirement of the affected State’s consent, and the protection of disaster victims. It might prove counterproductive if the Commission tried to lay down strict legal obligations with respect to international cooperation. Noting that Mr. Vasciannie’s statement had offered a perspective that differed from that of the Special Rapporteur, he said that the product of the Commission’s work must reflect a consensus among members from different backgrounds and legal systems in order to ensure that the final text was acceptable to States Members of the United Nations. His own views on the fourth report, like those of Mr. Murase, would inevitably be influenced by his country’s experience in coping with major disasters.

9. Despite the Special Rapporteur’s serious efforts, the three new draft articles failed to achieve the balance just mentioned between core principles and protection of disaster victims, and the way in which the responsibility of the affected State was fleshed out was difficult to accept.

10. With regard to draft article 10, he failed to see the difference between “duty” and “obligation”. The phrase “The affected State has the duty to seek assistance” meant that it was under an obligation to seek assistance. That obligation went against the principles of sovereignty, non-intervention and the requirement of the affected State’s consent. It was also inconsistent with the right of the affected State not to consent to external assistance. The Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance of the IFRC,³⁰⁹ to which reference was made in paragraph 42 of the report, placed no obligation on the affected State to seek assistance: they indicated that the affected State “should” seek international and/or regional

assistance.³¹⁰ Similarly, the revised Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (Oslo Guidelines) provided that “[i]f international assistance is necessary, it should be requested or consented to by the Affected State”.³¹¹ The language used by the IFRC would better convey the notion that an affected State had a responsibility to seek assistance when it was needed. Imposing an obligation to seek assistance on an affected State would undermine its legitimate right to decide for itself whether it needed such assistance and to keep all options open. It might also expose the affected State to external pressure motivated by considerations unrelated to humanitarian relief.

11. When drafting provisions on the responsibility of the affected State, the Commission should not rely too heavily on isolated instances of refusals of assistance, but should rather use instances when affected States, in coping with major disasters, had been ready to work with the international community. For those reasons, the title of draft article 10 should be amended to read, “The need of the affected State to seek assistance” and the draft article should begin with the phrase “The affected State should seek assistance, as appropriate”. In addition, there was a potential problem of interpretation of the phrase “if the disaster exceeds its national response capacity” in that it was unclear who would determine that the disaster had exceeded the affected State’s national response capacity. It was essential to stress that it was the affected State’s prerogative to decide when that point had been reached.

12. He had no difficulty with the way draft article 11, paragraph 1, was formulated, provided that it was understood that the affected State was under no obligation to seek external assistance: the draft article simply set parameters for its discretionary right to give or withhold consent. The prohibition of the arbitrary withholding of consent to external assistance was necessary in order to prevent undue delay in giving consent from jeopardizing the safety and well-being of persons in need of protection. He agreed with the statement in paragraph 71 of the report that the determination of when a State’s conduct amounted to that State being unable or unwilling to provide assistance was to be arrived at in the light of the specific circumstances of each case. He also concurred with the statement in paragraph 72 that whether a decision not to accept assistance was arbitrary should be determined on a case-by-case basis.

13. He wondered whether draft article 12, on the right to offer assistance, was actually needed. Any non-affected State could provide assistance to an affected State, subject to its consent, at any time it deemed appropriate. Similarly, intergovernmental organizations such as the Office of the United Nations High Commissioner for Refugees and *bona fide* humanitarian organizations such as the ICRC could provide assistance to an affected State in accordance with their statutory mandate and subject to the State’s consent. Establishing a right to offer assistance was therefore unnecessary. If, however, the Commission felt that some

³¹⁰ *Ibid.*, p. 12 (guideline 3, para. 2).

³¹¹ Office for the Coordination of Humanitarian Affairs, Oslo Guidelines, Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, Revision 1.1, November 2007, p. 19, para. 58 (available from <http://www.unocha.org/publication/oslo-guidelines-use-foreign-military-and-civil-defence-assets-disaster-relief>).

³⁰⁹ IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, Geneva, 2008, p. 8 (available from www.ifrc.org/PageFiles/41203/introduction-guidelines-en.pdf).

kind of enabling clause was required, then draft article 12 could be split into two paragraphs. The first paragraph would provide that, subject to the consent of the affected State, non-affected States and the relevant intergovernmental organizations, in accordance with their statutory mandate, might offer assistance to the affected State. The second paragraph would provide that intergovernmental organizations and *bona fide* NGOs could offer assistance to the affected State, subject to the latter's consent.

14. He had refrained from referring to the responsibility to protect, because it lay outside the scope of the topic under discussion.

15. Mr. NIEHAUS said that the problems caused by the increasing frequency and severity of natural disasters in recent years made tackling the legal dilemmas posed by disaster relief a matter of urgency. Such disasters, many of which could be attributed to climate change, affected a great many countries. Hence the timeliness of the Commission's consideration of the topic, which would certainly be facilitated by the excellent reports produced by the Special Rapporteur.

16. The three draft articles in the fourth report covered three central concerns. Their content, read together with draft articles 6, 7, 8 and 9, was clearly aimed at reinforcing humanitarian law and respect for fundamental rights and human dignity. In addition, the new draft articles acknowledged the tension between the affected State's urgent need for assistance, on which many human lives very often depended, and the potential for abuse of such assistance, resulting in a breach of State sovereignty. A preliminary analysis of that "clash" should point to the need to lay down appropriate international legal rules which, while upholding State sovereignty, effectively facilitated the delivery of assistance. In the majority of cases, such assistance was offered out of a spirit of international solidarity and a desire to provide support and comfort to human beings, leaving aside any disagreements or geographical divisions. Such assistance was usually heartily welcomed. Cases where a foreign State tried to take advantage of a disaster situation to achieve political ends were the exception rather than the rule.

17. He had therefore been surprised by the fact that several members had dwelt on the "danger" that such assistance could represent for State sovereignty. Reference had been made to the well-known cases of Ethiopia and Myanmar, where dictatorships had refused outside assistance, not necessarily in order to defend their sovereignty, but to burnish their own image on the domestic front and preserve a totalitarian regime. The main reasons for rejecting international assistance had lain in lack of confidence in the solidity of their dictatorships, not in threats to State sovereignty.

18. While draft article 10 rightly enjoined the affected State to seek and accept international assistance, it underemphasized the international community's duty to act out of a sense of solidarity and mutual support which, to him, was axiomatic. It was curious that the Commission was proposing to create a rule on the duty to accept, but was silent about its logical counterpart, the duty to provide—the very essence of effective international solidarity.

19. In article 12 of the Spanish version, the phrase "*tendrán derecho*" ("shall have the right to") should be replaced with "*deberán en la medida de sus posibilidades*" ("should, to the extent of their abilities"), wording that was more logical in relation to an offer of assistance.

20. The impact of a natural disaster was so enormous that the international community was generally quick to mobilize relief efforts. That was as it should be. However, the silent suffering and death of millions of children every year from famine and malnutrition—the third type of disaster mentioned by Mr. Huang—also called for immediate action. It could be reasonably argued that the Commission was a legal forum, whereas famine and malnutrition were sociopolitical problems. However, in the face of such a grave humanitarian crisis, drawing the international community's attention to its obligation to provide assistance to persons in the event of disasters should be considered an important aspect of the Commission's mandate.

21. With those comments, he agreed that the draft articles should be referred to the Drafting Committee.

22. Mr. CAFLISCH said that, as the Permanent Court of International Justice had ruled in its advisory opinion of 1923 on *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, sovereignty, in legal terms, was an essentially "relative question" (p. 24) which depended upon the development of international relations, and in particular treaty law. In its advisory opinion of the same year on the case of the *SS "Wimbledon"*, the Court had observed that the conclusion of treaties restricting the exercise of the sovereign rights of the State was not an abandonment of State sovereignty, but an attribute thereof (p. 25).

23. An important aspect of the development of contemporary international law was the growth in protection of individuals. The consideration of the current topic should therefore not be confined to relations between States providing and receiving assistance, or to the dichotomy between sovereignty and non-interference: individuals should be the main focus. Simple codification was also not the proper approach: as had been suggested earlier, a large component of *lex ferenda* was involved, and the Special Rapporteur had rightly addressed the topic from that angle.

24. As he understood the basic thrust of draft articles 10 to 12, three types of actors were involved: the affected State; the State offering assistance; and individuals in need of assistance. An affected State that was unable to cope with a disaster must seek assistance. Another State or international organization could offer assistance, but had no legal obligation to do so. However, an affected State was legally bound to accept an offer of assistance, unless there was a valid reason for refusing it, because it had to protect the individuals on its territory.

25. The opposite solution, whereby third parties were obliged to provide any assistance requested but the affected State was entitled to refuse it, made no sense from the standpoint of better protection of human rights. The solution proposed by the Special Rapporteur made perfect sense and he had no hesitation in recommending that draft articles 10 to 12 should be referred to the Drafting Committee.

26. Nonetheless, he wished to ask the Special Rapporteur four questions. First, what was to be understood by “relevant non-governmental organizations”, and who would assess their relevance? It was a matter of some significance, given the number and diversity of NGOs. Secondly, who would be called upon to establish that the disaster exceeded the response capacity of the affected State? That was also significant, since the affected State, by being empowered to conclude that it was unable to cope, a conclusion that would impose upon it the duty to seek assistance for its population, was by the very same token being given the opportunity to divest itself of any duty to seek assistance. Some kind of monitoring mechanism would therefore seem to be necessary.

27. Thirdly, what were the criteria for determining whether the affected State was withholding its consent to assistance “arbitrarily”, as draft article 11, paragraph 1, put it? It might well be that, in order to block assistance, the State might claim, falsely, that it had the situation under control. Hence, again, the need for a monitoring mechanism. Another situation in which consent to assistance might be deemed to be withheld “arbitrarily” was where one State refused the assistance of another State in the same region on the grounds that, in the past, the latter had sent hostile forces to infiltrate the former’s territory. Under such circumstances, could refusing assistance be, not arbitrary, but justified? Perhaps so. Such matters should be covered in the commentary to draft article 11.

28. Fourthly, the obligation to accept assistance included assistance from NGOs. However, such organizations were not at all, or not entirely, subjects of international law, and he therefore questioned whether States could be obliged to accept assistance from them.

29. In conclusion, he commended the Special Rapporteur on a very balanced fourth report. Work on the topic was now well under way.

30. Mr. HASSOUNA thanked the Special Rapporteur for his valuable fourth report. As the end of the current quinquennium drew near and new members would be joining the Commission, it would be useful to know what the road map was for the future consideration of a topic that had assumed increasing importance at the global and regional levels. Noting that a number of regional agreements on disaster management were mentioned in the report, he pointed out that under an agreement concluded between the members of the League of Arab States, a centre for protection against the dangers of earthquakes and other natural disasters had been established in 2004;³¹² a protocol establishing a mechanism for coordination and the urgent supply of experts and materials in disaster situations had been concluded in 2008.³¹³

31. He shared the view that the legal framework presented by the Special Rapporteur in his fourth report was lacking in references to State practice. It would have been useful

³¹² See League of Arab States, “The Arab Strategy for Disaster Risk Reduction 2020”, adopted by the Council of Arab Ministers Responsible for the Environment, at its 22nd session, 19–20 December 2010, p. 9 (available from www.unisdr.org/files/18903_17934asdrffinaenglishjanuary20111.pdf).

³¹³ *Ibid.*, p. 8.

to include information on recent major disasters, how the affected States and the international community had reacted to them and the role of the Security Council in determining whether a given situation was a threat to international peace and security. That raised the issue of whether, under Chapter VII of the Charter of the United Nations, the Security Council might participate in creating international legal obligations for States to accept or provide aid.

32. Turning to the three draft articles contained in the fourth report, he said that he endorsed the Special Rapporteur’s general approach of striking a balance between State sovereignty and human rights protection; the rights and obligations of the parties; and the different interests at stake and actors involved. He also agreed with the expedient of not dealing explicitly with the notion of humanitarian intervention and the duty to protect, while drawing on elements of that notion implicitly. The notion had been advanced fairly recently, by Bernard Kouchner, former French Minister for Foreign Affairs, and was still controversial. There was broad agreement in the Commission not to embrace it; however, it might be appropriate to refer to it and its implications in the commentary to the draft articles.

33. The three draft articles focused mainly on the affected State and its rights and obligations, but their scope should be extended to include neighbouring States affected by the disaster as well as international organizations whose functions conferred on them responsibilities similar to those of States. The draft articles were interrelated, yet they formulated separate legal rules and, as such, should remain separate instead of being combined.

34. The duty of the affected State to seek assistance, laid down in draft article 10, should be interpreted in a flexible way. It should give the affected State a wide margin of discretion to determine its national response capacity and choose among the parties offering assistance. Such steps should be taken proactively and in good faith.

35. In draft article 11, the term “arbitrarily” was the key element and warranted explanation in the commentary. Consent could be withheld for a variety of reasons, but those reasons should always be stated. The inability or unwillingness of the affected State to provide the required assistance to its population must be determined on a case-by-case basis. That raised the question of who should make that determination—the benefactor State, the affected State or the Security Council—and what criteria should be used to do so.

36. In accordance with draft article 11, paragraph 2, the affected State was obliged to notify all concerned of its decision concerning an external offer of assistance. That placed a heavy burden on the affected State and was impracticable in disaster situations. A better solution would be to require the State to announce publicly its reasons for accepting or declining an offer of assistance. In today’s world of instant communication, such an announcement could replace formal notification. Another issue warranting consideration was, when a State gave its consent to assistance and then withdrew it, what rule would apply to the withdrawal of consent or the termination of the provision of assistance by some other means.

37. Concerning draft article 12, he said that the right to offer assistance was to be viewed as a manifestation of international solidarity, cooperation and humanity. Although most international instruments referred to a “right”, he saw it more in terms of a moral duty that might develop into a legal duty over time.

38. He shared the view that an offer of assistance to the affected State should always be provided on a *bona fide* basis by all legal persons, in accordance with the principles laid down in the draft articles, including the principle of non-discrimination. He also agreed that NGOs should not be placed on the same footing as States, the United Nations and intergovernmental organizations, since a State that did not respond to an offer from an NGO could not be deemed to incur international responsibility. The role that NGOs and volunteers could play in assisting disaster victims should not be underestimated: they often worked faster and more efficiently than Governments that were constrained by bureaucracy; at the same time, however, many NGOs were not subject to the requirements of transparency and accountability. A solution might be for the United Nations to keep a roster of legitimate and credible NGOs whose offers of assistance might be accepted by States.

39. One last issue he wished to raise was whether, when one State was either in the best position to provide immediate or appropriate aid or was the sole owner of essential technology or medications, that State then had a responsibility to provide such aid. Furthermore, was there a corollary responsibility on the part of the affected State to accept the aid? Those were some of the practical issues that the Special Rapporteur might wish to consider in his future reports.

40. In conclusion, he said that he supported the idea of referring all three draft articles to the Drafting Committee.

41. Mr. VÁZQUEZ-BERMÚDEZ said that in the Special Rapporteur’s fourth report, he had achieved a balanced approach to the responsibility of the affected State when its disaster response capacity was exceeded; consent to external assistance; and offers of assistance within the international community.

42. His own position with regard to the responsibility to protect was that it was not applicable in the context of disasters. That view had also been taken by Heads of State and Government in the 2005 World Summit Outcome resolution,³¹⁴ which described the responsibility to protect as applying solely to four specific categories of crimes, namely genocide, war crimes, ethnic cleansing and crimes against humanity. It was accordingly not for the Commission to extend it to cover disasters.

43. The Commission’s work would be useful to States if the final product was more than recommendations or guidelines, of which there were already many useful examples, including the Oslo Guidelines of the Office for the Coordination of Humanitarian Affairs and the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery

Assistance of the IFRC. It was clear that some aspects of the drafting work would be *de lege ferenda*, but the Commission should not be deterred from proposing any texts it considered appropriate out of the fear that the obligations they set out might remain unfulfilled. To ensure that the work was heading in the right direction, the opinions and comments of States needed to be taken into account. In that respect, the comments cited in the introduction to the fourth report were encouraging.

44. Turning to the draft articles, he noted that they built on principles already approved by the Commission. For example, draft article 10 on the duty of the affected State to seek assistance from the international community followed from the principle contained in draft article 9 that the affected State had the duty to ensure the protection of persons and the provision of disaster relief and assistance. Draft article 10 was based, *inter alia*, on the guiding principles annexed to General Assembly resolution 46/182, paragraph 5 of which referred to the need for international cooperation when the magnitude and duration of an emergency was beyond the response capacity of the affected State. Draft article 10 spoke of a duty to “seek” assistance which, as the Special Rapporteur pointed out in paragraph 44 of his report, implied a broader approach than a duty to “request” assistance. Although he supported draft article 10, he agreed with Mr. Nolte and Sir Michael that the words “as appropriate”, qualifying the phrase “seek assistance”, should be deleted. It was his view that it should also be deleted from draft article 5, where it applied to the obligation of States to cooperate among themselves.

45. He agreed with the reasoning underpinning draft article 11. The guiding principles annexed to General Assembly resolution 46/182 stated that, in the context of disaster response, “[t]he sovereignty, territorial integrity and national unity of States must be fully respected” (para. 3). The importance attached by States to those principles was illustrated by the so-called “Quito Declaration” on solidarity with Haiti, adopted by the Heads of State and Government of the Union of South American Nations on 9 February 2010,³¹⁵ in which they decided, *inter alia*, to contribute to ensuring that international cooperation reaching Haiti meets the country’s demands, needs and priorities, in the framework of absolute respect for its national sovereignty and the principle of non-intervention in domestic affairs.

46. The corollary was the need for the State to consent to the provision of international relief assistance. Consent could be refused if offers of assistance were not in accordance with the principles of humanity, neutrality, impartiality and non-discrimination. It could be withdrawn if the strictly humanitarian character of an international assistance operation was compromised and the operation constituted interference in the domestic affairs of a State or affected its national security.

47. However, where the affected State was not in a position to protect its population and to provide relief and assistance in the event of a disaster, it could not arbitrarily reject offers of external assistance made in good faith and in accordance with humanitarian principles, since

³¹⁴ General Assembly resolution 60/1 of 16 September 2005.

³¹⁵ Quito Declaration (available from www.comunidadandina.org/unasur/dec_unasur_haiti.pdf).

that would violate its duty to protect persons in need in its territory. In that connection, he cited the preamble to General Assembly resolutions 43/131 and 45/100, which stated that “the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity”.

48. As had been suggested earlier, the commentary to draft article 11 should lay out in detail the scope of the concept of arbitrariness, since that would determine when a State could be considered to have incurred international responsibility. He was in favour of the deletion of the reference to the affected State being “unwilling” to provide the assistance required, since that would be tantamount to accepting the possibility that the affected State might not fulfil its duty to protect its population. Furthermore, the current wording of draft article 11 implied that if the affected State was unwilling to provide assistance, it could withhold its consent to external assistance, as long as it did not do so arbitrarily.

49. With respect to draft article 11, paragraph 2, he agreed with those who had indicated that the duty of the affected State to notify all concerned of its decision regarding an offer of assistance should not extend to offers from NGOs: that would only give the affected State additional tasks to perform under difficult circumstances.

50. As to draft article 12, he said that the importance of the principles of humanity, neutrality and impartiality that should come into play in any humanitarian response effort should be re-emphasized. The right of non-affected States, competent international organizations and humanitarian NGOs to offer assistance to affected States in the event of disasters should be recognized, and such offers should not be regarded as an unfriendly act or interference in a State’s internal affairs. They should be viewed as acts of solidarity and friendship, and in most instances they were. He cited General Assembly resolution 65/264, the sixteenth preambular paragraph of which spoke of the generous assistance provided by Member States to countries and peoples stricken by natural disasters, while paragraph 8 welcomed the effective cooperation between affected States and the international community in the delivery of emergency relief.

51. In conclusion, he expressed his support for the referral of the three draft articles to the Drafting Committee.

52. Mr. DUGARD congratulated the Special Rapporteur on his report, which struck the right balance between respect for State sovereignty and the need for humanitarian assistance for victims of disasters.

53. Referring to the criticism voiced by some members with respect to the reference to “relevant non-governmental organizations” in draft articles 10 and 12, he said it was true that NGOs were not always transparent and accountable—but the same could be said of many States. The use of the qualifying phrase “as appropriate” in draft article 10 meant that the affected State was justified in refusing assistance from a hostile State and also from a hostile NGO. In his view, the phrase “relevant non-governmental organizations” could not be improved

upon, but it was a matter that could be considered in the Drafting Committee.

54. He was not particularly happy with the phrase “shall have the right to offer assistance” in draft article 12. Mr. Vasciannie was correct in pointing out that it could be interpreted as giving States a right to intervene. It might therefore be wiser simply to say that States “may offer assistance”.

55. With regard to the responsibility to protect, he strongly disputed Mr. Hassouna’s contention that the Commission had taken a firm stand against that principle. That was patently untrue: the Commission had simply decided that it was not appropriate to invoke it in the context of disasters,³¹⁶ since it had evolved with specific reference to genocide, war crimes and crimes against humanity.

56. The events in Ethiopia and Myanmar had dominated the Commission’s discussion, although different members appeared to recall the facts quite differently. It would be helpful if the Special Rapporteur could provide detailed information on those events in his next report.

57. He supported the referral of the proposed draft articles 10, 11 and 12 to the Drafting Committee.

58. Mr. SINGH pointed out that, according to paragraph 27 of the fourth report, some 373 natural disasters had killed nearly 300,000 people and affected nearly 208 million more in the year 2010 alone. Those figures threw into sharp relief the relevance of the topic under consideration. On the basis of the pertinent General Assembly resolutions, the Special Rapporteur highlighted a number of principles, including that humanitarian assistance should be provided with the consent of and based on an appeal from the affected country and that the affected State had a duty to seek international assistance where its national capacity was overwhelmed.

59. Turning to the draft articles under consideration, he said it was his view that they should be retained as three separate articles rather than being combined into one, as had been proposed. As to draft article 10, he agreed with the Special Rapporteur that the phrase “the duty to seek assistance” was more appropriate than “the duty to request assistance”. It was the affected State itself that was in the best position to determine whether it had the capacity to respond to a disaster situation. That principle had been recognized in the guiding principles annexed to General Assembly resolution 46/182, which stated that “humanitarian assistance should be provided with the consent of the affected country”. The affected State must make a realistic assessment in good faith of its own capacity to respond and, where it decided to seek international assistance, it could also decide on the States or organizations from which it would accept such assistance.

60. Draft article 11 sought to strike a balance between the concept of sovereignty and the obligation of the

³¹⁶ See *Yearbook ... 2008*, vol. II (Part Two), pp. 133–134, paras. 247–250; and *Yearbook ... 2009*, vol. II (Part Two), p. 135, para. 153, and p. 137, para. 164. See also *Yearbook ... 2008*, vol. I, 2978th to 2982nd meetings, pp. 129–184, *passim*.

affected State towards its own nationals. However, it should also reflect the well-established principle that international assistance might be provided only upon the request or with the consent of the affected State. The events in Ethiopia and Myanmar had been the subject of much discussion, but in his view they were not pertinent to the Commission's consideration of the draft articles. The principles of humanity, neutrality and impartiality must be duly taken into account by all those involved in providing humanitarian assistance, including States, international organizations and NGOs.

61. With respect to draft article 12, he agreed that it should refer to the "duty", rather than the "right", to provide assistance. That would be consistent with the commentary to draft article 5, which stated that the duty to cooperate was reciprocal.

62. He expressed his support for the referral of the three draft articles to the Drafting Committee.

63. Mr. ADOKE thanked the members of the Commission for their vote of confidence in having chosen him to complete Mr. Ojo's term in office and said he looked forward to benefiting from their wealth of experience.

64. The Special Rapporteur's fourth report was comprehensive, balanced and well-reasoned. He agreed with the Special Rapporteur that, where the national capacity of an affected State to provide assistance was exceeded, the act of seeking international assistance might be a step towards fulfilling its primary responsibilities under international human rights instruments and customary international law. The question at issue was whether it should be mandatory for the affected State to seek assistance or merely a matter to be left to its discretion. Given the devastating effects of disasters on the living conditions of the affected population, it would be unreasonable for States to refuse assistance where it was obvious that they lacked the capacity to deal with a disaster. Sovereignty and non-interference were undoubtedly important factors in governmental decision-making, and not without reason. However, it was necessary to strike a balance between the need to provide assistance and the assertion of sovereign rights.

65. Obtaining the affected State's consent to offers of assistance was of paramount importance, yet affected States should not unreasonably withhold consent to external assistance when it was obvious that it was necessary. They should be given the latitude to evaluate the disaster and decide whether to seek assistance on the basis of their particular circumstances and the nature of the disaster. When assistance was offered, they should be able to decide what type of assistance was required and facilitate its reception. Accordingly, draft article 10 should be reformulated so as to reduce the element of compulsion in its wording.

66. Draft article 11, paragraph 1, could also benefit from further review, specifically with a view to replacing the mandatory "shall" with "should", thereby allowing affected States greater control in deciding whether to grant consent.

67. Draft article 12, besides acknowledging the right of relevant international organizations to offer assistance

in responding to disasters, should also reiterate the key humanitarian principles applicable to the provision of such assistance. That would certainly reassure affected States that might be hesitant to accept an offer of assistance, particularly from an NGO or other organization whose motives they might not regard as entirely altruistic.

68. He was in favour of referring draft articles 10, 11 and 12 to the Drafting Committee.

69. Mr. VARGAS CARREÑO said that the Special Rapporteur's rigorous approach to a complex topic had produced draft articles that were balanced, consistent with current practice and conducive to achieving general international acceptance.

70. Nonetheless, there was still room for improvement. Rather than comment on the three proposed draft articles, he wished to address the subject of the Commission's future work on the topic. In paragraph 80 of his report, the Special Rapporteur had written that the protection of persons in the event of disasters was the cornerstone of the legal structure framed by the principles of humanity, neutrality, impartiality and non-discrimination and underpinned by solidarity. While he himself agreed entirely, he believed that the draft articles should also establish rules relating to the responsibility of the international community and of non-affected States towards States affected by a disaster: otherwise, the valuable work already done by the Special Rapporteur would be incomplete. The obligation immediately to assist a State that had suffered a disaster appeared to emerge very clearly from existing international law, and he hoped that through the progressive development of the law, such an obligation would become binding on non-affected States. The Commission must study the ways in which such States, as members of the international community, were currently responding to disasters.

71. Another area of concern was prevention. The terrible earthquakes that had struck Chile in 2010 and Japan in 2011 had generated tsunamis in other parts of the world, the effects of which had fortunately been predicted. That had not been the case 50 years ago, following the 1960 earthquake in Valdivia, Chile—the most powerful earthquake ever recorded—where aftershocks had wreaked havoc in Japan the next day. There were also many other types of disasters besides tsunamis where efforts at prevention could prove crucial. In his view, the set of draft articles would be improved by the addition of rules relating to the way in which non-affected States should respond to disasters, including measures of prevention.

72. He was in favour of referring draft articles 10, 11 and 12 to the Drafting Committee.

73. The CHAIRPERSON, speaking as a member of the Commission, commended the Special Rapporteur for the elegant way in which, in his fourth report, he had reconciled the need for an affected State to ensure the protection of persons in the event of a disaster and its right under domestic law to direct, control and supervise humanitarian assistance within its territory. The Commission's agreement that it would refrain from invoking the responsibility of the State to protect its population proclaimed in the 2005 World Summit Outcome had proved to be wise.

74. The debate on the Special Rapporteur's fourth report took place against the backdrop of the Commission's earlier decisions to refer, in draft article 6, to the principles of humanity, neutrality and impartiality and to non-discrimination; to stipulate, in draft article 8, that the human rights of disaster victims must be respected; and to make it clear, in the commentary to draft article 2, that the word "rights" was used with reference both to human rights and, *inter alia*, to rights acquired under domestic law. Thus, to speak of respect for human rights in the event of a disaster was not, as had been suggested, "empty talk".

75. Another issue facing the Commission was whether the draft articles should cover situations of armed conflict. The commentary to draft article 4 nicely resolved the problem by explaining that the whole set of draft articles could apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, did not apply. It might be useful for the Commission to contemplate approaches used in international humanitarian law, particularly for complex emergencies in which a disaster occurred in an area where there was an armed conflict.

76. The idea that the victims of a disaster had the right to receive humanitarian assistance and that States had a duty to assist people placed under their authority or to authorize humanitarian agencies to do so were not new ideas created by the Commission. Rather, they stemmed from other sources, one of which was Resolution 4 of the 26th International Conference of the Red Cross and Red Crescent, held in 1995.³¹⁷

77. Although the Special Rapporteur's fourth report did not contain abundant examples of State practice in relation to the protection of persons in the event of disasters, for better or for worse, such practice did exist. The fact that it was difficult in some cases to determine whether it reflected *opinio juris* should not be an impediment to the Commission's work on the topic, especially since there was a trend towards the development of national laws and regulations aimed at facilitating disaster relief. For example, the 2009 progress report on the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance³¹⁸ showed that States and intergovernmental organizations were working to issue or amend laws and regulations with a view to overcoming obstacles to disaster relief.

78. It was against that background that Ms. Jacobsson wished to comment on the proposed draft articles.

79. With regard to draft article 10, she agreed that the affected State had the duty to seek assistance if the disaster exceeded its national response capacity. However, she was in favour of deleting the term "as appropriate", which was misleading because it suggested that the affected State could refrain from seeking assistance, even in situations where the disaster exceeded its national response capacity. Despite the

fact that the word "seek" implied a proactive response from the affected State, the Commission should emphasize that point in the commentary. It was of less practical importance for the draft article to specify the sources from which the affected State should seek assistance, provided that it attempted to meet its responsibility to ensure the protection of persons in its territory.

80. She agreed that draft article 12 should precede draft article 11. Perhaps, as had been pointed out, draft article 12 stated the obvious: that competent intergovernmental organizations, relevant NGOs, and even, she would add, private individuals, had the right to offer assistance. The real issue was whether the Commission should specify the duty of non-affected States to offer assistance. Personally, she would not be against doing so. A rule to that effect would not be unprecedented: examples could even be found in the statutes of international organizations. She endorsed the first paragraph of Mr. Nolte's proposal, made at the Commission's 3103rd meeting, to combine draft articles 10 to 12 to read: "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." She would prefer, however, to replace the phrase "in the spirit of" with "in accordance with".

81. In answer to the question of what legal implications should follow from an offer of assistance, she said that it was clear that the affected State had the right to reject assistance, provided that it was able to meet the needs of persons affected by the disaster. However, it was also clear, as stated by the Special Rapporteur in paragraph 52 of his report, that the right to refuse an offer of assistance was not unlimited.

82. With regard to draft article 11, she said that the idea contained in paragraph 1 should be stated very clearly, and she was not entirely happy with the use of the word "arbitrarily", nor was she certain that there was anything to be gained by Sir Michael's proposal to replace the word "arbitrarily" with "unreasonably". Irrespective of the word ultimately chosen, it was necessary to spell out in the commentary exactly which situations the Commission had in mind.

83. If it was assumed that sovereignty entailed the duty of the affected State to protect persons in its territory, then it followed that a State that was unable to ensure such protection and unwilling to accept an offer of assistance had an obligation not only to notify those concerned of its decision but also to provide them with the reasons for its decision. However, it was true that in some cases, assistance was not offered *bona fide*. In order to make it clear that the draft article applied only to the opposite case, namely to assistance offered in accordance with the principles of humanity, neutrality and impartiality and on the basis of non-discrimination, she proposed that the first paragraph of draft article 11 be amended to read: "Consent to external assistance offered in accordance with article 6 shall not be withheld [arbitrarily] if the affected State is unable or unwilling to provide the assistance required."

³¹⁷ *International Review of the Red Cross*, vol. 36 (January–February 1996), No. 310, p. 69.

³¹⁸ IFRC, "The right aid at the right time", Geneva, November 2009 (available from www.ifrc.org/PageFiles/41203/IDRL-Progress-Report_en.pdf).

84. On the other hand, if an affected State rejected or failed to consider an offer of assistance from an NGO, the requirement for it to notify all NGOs of its decision, or worse, provide them with the reasons for its decision, would place too heavy a burden on it. One of the most difficult problems encountered in disaster situations was the coordination of humanitarian aid and assistance, which was why international guidelines for such coordination had been established. Accordingly, any requirement that affected States provide reasons for the arbitrary rejection of an offer of assistance should be balanced by an effort to avoid placing unreasonable administrative obligations on them. She was not convinced that establishing a list of suitable organizations, as suggested by Mr. Hassouna and Mr. Murase, was practical, since flexibility was of crucial importance. Perhaps, indeed, it was not for the Commission to draw up such a list. Mr. Hmoud had touched on a possible solution: to exclude NGOs from the list of organizations entitled to offer assistance. The goal was simple: to prevent an affected State from circumventing its primary responsibility to ensure the protection of persons on its territory. However, it was also necessary to provide for a situation in which an affected State that was unable or unwilling to provide assistance consented to receiving assistance but subsequently withdrew its consent. Such a situation could pose considerable practical problems.

85. In conclusion, Ms. Jacobsson was in favour of referring draft articles 10, 11 and 12 to the Drafting Committee.

Organization of the work of the session (*continued*)*

[Agenda item 1]

86. Mr. MELESCANU (Chairperson of the Drafting Committee) said that the Drafting Committee on the protection of persons in the event of disasters would consist of Mr. Valencia-Ospina (Special Rapporteur), Mr. Dugard, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood, with Mr. Perera (*ex officio*).

The meeting rose at 1 p.m.

3106th MEETING

Friday, 15 July 2011, at 10 a.m.

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

Present: Mr. Adoke, Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, 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.

Reservations to treaties (*continued*)* (A/CN.4/638, sect. A, A/CN.4/639 and Add.1, A/CN.4/647 and Add.1, A/CN.4/L.779, A/CN.4/L.793, A/CN.4/L.795)

[Agenda item 2]

SEVENTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)*

1. The CHAIRPERSON invited the Commission to continue its consideration of the addendum to the seventeenth report of the Special Rapporteur on reservations to treaties (A/CN.4/647 and Add.1).

2. Sir Michael WOOD said that the draft introduction to the Guide to Practice set out in paragraph 105 of the report would be of valuable assistance to users, and he hoped that the plenary could consider and adopt it at an appropriate stage as part of the Guide. The title of the chapter on dispute settlement in the context of reservations of the seventeenth report was a little misleading, as the Special Rapporteur had indicated, and he rightly concluded that there was no reason to propose a new dispute settlement mechanism specifically for disputes concerning reservations. If two or more States or international organizations had a dispute or a difference of legal views about a reservation which one or more of them wished to resolve, they had at their disposal all the means of dispute settlement set out in Article 33 of the Charter of the United Nations. The most interesting part of the report began at paragraph 78, entitled “Advantages of a flexible assistance mechanism for the resolution of disputes concerning reservations”. The idea was not to recommend the creation of a new dispute settlement body, but rather the establishment of a small panel of government experts with a dual function: to assist in the resolution of differences of opinion on reservations, and to provide technical assistance to States that referred such questions to it. The details of how such a mechanism would function had not been worked out, which was intentional, but it seemed clear that its mandate would be broad and potentially quite sensitive. In proposing that mechanism, the Special Rapporteur referred “to existing precedents and, specifically, to the one established by ... CAHDI”, and also to COJUR. However, neither CAHDI nor COJUR had the functions proposed by the Special Rapporteur for a new panel. CAHDI was not a body that assisted in dispute settlement, it did not give technical assistance in the drafting of reservations, and while occasionally it might consider the terms of an objection, there were very different views on reservations, legal and political, among the member States of the Council of Europe, although that might pose less of a problem when the Guide to Practice was available. For now, the objective of CAHDI was not really “to present as united as possible a ‘front’ with respect to reservations formulated by other States” (para. 93), because a lot of its time was devoted to the consideration of reservations made by States represented in it, whether as member States or observers. Its main activity involved the exchange of views on those reservations and reservations made by other States. From time to time, that might lead to coordinated reactions by several participating States,

* Resumed from the 3097th meeting.

* Resumed from the 3104th meeting.