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Summary record of the 3138th meeting

Topic:
Protection of persons in the event of disasters

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SUMMARY RECORDS OF THE SECOND PART OF THE SIXTY-FOURTH SESSION

Held at Geneva from 2 July to 3 August 2012

3138th MEETING

Monday, 2 July 2012, at 3.05 p.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Al-Marri, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters¹³² (A/CN.4/650 and Add.1, sect. C, A/CN.4/652,¹³³ A/CN.4/L.812)¹³⁴

[Agenda item 4]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce his fifth report on the protection of persons in the event of disasters contained in document A/CN.4/652.

2. Mr. VALENCIA-OSPINA (Special Rapporteur) said that his fifth report on the protection of persons in the event of disasters comprised several chapters. The introduction briefly described the Commission's progress on the topic since he had presented his preliminary report in 2008.¹³⁵ The practical results were plain to see; on the basis of the proposals that he had put forward in his second¹³⁶ and

¹³² At its sixty-second session (2010), the Commission provisionally adopted draft articles 1 to 5 and commentaries thereto (*Yearbook ... 2010*, vol. II (Part Two), paras. 330–331). At its sixty-third session (2011), the Commission provisionally adopted draft articles 6 to 11 and commentaries thereto (*Yearbook ... 2011*, vol. II (Part Two), paras. 288–289).

¹³³ Reproduced in *Yearbook ... 2012*, vol. II (Part One).

¹³⁴ Mimeographed; document available from the Commission's website.

¹³⁵ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598.

¹³⁶ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615.

fourth¹³⁷ reports, the Commission had provisionally adopted 11 draft articles with commentaries thereto. He hoped that draft article 12, on which it had not been possible to take a decision at the sixty-third session owing to a lack of time, would be adopted at the current session.

3. He then provided a detailed summary of the views expressed on the topic in the Sixth Committee by States and organizations during the sixty-sixth session of the General Assembly (paras. 10–54). Section A of that chapter recorded general comments, while sections B, C, D, E and F summarized the remarks of States and international organizations with regard to the 11 draft articles already provisionally adopted by the Commission and the proposed draft article 12.

4. Section G summarized the comments made orally in response to the question that the Commission had decided, in the absence of the Special Rapporteur, to pose in chapter III, section C, of its report on the work of its sixty-third session,¹³⁸ namely, whether States' duty to cooperate with the affected State in disaster relief matters included a duty on States to provide assistance when requested by the affected State. Paragraph 68 of his fifth report reflected his own position on the matter.

5. The Commission's report on the work of its sixty-third session also asked for information concerning the practice of States on the topic, including examples of domestic legislation.¹³⁹ No written answers had been received on either of those matters when the fifth report was drafted, but since then Belgium had sent a communication in which it had provided a detailed description of Belgian State practice with regard to domestic legislation and international agreements on mutual assistance and had explained the reasons for its negative answer to the Commission's question on the duty to provide assistance.

6. Many speakers in the Sixth Committee had likewise replied to that question in the negative (A/CN.4/650 and Add.1, para. 39), a position with which he agreed,

¹³⁷ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/643.

¹³⁸ *Yearbook ... 2011*, vol. II (Part Two), para. 44.

¹³⁹ *Ibid.*, para. 43. See also *Yearbook ... 2008*, vol. II (Part Two), para. 31.

having analysed the relevant practice prior to drawing up his proposal for draft article 12. That was why the draft article was cast in terms of a “right to offer assistance” and not a “duty to provide assistance”. On the other hand, the tentative phrase “the Commission has taken the view that States have a duty to cooperate”, which introduced the question in paragraph 44 of its report on the work of the sixty-third session,¹⁴⁰ was misleading, since the Commission had already decided by consensus that draft article 5 should unequivocally set forth the duty to cooperate, a duty that was one of the seven principles proclaimed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, annexed to General Assembly resolution 2625 (XXV) of 24 October 1970.

7. The growing concern of States and international organizations to regulate the different phases involved in responding to disasters and their manifold consequences had been demonstrated once again by the special attention that the General Assembly had paid to that matter at its sixty-sixth session and by its adoption of no less than a dozen resolutions addressing various aspects of the subject and specific situations that had arisen in various parts of the world.

8. The competent international organizations and the components of the International Red Cross and Red Crescent Movement had stepped up their mandated activities in 2011. The third session of the Global Platform for Disaster Risk Reduction and the 31st International Conference of the Red Cross and Red Crescent had taken place in that year. At the Conference, the International Federation of Red Cross and Red Crescent Societies (IFRC) had presented a pilot version of a Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.¹⁴¹ It was hoped that the final version could be adopted by the end of the current year.

9. The outcome document of the United Nations Conference on Sustainable Development (Rio+20), entitled “The future we want”,¹⁴² contained provisions in paragraphs 186 to 189 on disaster risk reduction. Heads of State and of Government and high-level representatives reaffirmed their commitment to the Hyogo Framework for Action 2005–2015,¹⁴³ recognized the importance of early warning systems, encouraged donors and the international community to enhance international cooperation in support of disaster risk reduction in developing countries and committed themselves to undertaking and strengthening in a timely manner risk assessment and disaster risk reduction instruments. They likewise stressed the importance of stronger interlinkages among disaster risk reduction, recovery and long-term

development planning and called on all stakeholders to take the appropriate and effective measures to reduce exposure to risk for the protection of people, infrastructure and other national assets from the impact of disasters.

10. In view of the comments made in the Sixth Committee, he had considered it wise to analyse the duty to cooperate in greater detail in an entire chapter of his fifth report (paras. 79–116). As he had demonstrated in previous reports, cooperation played a central role in the context of disaster relief and was imperative if disaster response were to be rapid and efficient. Admittedly, the nature of cooperation was shaped by its purpose. In the context of providing disaster relief, the duty to cooperate had to strike a fine balance between three important principles of international law if it were to prove legally and practically effective. First, the duty to cooperate must not impinge on the national sovereignty of the affected State. That aspect was examined in section A of the report, entitled “The nature of cooperation and respect for the affected State’s sovereignty”. Second, the duty to cooperate imposed an obligation of conduct on assisting States. That obligation of conduct was covered in section B. Third, as was explained in section C entitled “Categories of cooperation”, cooperation had to be relevant and confined to offering the various forms of assistance required in the event of a disaster. A perusal of the relevant international instruments had shown that the duty to cooperate encompassed a multitude of technical, scientific and logistical activities, which included coordination of communications and information-sharing as well as the provision of scientific and technical expertise to boost the response capacity of the affected State and provision of personnel, supplies and equipment. In more recent instruments, the focus had shifted to disaster preparedness, prevention and mitigation.

11. In the light of the considerations set out in that chapter of the report, he had arrived at the conclusion that there were grounds for including an additional draft article highlighting the significance of the duty to cooperate established in draft article 5. The provisional title of the new draft article A (para. 116) was “Elaboration of the duty to cooperate” and it read as follows:

“States and other actors mentioned in draft article 5 shall provide to an affected State scientific, technical, logistical and other cooperation, as appropriate. Cooperation may include coordination of international relief actions and communications, making available relief personnel, relief equipment and supplies, scientific and technical expertise and humanitarian assistance.”

12. Its wording was closely modelled on that of paragraph 4 of article 17 (Emergency situations) of the articles on the law of transboundary aquifers¹⁴⁴ adopted by the Commission at its sixtieth session in 2008. The close similarity of the texts was justified in that article 17, paragraph 4, provided for the duty to cooperate when other States experienced an emergency. The definition of “emergency” was given in paragraph 1 of the same article

¹⁴⁰ See footnote 138 above.

¹⁴¹ The pilot version of November 2011 is available from [http://www.ifrc.org/PageFiles/88609/Pilot%20Model%20Act%20on%20IDRL%20\(English\).pdf](http://www.ifrc.org/PageFiles/88609/Pilot%20Model%20Act%20on%20IDRL%20(English).pdf).

¹⁴² General Assembly resolution 66/288 of 27 July 2012, annex.

¹⁴³ Report of the World Conference on Disaster Reduction, held in Kobe, Hyogo, Japan, 18–22 January 2005 (A/CONF.206/6 and Corr.1), chap. I, resolution 2, “Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters”.

¹⁴⁴ General Assembly resolution 63/124 of 11 December 2008, annex. The draft articles on the law of transboundary aquifers adopted by the Commission and commentaries thereto appear in *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54.

and had been drawn from article 28 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. The commentary to article 28, paragraph 1, of the draft articles on the law of the non-navigational uses of international watercourses explained what elements had to be present for there to be an emergency,¹⁴⁵ a notion that was akin to that of a disaster as defined in draft article 3 on the topic under consideration. While both draft article 17, paragraph 4, and his proposed draft article A listed the same four categories of cooperation discussed in points 1 to 4 of section C of the chapter in his fifth report on the development of the obligation to cooperate, neither article referred to cooperation in disaster preparedness, prevention and mitigation. In his own topic, the reason for that temporary omission was that elements of legal relevance to the pre-disaster phase that were not excluded from the scope of the draft articles would be considered in a subsequent report.

13. The duty of the affected State and assistance providers to consult each other in order to determine the duration of external assistance was another facet of the duty to cooperate. That duty was evident from the description of practice regarding termination of assistance to be found in the penultimate chapter of the report. Although the affected State and the actors providing assistance retained the right to express their wishes as to when it should end, the duty to cooperate obliged both sides to consult one another on the matter. Consultations could be held before the provision of assistance or in the course of it, at the initiative of either party. Draft article 14, entitled “Termination of assistance”, read as follows:

“The affected State and assisting actors shall consult with each other to determine the duration of the external assistance.”

14. On concluding his introduction of his fourth report¹⁴⁶ in 2011, he had emphasized that it was quite clear that the affected State could make its acceptance of an offer of assistance subject to certain conditions that guaranteed the full exercise of its sovereignty, and he had announced that he would examine those conditions in his fifth report.¹⁴⁷ He had devoted a chapter on the conditions for the provision of assistance by addressing the issue from three points of view (paras. 117–181). Section A concerned compliance with national laws. Section B dealt with identifiable needs and quality control, and section C examined limitations on conditions under international and national law.

15. There was no sharp dividing line between those conditions on the provision of assistance. They existed side by side and might overlap to a certain extent. In general terms, they were reflected implicitly or explicitly in the draft articles already provisionally adopted by the Commission. For example, the element of identifiable needs was mentioned in draft article 2, which stated: “The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.” Similarly, paragraph 2 of draft article 9

(Role of the affected State) alluded both to the need to comply with national laws and to limitations on conditions under national law in its wording: “The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.” To some extent, reference was made to both of those aspects in draft article 10 on the duty of the affected State to seek assistance when a disaster exceeded its national response capacity. Draft article 2, which demanded full respect for the rights of affected persons, draft article 4 on the relationship of the draft articles with international humanitarian law, draft article 6 on humanitarian principles in disaster response, draft article 7 on human dignity and draft article 8 on human rights all touched on the other element of section C, namely, limitations on conditions under international law. The principle underlying the notion of setting conditions on the delivery of assistance was established in draft article 11, paragraph 1, which stipulated that the provision of external assistance required the consent of the affected State. The affected State’s power to set the conditions that had to be met by any offer of assistance was the corollary to its central role in providing disaster relief, a role recognized in draft article 9, paragraph 1, which stipulated: “The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.”

16. In the light of the foregoing, the question arose whether it was necessary to formulate a series of provisions covering the conditions that could be imposed in the various areas in which assistance might be provided and the modalities of providing it in each of those areas. That question could only be answered after an attempt to identify and assess the range of possible conditions, which was the aim of the chapter on the conditions for the provision of assistance.

17. Section A of the chapter dealt with compliance with national laws, focusing on two aspects: first, the obligation of assisting actors to comply with national laws; and second, the need for the affected State to make exceptions to facilitate prompt and effective assistance. Under the first aspect, the Special Rapporteur also considered the obligation of actors providing assistance to cooperate with the national authorities of the affected State and discussed in particular the responsibilities of the head and other personnel of the relief operation. Under the second aspect, he considered the obligation of the affected State to provide the relevant information on laws and regulations to assisting actors and discussed the need in some instances to exempt relief operations from compliance with national laws relating, in particular, to privileges and immunities, visa and entry requirements, customs requirements and tariffs, quality of goods and equipment, and freedom of movement.

18. Section B discussed how the affected State might condition the provision of assistance on the identifiable needs of the persons concerned and the quality of assistance. Section C dealt with limitations on conditions under international and national law, with emphasis on core humanitarian obligations and human rights. The discussion of reconstruction and sustainable development was included because, as the commentary to draft article 1

¹⁴⁵ *Yearbook ... 1994*, vol. II (Part Two), p. 129.

¹⁴⁶ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/643.

¹⁴⁷ *Ibid.*, vol. I, 3102nd meeting, para. 25.

explained, the scope *ratione temporis* of the draft articles was not only limited to the immediate post-disaster response but also encompassed the recovery phase, including reconstruction.¹⁴⁸ A reference to sustainable development was justified, as the link between that concept and the phases of the disaster cycle was being increasingly emphasized in relevant declarations and resolutions of the United Nations and conferences held under its auspices, including the recent Rio+20 Conference. Lastly, section C included a discussion of the obligations that an affected State's own laws might impose with regard to the setting of conditions.

19. This chapter demonstrated that the setting of conditions by the affected State on the provision of assistance constituted a specific exercise of a power stemming immediately and directly from the duty of the affected State, by virtue of its sovereignty, to ensure the protection of persons and provision of disaster relief and assistance on its territory, as stated in draft article 9, paragraph 1. Consequently, for the purposes of the draft articles, it would suffice to specify that the affected State could impose conditions on the provision of assistance within certain limits, using a general and simplified formulation. The Special Rapporteur in his third report¹⁴⁹ had proposed a draft article 8 entitled "Primary responsibility of the affected State", which read in part as follows: "The State retains the right, under its national law, to direct, control, coordinate, and supervise such assistance within its territory."¹⁵⁰ That draft article incorporated the phrase "under its national law" from the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, thus emphasizing that the appropriate way for the affected State to exercise its operational control was through its own legal system. The Commission, however, when provisionally adopting the text of the proposed draft article 8 as current draft article 9 (Role of the affected State), had eliminated the phrase "under its national law". The Drafting Committee had explained that, while an earlier version of the paragraph had referred to the source of the primary role as being "under its national law", that phrase had been deleted since it was not always the case that internal law existed to regulate the matter, nor that such law always covered all of the relevant aspects. That position was reflected in paragraph (6) of the commentary to draft article 9.¹⁵¹

20. The position taken by the Commission was understandable in the context of a provision outlining the role of the affected State. However, in the very different context of the imposition of conditions on the provision of assistance, he thought it useful to propose the inclusion of a new draft article that would cover the whole matter in a general and simplified way. The draft article would reaffirm the right of the affected State, by virtue of its sovereignty and as an expression of its consent, to impose conditions on the provision of assistance, conditions that must be in keeping with national and international law.

¹⁴⁸ *Yearbook ... 2010*, vol. II (Part Two), p. 185, paragraph (4) of the commentary.

¹⁴⁹ *Ibid.*, vol. II (Part One), document A/CN.4/629.

¹⁵⁰ Reproduced, *ibid.*, vol. II (Part Two), footnote 1339.

¹⁵¹ *Yearbook ... 2011*, vol. II (Part Two), p. 158.

The draft article 13 that he proposed in paragraph 181, which was entitled "Conditions on the provision of assistance", therefore read as follows:

"The affected State may impose conditions on the provision of assistance, which must comply with its national law and international law."

21. In addition to the growing interest shown by States, international entities and non-governmental organizations in the topic of disasters, the academic world was increasingly focusing on legal regulation of the disaster cycle. The Commission could take satisfaction in the fact that the increased attention to the issue coincided with the Commission's undertaking of, and rapid progress in, the development of draft articles on the protection of persons in the event of disasters. He recalled that a former Commission member had called the topic an idea that, while it might seem attractive at first sight, should be eliminated from the programme of work as the Commission did not have the means or the expertise to examine it thoroughly. However, the Commission, by adopting 11 draft articles in two successive sessions (2010 and 2011), had demonstrated that it was fully capable of bringing its work on the topic to fruition.

22. Individual Commission members had also been involved in a number of initiatives related to the topic of disasters, and the recently published *Challenges of Contemporary International Law and International Relations: Liber Amicorum in Honour of Ernest Petrič* included three essays in which members of the Commission referred to its work on the topic of the protection of persons in the event of disasters.¹⁵² One essay, by Mr. Perera, had stressed the balanced nature of the draft articles provisionally adopted thus far.¹⁵³

23. The third essay in the above-mentioned *Liber Amicorum* was by another Commission member, Mr. Vasciannie,¹⁵⁴ who had been the author of the question posed to States by the Commission in 2011 and the driving force behind the transformation of the commentaries to draft articles 10 and 11 into summaries of the debate. In the section of his essay in the *Liber Amicorum* that dealt with the protection of persons in the event of disasters, Mr. Vasciannie focused on two issues that, in his view, the Commission had not been able to resolve.¹⁵⁵ The first was whether States could use force to ensure that a State affected by a disaster was obliged to accept outside assistance. The discussion had not actually occurred in the terms Mr. Vasciannie described, as could be seen from the summary records of the Commission's meetings. In any case, the issue had been definitively resolved by the Commission, which had, from the start, supported the position that the Special Rapporteur had explicitly and unequivocally espoused in his reports, namely that the

¹⁵² M. Pogačnik (ed.), *Challenges of Contemporary International Law and International Relations: Liber Amicorum in Honour of Ernest Petrič* (Nova Gorica, Slovenia, European Faculty of Law, 2011).

¹⁵³ *Ibid.*, "The role and contribution of the ILC in meeting challenges of contemporary international law and international relations", pp. 313–325, in particular pp. 322–324.

¹⁵⁴ *Ibid.*, "The International Law Commission: A Caribbean perspective", pp. 385–404.

¹⁵⁵ *Ibid.*, pp. 402–404.

notion of the “responsibility to protect” did not apply in the context of the response to disasters. As paragraph 164 of the report of the Commission on the work of its sixty-first session indicated,¹⁵⁶ the Commission had endorsed the Special Rapporteur’s position on the issue.

24. The second issue raised by Mr. Vasciannie concerned the duty to cooperate, a fundamental principle of international law enshrined in the Charter of the United Nations. In his critique of the principle in his essay, Mr. Vasciannie, to support his position, had quoted a text supposedly adopted by the Drafting Committee. Unfortunately, the provision reproduced in his article was not the version presented by the Drafting Committee at the sixty-first session and provisionally adopted by the Commission at the sixty-second session as draft article 5 (Duty to cooperate).¹⁵⁷

25. In closing, he wished to stress that the topic at hand, unlike some others included in the Commission’s current programme of work, had been included, not at his suggestion or that of any other member of the Commission, but at the suggestion of the Commission secretariat, which was an integral part of the Office of Legal Affairs. The secretariat, like the Commission, had been of the view that the topic fell under the rubric of “new developments in international law and pressing concerns of the international community”,¹⁵⁸ one of the criteria for selecting topics that was established by the Commission at its fiftieth session. He, as Special Rapporteur, had drafted his five reports, not as part of a personal crusade, but to enable the Commission to develop a balanced approach to the issue and to build the momentum needed for rapid progress—both of which it had done. He hoped that in its future work on the topic, the Commission would be able to maintain that approach and that momentum so as to consolidate the gains achieved thus far through its collegial efforts.

26. Mr. MURASE said that he agreed with the substance of draft article A as proposed by the Special Rapporteur. However, he would like to see the duty to cooperate approached from a different angle. In fact, he would like for the formulation of the draft articles, in general, to be more practical, rather than to consist merely of an enumeration of abstract concepts such as solidarity, impartiality, neutrality and, in particular, the duty to cooperate. While no one would object to the general proposition expressed in draft article A, in his view, the Commission’s approach should be more relevant to the actual needs of the international community and should utilize actual disaster situations as a basis for determining what type of cooperation was required.

27. Immediately following disasters of great magnitude, such as the earthquake and tsunami off the Pacific coast of Tohoku that struck Japan in 2011, military forces often provided the only means of effective relief. As self-supporting units, they were well organized and could carry out widespread operations swiftly and systematically. They were also well equipped with communications and other technologies, commanded a high level of

expertise and large numbers of trained personnel and had at their disposal helicopters, hospital ships and other essential equipment. Non-governmental organizations and volunteers, on the other hand, were not usually self-supporting and therefore could not alone provide adequate relief in the immediate aftermath of a disaster.

28. In the case of Japan, the scale of the 2011 earthquake had far exceeded the country’s national response capability, and Japan had gratefully accepted offers from other countries to send their military personnel to the affected regions, which had helped to save many lives. However, inviting a foreign military force into one’s territory without a status-of-forces agreement was a sensitive matter. Even in respect of countries such as the United States of America, with which Japan had concluded a security treaty that allowed for the stationing of United States troops on Japanese soil, the relief operations conducted by those troops in 2011 technically fell outside the scope of that treaty and its related status-of-forces agreement. It would have been desirable for Japan to have concluded a status-of-forces agreement that focused specifically on disaster relief activities with the United States and the other countries that had provided it with assistance using military personnel and supplies. The absence of such an agreement made it difficult both for countries sending and for those receiving military personnel.

29. It was clearly out of the question for States to send military forces without the consent of the affected State. After the 2008 cyclone that had struck Myanmar, France and the United States had sent naval ships carrying humanitarian supplies to help cyclone victims but had been denied permission to enter Yangon Port by the Government of Myanmar. Regardless of the good intentions of those and other States offering assistance, the humanitarian supplies provided in that case should have been delivered by commercial ships, instead of military vessels, in the absence of relevant agreements with the affected State.

30. Accordingly, he proposed that the Commission should elaborate a model status-of-forces agreement for humanitarian relief operations in the event of disasters, which could be attached to the draft articles on the current topic. Even though such a model related to the pre-disaster phase and might be regarded as falling outside the scope of the project as envisaged by the Special Rapporteur, it would nonetheless be a useful contribution by the Commission.

31. In the period immediately following a disaster, an affected State often lacked the capacity to negotiate a status-of-forces agreement. When Japan had sent its Self-Defence Forces to Indonesia and Thailand in the aftermath of the 2005 tsunami, all sides had tried to negotiate such an agreement, but to no avail. If they had had a model status-of-forces agreement elaborated by the Commission, they could have agreed to apply it provisionally until such time as an individual agreement had been worked out. Such a model agreement could also have helped to expedite the preparation of the definitive agreement.

32. He wished to draw attention to the “Indonesian-Australian paper: a practical approach to enhance regional cooperation on disaster rapid response”, which had been

¹⁵⁶ *Yearbook ... 2009*, vol. II (Part Two), p. 137.

¹⁵⁷ *Yearbook ... 2010*, vol. II (Part Two), p. 172, and pp. 188–190 for the commentary thereto.

¹⁵⁸ *Yearbook ... 1998*, vol. II (Part Two), para. 553.

endorsed on 10 October 2011 by the East Asia Summit and the Association of Southeast Asian Nations (ASEAN) Regional Forum. Paragraph 17 of that proposal stated that “EAS participating countries should consider mechanisms to allow rapid deployment and acceptance of assistance personnel and supplies, including through the development and use of voluntary model arrangements and/or binding bilateral agreements, taking into account the existing mechanisms in the region”.¹⁵⁹

33. The Commission could develop a model status-of-forces agreement for disaster relief operations that was similar to the United Nations model status-of-forces agreement for peacekeeping operations,¹⁶⁰ which was intended to facilitate swift reception and deployment. The 1990 model provided details on such aspects as exemptions from entry and departure procedures; freedom of movement; the wearing of uniforms; exemption from duties or taxes and export-import restrictions on goods and equipment; communications; the use of vehicles, vessels and aircraft; and temporary domestic legal status, including immunity from the jurisdiction of the host country and the settlement of claims. In the recent practice of the Security Council, the model status-of-forces agreement was applied provisionally until the conclusion of an individual agreement between the relevant parties.

34. It was unclear what the Special Rapporteur had intended when characterizing the duty to cooperate as an “obligation of conduct and not result” in paragraphs 86 and 88 of his fifth report. In his view, the general and discretionary nature of the duty to cooperate did not reach the level of either an “obligation of result” or an “obligation of conduct”, as understood in the context of the regime of State responsibility. The expression “obligation ... of conduct and not result”¹⁶¹ did appear in paragraph (4) of the commentary to draft article 17, paragraph 2, of the final draft articles on the law of transboundary aquifers, which set forth the specific obligations of the States concerned, but it did not appear in paragraph (9) of the commentary to draft article 17, paragraph 4, which set forth a general duty of cooperation.

35. Although he agreed with the substance of draft article 13 (Conditions on the provision of assistance), it was also important to ensure the necessary derogations from national law in the event of disasters. For example, rescue dogs should be permitted to enter an affected State without undergoing the normal quarantine procedure, and foreign medical doctors should be permitted to work in an affected State without licences and certificates. That principle should be reflected in draft article 13 as a saving clause.

36. With regard to draft article 14 (Termination of assistance), he was not sure that it was necessary to state the obvious, and he was concerned at the use of the word “shall” in that context. That said, he was in favour of referring all the draft articles to the Drafting Committee.

¹⁵⁹ Available from the website of the Ministry of Foreign Affairs of Indonesia (<https://www.kemlu.go.id/Documents/Indonesian%20-%20Australian%20Paper/Indonesia-Australia%20Paper%20-%20A%20Practical%20Approach%20to%20Enhance%20Regional%20Cooperation%20on%20Disaster%20Rapid%20Response.pdf>).

¹⁶⁰ Model status-of-forces agreement for peace-keeping operations: Report of the Secretary-General (A/45/594).

¹⁶¹ *Yearbook ... 2008*, vol. II (Part Two), p. 41.

37. Mr. FORTEAU said that he welcomed the attention that the Special Rapporteur had paid to the questions of prevention and preparedness in paragraphs 114 and 115 of his report—a matter that the Commission had emphasized at its sixty-third session. It would be useful to incorporate more explicit reference to those questions in the draft articles, especially in draft article A proposed by the Special Rapporteur in his fifth report.

38. In order to address what might be called “legal” prevention or preparedness, the Commission should consider adding a provision enumerating the various types of domestic laws that States could enact in order to enable them to offer or receive assistance in the event of disasters, since such legislation was an important factor in determining the operational success of assistance efforts. Along those lines, paragraph 11 of the fifth report cited a number of examples of domestic legislation. The inclusion of a reference to the pilot version of a Model Act being developed by IFRC,¹⁶² mentioned in paragraph 190 of the fifth report, might be quite useful in that regard. Mr. Murase’s proposal to provide a draft model status-of-forces agreement was a good example of legal prevention and deserved serious consideration.

39. With regard to draft article A, the Special Rapporteur’s proposed inclusion of a non-exhaustive list of the means of cooperation might be debatable, since the normative scope of that provision was unclear. Nonetheless, the list did provide some very useful specifics, which might even be supplemented. For instance, it seemed legitimate to include a reference to financial assistance, which could be one of the means used by other States to help the affected State cope with a disaster. In addition, it might be necessary to include a paragraph stipulating that assisting States should consult affected States in order to determine what kind of assistance the latter considered to be most appropriate, following the example of the Inter-American Convention to Facilitate Disaster Assistance cited in paragraph 113 of the fifth report. Draft article A should also lay down certain requirements concerning the conduct of the affected State in terms of the duty to cooperate. The Special Rapporteur had given several such examples in paragraphs 101, 102 and 108 of his report, but the obligations of the affected State were not currently covered by draft article A.

40. That said, draft article A posed a fundamental problem, which the Special Rapporteur described in paragraph 81 of his report as “an attempt to identify the contours of the duty of cooperation”. In other words, draft article A was intended to elaborate on draft article 5. In reality, however, that was not the case, as draft article A did not deal with the duty to cooperate, as such. Rather, it proposed—which was quite different—a duty to provide cooperation, in other words, to provide assistance. Thus, what draft article A was elaborating on was not draft article 5 at all—it was draft article 12 (The right to offer assistance), which was still under consideration in the Drafting Committee. By referring in the title of draft article A to the “duty to cooperate” and defining it in the text of the draft article using the words “provide ... cooperation”, the Special Rapporteur seemed to be saying that States had a duty to

¹⁶² See footnote 141 above.

provide assistance. Yet, in paragraph 68 of his report, he reaffirmed his conclusion that “the duty to cooperate in relief matters does not currently include a legal duty for States to provide assistance when requested by an affected State”. That contradiction should be resolved.

41. He himself was inclined to think that the Commission should accept the idea that there was such a duty, by stipulating it in draft article 12 and elaborating on it in draft article A, for the sake of balance or parallelism between the duties. It would be difficult to impose an international obligation on the affected State to provide assistance to its population without imposing a parallel obligation on other States when a disaster exceeded the affected State’s response capability. In his view, it was necessary to impose such parallel duties, especially given the definition of “disaster” in article 3, which referred *inter alia* to “widespread loss of life”.

42. To maintain that there was no duty on the part of States members of the international community to provide assistance in the event of disasters could, in certain respects, be seen as a step backward, at least in relation to some areas of existing international law. Moreover, paragraphs 71 and 72 of the fifth report mentioned a number of precedents in treaties that seemed to contradict the notion that relief efforts undertaken by the assisting State were always of a voluntary nature. That did not imply that the duty had to be formulated in absolute or unconditional terms: one could, for example, limit the duty to provide assistance “to the extent of the capabilities of each State” and “as far as circumstances permit”.

43. With regard to draft article 13 on conditions on the provision of external assistance, he proposed, first of all, that at the very beginning of the sentence a reference should be inserted to the effect that the draft article was to be applied subject to the obligations set out in draft articles 9 (Role of the affected State), paragraph 1, and 11 (Consent of the affected State to external assistance), paragraph 2. The placement of conditions on the provision of assistance should not have the effect of circumventing the duty to ensure the protection of persons, nor should it constitute an indirect means of arbitrarily refusing assistance.

44. Second, the current wording of draft article 13 seemed much too brief and failed to reflect all of the important elements discussed in the chapter of the fifth report on the conditions for the provision of assistance. He thus proposed that the draft article should be expanded to include more detail or should be supplemented by other draft articles in order to address the following issues: the obligation of assisting actors to comply with national laws; the corresponding obligation of the affected State to ensure the protection of assisting entities and personnel; the obligation of the affected State to assess the extent and nature of its needs; and the principle whereby the operational modalities of assistance could or should be governed by agreements concluded between the interested parties.

45. Third, the question of the interrelationship between the rules on assistance and the other rules of international or national law seemed to warrant the development of a more precise formulation of the rule set forth in draft article 13. In particular, it was difficult to conceive of the

affected State as having the duty to ensure “the waiver of national laws as appropriate”, as stated in paragraph 119 of the fifth report. To request a State to derogate from its national laws was incompatible with the principle of the rule of law, unless by “waiver” what was meant in that context was to adopt national emergency legislation as a means of allowing for the provision of external assistance. But to condition the delivery of external assistance on the adoption of such legislation was to risk wasting precious time, or even to prevent such assistance from being delivered precisely when it was most urgently needed.

46. Consequently, he wished to propose a different approach consisting of a two-phase provision that would stipulate (a) that, as a matter of principle, assistance operations must be carried out in compliance with international law and the national laws of the affected State; but (b) that when compliance with those rules risked undermining assistance operations, the foregoing principle must allow for exceptions, the legal basis of which would be either the applicable derogation clauses in international or national law or the rules relating to a situation of distress or necessity, as those terms were embodied in articles 24 and 25 of the articles on responsibility of States for internationally wrongful acts.¹⁶³

47. Draft article 14 (Termination of assistance) appeared to be entirely acceptable and desirable. It would nevertheless be advisable to supplement it in three different ways. First of all, the draft article should recall the principle discussed in paragraph 182 of the Special Rapporteur’s fifth report, whereby the affected State retained control over the length of time during which the assistance would be provided, and assisting actors were obliged to leave the territory of the affected State upon request. Second, it should specify that that principle applied provided the request to leave the territory of the State did not constitute an arbitrary refusal of consent to external assistance. That followed from the provision set out in draft article 11, paragraph 2, which should, to some extent, also be reflected in draft article 14. Third, it might be necessary to specify that, in the event of withdrawal, the concerned parties must cooperate in order to ensure an orderly departure from the territory of the affected State, with regard to the repatriation of goods and persons.

48. Subject to those reservations, which flowed directly from the extensive practice compiled by the Special Rapporteur, he was in favour of referring the draft articles to the Drafting Committee.

49. Mr. TLADI said that, as a new member of the Commission, in addition to commenting on the current report, he would also comment briefly on the draft articles already provisionally adopted by the Commission. His views on the Special Rapporteur’s fifth report were in large part influenced by his general stance on the preceding draft articles.

50. At the outset, he wished to express his opinion that the protection of persons in the event of disasters was an important topic, given the frequency, magnitude and

¹⁶³ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two), paras. 76–77.

potentially grave consequences of disasters. He was of the view that the Special Rapporteur's decision to adopt a human rights approach to the topic, which had since been endorsed by the Commission, was the correct one. He was also of the view that the critical principle that should run like a golden thread throughout the consideration of the topic was that of cooperation.

51. While he agreed for the most part with the content of the draft articles provisionally adopted thus far and generally shared the views expressed by the Special Rapporteur, in respect of the few provisions on which he disagreed with them his disagreement was particularly strong. During the Commission's consideration of the topic of expulsion of aliens, he had spoken about the need to strike a balance between State sovereignty and the protection of human rights. He had stated that such a balance could not always be struck in the same way and that the context and the state of development of different areas of law significantly affected how that balance was struck. Accordingly, he proposed that that balance in the draft articles should be reconsidered. Furthermore, he remained unconvinced that draft articles were necessarily the most useful form that the final product could take. That view had also been expressed by some delegations in the Sixth Committee, most notably the United Kingdom¹⁶⁴ and the Islamic Republic of Iran.¹⁶⁵

52. With regard to substance, the draft articles included many self-standing provisions that did not create particular rights or obligations, or set out any particular standards in the context of the protection of persons in the event of disasters. Put another way, those provisions were not operational in any meaningful way; rather, they appeared to lay down general principles intended to inform the interpretation of the text as a whole. Yet it was not clear, for example, what was served by having draft article 8 proclaim that persons affected by disasters were "entitled to respect for their human rights" as if that had ever been in doubt. That wording almost suggested that the development of international human rights law over the past 60 to 70 years had somehow excluded persons affected by natural disasters. A similar comment could be made about draft articles 6 and 7. He thus proposed the addition of a separate provision that would enumerate all the principles underlying the draft articles that were deemed relevant to their interpretation as a whole. There was no reason why the principle of cooperation, provided for in draft article 5, could not also be dealt with in that manner.

53. The most operative provisions of the text adopted thus far were draft articles 8 to 12. Central to all was the attempt to balance the key principles underlying the provision of humanitarian assistance in situations of disasters, namely respect for the sovereignty of the affected State and the need to ensure adequate assistance to those affected. How that balance had been struck had been the subject of much comment in the Sixth Committee, and delegations had been divided on the issue. The delegation of Pakistan had made an interesting comment regarding draft articles 10 and 11, in which it had seemed to imply that a State affected by

disaster might not seek assistance.¹⁶⁶ He wondered what would make a reasonable State that had determined that a disaster exceeded its national response capacity refuse to seek assistance unless it was compelled to do so by a legal obligation. Admittedly, that was a matter of policy, but it concealed a real legal question that underlay the sovereignty/cooperation balance. The same question underlay the intended meaning of the word "arbitrarily" in draft article 11, paragraph 2. Unless a definition was provided for that term, draft article 11 would remain meaningless. Arbitrariness, as a legal concept, referred to irrational decisions or decisions made without justification. However, a State always had a justification for its actions, even though one might question the soundness of the justification or disagree with it.

54. The real issue of law, which draft article 11 did not, and probably could not, address was whether under international law a State was entitled to decide from whom it would or would not accept assistance and under what conditions. No State would ever be unwilling to request and accept assistance in the event of a disaster that it could not handle. However, it was conceivable that States might not be willing, for political reasons, to request and accept assistance from a given State or group of States. That raised the question of whether the draft article implied that a State was obliged to accept assistance from States with which it did not enjoy good relations.

55. Commenting on draft articles 10 and 11 in the Sixth Committee, IFRC had noted that, under international law, States were free to be selective about where they addressed requests for assistance and from whom they accepted offers of assistance.¹⁶⁷ Thus, unless the Commission was willing to suggest otherwise, draft articles 10 and 11, beyond restating general principles of cooperation, would be of little practical effect. In that connection, he would draw attention to the statement made by the delegation of Israel in the Sixth Committee, namely that the relationship between the affected State and third States should be understood, not on the basis of rights, but rather in terms of international cooperation.¹⁶⁸

56. During the Commission's deliberations on the topic at its sixty-third session, Mr. Dugard had referred to Myanmar as an example of a State that had withheld consent—arguing in effect for a duty to accept assistance.¹⁶⁹ His own research in international news websites had confirmed that the Government of Myanmar had provided reasons for not accepting assistance from United States, French and United Kingdom warships and had insisted on the right to distribute aid itself, as mentioned by Mr. Murase earlier. Could that be considered as arbitrarily withholding consent? The issue was about who provided assistance and under what conditions, and not whether those conditions were accepted. To insist on a duty to provide assistance would require the Commission to address the issue, and he was doubtful that it was in a position to do so. It was certainly not an issue that could be resolved through the commentaries.

¹⁶⁴ *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee, 23rd meeting (A/C.6/66/SR.23)*, para. 45.

¹⁶⁵ *Ibid.*, 24th meeting (A/C.6/66/SR.24), para. 50.

¹⁶⁶ *Ibid.*, 25th meeting (A/C.6/66/SR.25), para. 7.

¹⁶⁷ *Ibid.*, para. 41.

¹⁶⁸ *Ibid.*, 23rd meeting (A/C.6/66/SR.23), para. 33.

¹⁶⁹ *Yearbook ... 2011*, vol. I, 3103rd meeting, para. 56.

57. That the relationship between the affected State and third States was better conceptualized in terms of cooperation than in terms of rights and duties was buttressed by the views of the Special Rapporteur and the comments of States in the Sixth Committee on the question of whether there was a duty to provide assistance. If imposing a legal duty to receive assistance was so critical to the international community's provision of effective humanitarian assistance in times of disaster, he wondered why there was such near universal objection to recognizing a duty to provide assistance, as Mr. Forteau had advocated. He was not convinced by the reasons advanced, which were based on the limits of the capabilities of third States. In accordance with draft article 10, the duty to request assistance was conditional upon the limitations of the affected State. There was thus nothing to prevent the insertion of a similar qualifier concerning the duty to provide assistance, when assistance was requested, or requiring that such assistance should not be arbitrarily withheld, as also mentioned by Mr. Forteau.

58. However, he was by no means suggesting that the draft articles should impose such a duty. On the contrary, he considered that insistence on a right/duty relationship was neither helpful nor necessary, and that conclusion had implications for the form that the Commission's work on the topic should take.

59. He had serious doubts about the extent to which the duty not to withhold consent arbitrarily reflected State practice. In his fourth report,¹⁷⁰ the Special Rapporteur referred to a few instruments that, presumably, formed the basis of draft article 11. To begin with those instruments that explicitly postulated such a duty, the Guiding Principles on Internal Displacement¹⁷¹ did not constitute State practice; they were a set of principles compiled by the representative of the Secretary-General on internally displaced persons. However, beyond the question of form, Guiding Principle 25, paragraph 2, on which draft article 11 was based, was itself problematic: According to the annotations to the Principles,¹⁷² Guiding Principle 25, paragraph 2, was based on the Geneva Conventions and the Protocols thereto. Those instruments provided that relief action should be subject to the agreement of the parties concerned (art. 70, para. 1, Protocol I); that the occupying Power should agree to relief schemes (art. 59, para. 1, Fourth Geneva Convention); and that relief action should be undertaken subject to the consent of the high contracting party (art. 18, para. 2, Protocol II).

60. It was simply not justified, on the basis of those provisions, to conclude that there was a general legal obligation not to arbitrarily refuse assistance. Article 59 of the Fourth Geneva Convention evidently applied to territories under occupation. In such situations, it was conceivable that an occupying Power might have an interest in denying assistance to the population in its territory; a legal obligation "to agree" to relief schemes was thus understandable. However, whether it was legally coherent to extend that duty to situations not under occupation was doubtful.

¹⁷⁰ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/643.

¹⁷¹ E/CN.4/1998/53/Add.2, annex.

¹⁷² W. Kalin, *Guiding Principles on Internal Displacement: Annotations* (Washington, D.C., American Society of International Law and the Brookings Institution, 2008), p. 115. Available from www.brookings.edu/wp-content/uploads/2016/06/spring_guiding_principles.pdf.

61. That the obligation "to agree" was limited to situations under occupation was also clear from other provisions on which Guiding Principle 25, paragraph 2, was purportedly based. Neither Protocol I, article 70, nor Protocol II, article 18, paragraph 2, obliged the affected State "to agree"; nor was any duty placed on such affected States not to arbitrarily withhold consent. Under their provisions, assistance was subject to the agreement of the States concerned, without qualifying the agreement in the manner proposed in draft article 11 and Guiding Principle 25.

62. According to the Special Rapporteur's fourth report, the Guiding Principles had been welcomed by the General Assembly. In fact, in its resolution 62/153 of 18 December 2007, the General Assembly had recognized the Principles as a framework and had encouraged relevant actors to apply them. Moreover, since the resolution spoke chiefly of standards and their application and avoided referring to the Principles in the context of law, the extent to which the Assembly had endorsed the Principles seemed limited to their more practical aspects relating to the facilitation of cooperation. Also, while the Assembly had encouraged States to adopt legislation implementing the Principles, the Special Rapporteur had not cited any legislation that would imply a duty to accept assistance. Lastly, although the Assembly had adopted a dozen resolutions on humanitarian assistance at its sixty-sixth session, not once had it referred to the type of duty mentioned in draft article 11.

63. In paragraph 60 of his fourth report, the Special Rapporteur sought to rely on the general provision set forth in article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights. Apart from the fact that paragraph 60 put forward an overly generous interpretation of the provision, it was not clear why, if article 2 implied a duty not to refuse assistance, it could not also be applied to impose a duty to provide assistance.

64. The Special Rapporteur had rightly observed that cooperation played a central role in the context of disaster relief. It was in drawing the contours of the cooperation principle that the work of the Commission could be of practical use to States, and not in creating rights and obligations that neither existed in practice nor offered any utility. He endorsed the factors identified by the Special Rapporteur as important for elaborating on the duty to cooperate.

65. Concerning draft article A, while he found the list of specific areas in which third States should provide assistance acceptable and welcomed the inclusion of the words "and other cooperation", he considered the obligatory tone of "States and other actors ... shall provide ... cooperation" to be curious for a number of reasons: first, simply because it appeared to create a legal obligation to provide assistance, when, in fact, the draft articles made it clear that there was no such obligation; second, because the language of the draft article appeared to remove the discretion of the assisting State to determine the nature of the assistance that it could or would provide. He did not believe that the addition of the phrase "as appropriate" resolved the problem: he understood the phrase as referring to the appropriateness of the category of assistance for the disaster and not as qualifying the

willingness or ability to provide a specific category of assistance. However, that was a matter that could be taken up in the Drafting Committee.

66. The conditions on the provision of assistance were also important, since they dealt with practical issues, such as access to the disaster area, without which humanitarian assistance would be difficult, if not impossible. While he welcomed many of the issues raised by the Special Rapporteur, he could not endorse the approach taken, because he disagreed with the point of departure of the draft articles, namely the right/duty relationship between the affected State and the assisting State. The right/duty approach was immediately apparent when the Special Rapporteur stated in paragraph 117 of the fifth report that he would consider the conditions that an affected State might place on the provision of assistance, suggesting that the conditions that might be placed were finite. In fact, the reverse was true. Although there were some conditions that might not be placed, as a general rule the affected State could place whatever conditions it deemed necessary. Draft article 13 accurately reflected that position of international law, and therefore his criticism was directed less at the draft article than at the substance of the report.

67. Thus, while he considered that draft article 13 was appropriate, although he would prefer it to be drafted as a guideline, a number of the issues covered in paragraphs 120 to 181 of the fifth report, including the duty to facilitate the entry of assistance teams, needed to be fleshed out, not as conditions that might be imposed, but as various categories of cooperation, as Mr. Forteau had suggested. For example, the duty of assisting States to cooperate implied a duty to perform specific tasks, as enumerated in draft article A, but the corollary of that duty of cooperation was that the affected State had the duty to facilitate assistance. Issues relating to visa requirement waivers and provision of assistance had nothing to do with imposing conditions on rendering assistance; rather, they flowed from cooperation to facilitate the assistance. Such cooperation should define the relationship between the assisting State and the affected State, and any duties identified must be those ensuing from and necessary to give effect to that cooperation.

68. He wished to be clear that there was no general obligation on affected States to do any of the things mentioned in paragraphs 120 to 181. However, once assistance was offered and accepted, the duty to cooperate implied the duty to facilitate entry, whether through the waiver of existing laws or the use of exceptions provided for in them. The Special Rapporteur relied for many of his assertions in that respect on several agreements, including the 2005 ASEAN Agreement on Disaster Management and Emergency Response and the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations. Yet, it was clear that their provisions were based on the "request, offer and acceptance" model of providing assistance. Thus, while in his fifth report the Special Rapporteur seemed to suggest that there was a general obligation to allow entry of personnel, supplies and/or equipment, such a duty of cooperation flowed only from agreement between the affected State and the assisting State on the rendering of assistance.

69. Those were some of the practical details that could benefit from consideration with a view to framing an instrument that would be helpful to States as they cooperated to render assistance to persons affected in the event of disasters. Focusing on rights and duties, in the manner of the draft articles, where the rights and duties had no normative content or value, was not helpful. As to the final form of the Commission's work on the topic, he was not convinced that a legal instrument in the form of a convention that spelled out esoteric legal obligations with little practical value was what the international community needed. In that connection, he endorsed Mr. Murase's call for a more practical approach that would be beneficial to the international community, with details of the different categories of cooperation and assistance required in the event of disasters.

70. Mr. AL-MARRI said that the Special Rapporteur was to be commended on his fifth report. The protection of persons in the event of disasters and the determination of the rights and duties of affected States were obligations covered by international and national legislation, rules and practice. The report and the recommendations were invaluable because they were balanced and based on actual State practice. The report also provided useful information on the relationship between the Guiding Principles and the draft articles. Draft articles 13 and 14 warranted the Commission's full support. Having followed with interest the statements made thus far, he hoped that the debate would take into account the responsibility of the affected State, especially in ensuring access to relief and its proper management. He wished to emphasize that point in particular, since, over the years, some States had been seen to refuse external assistance, despite being unable to assist their own disaster-stricken populations.

71. Mr. KITTICHAISAREE, after commending the Special Rapporteur on his impressive work, said that he wished to reserve his position on the specific provisions of the draft articles and focus on another issue. From the debate in the Sixth Committee, it was evident that there were conceptual differences on the topic, which the Special Rapporteur had reflected in the report. It appeared that 13 delegations had welcomed establishing as legal, and not merely moral or political, the duty of the affected State to seek assistance under draft article 10 (see para. 24 of the fifth report), while 19 other States had opposed the idea that the affected State was placed under a legal obligation to seek external assistance in cases where a disaster exceeded its national response capacity (*ibid.*, para. 28).

72. One of the recurring themes in the Sixth Committee had been that the Commission's work on the topic did not involve the concept of the "responsibility to protect". Delegations had endorsed the Commission's view, based on the position of the Secretary-General, that the concept of the "responsibility to protect" fell outside the scope of the topic and applied only to four specific crimes: genocide, war crimes, ethnic cleansing and crimes against humanity.¹⁷³ However, the delegation of Poland had argued that the time had come to consider extending the concept to include

¹⁷³ Report of the Secretary-General on implementing the responsibility to protect (A/63/677).

natural catastrophes.¹⁷⁴ Several States had observed that the use of the term “duty” in draft article 9 was welcome for various reasons, especially in order to avoid any confusion with the concept of “responsibility” (*ibid.*, para. 23).

73. It appeared that Member States were concerned that the Commission might confuse the two regimes. In most cases, an affected State had a genuine interest in protecting persons in its territory, but there were extreme cases where the authorities might have the malicious intent not to seek assistance in order to defy the opposition, as had happened in Darfur, where crimes against humanity did indeed entail the “responsibility to protect”.¹⁷⁵

74. He therefore suggested that the Commission should consider adopting a different approach. First, there would be a general regime for States that were not in an extreme situation, where there was a general presumption that they had the sovereign right to seek external assistance from whom, when and as they wished. Second, for “hard core” States, the Commission would need to review carefully the provisions of draft article 10 and draft article 11, paragraph 2, as they applied to situations where the disaster exceeded the national response capacity and the State withheld its consent arbitrarily, unreasonably or maliciously. If the Commission adopted such an approach, more Member States would likely be willing to endorse the Special Rapporteur’s recommendations. It should be noted that even the ASEAN Agreement on Disaster Management and Emergency Response, cited frequently in the report, did not impose legal obligations on its members, but merely listed best practices for them to follow.

75. Mr. PARK thanked the Special Rapporteur for the introduction of his fifth report, which would undoubtedly contribute to the development of international law, in particular on the fundamental principles relating to relief and assistance, the duties of States affected by natural disasters and the right of access of various actors. It was always difficult to strike a balance between the principles of the protection of victims and the sovereignty of affected States. He would like to know which of those two principles the Special Rapporteur viewed as being of primary importance. It was also important to learn lessons from past experience, such as the reasons for the lack of success of the International Relief Union established by the League of Nations in 1927. In the future, he would also welcome some proposals on the privileges and immunities of persons involved in relief and aid work.

76. On more specific matters, he had a suggestion on how to resolve the tension between draft articles 10 and 11, which dealt with the duty to seek assistance and the requirement of consent. The key to resolving the conflict was needs assessment, as discussed in paragraph 151 of the report. In his view, the matter warranted a separate draft article. However, needs assessment should not be left to the affected State, but should be done by a neutral international institution. In that connection, he referred members to the IFRC Model Act for the Facilitation and

Regulation of International Disaster Relief and Initial Recovery Assistance,¹⁷⁶ mentioned in paragraph 190 of the report, which enshrined a similar concept.

77. With respect to the relationship between draft article 5 and proposed draft articles 12 and A, it was interesting that most States had responded negatively to the Commission’s question regarding the duty to provide assistance to States affected by disasters when requested. Draft article 12 referred to the right to offer assistance; in other words, there was a right with no corresponding duty. However, draft article 5 concerned the duty to cooperate. The Special Rapporteur had endeavoured to seek a practical solution in the form of new draft article A. Nevertheless, he would appreciate further clarification regarding the relationship between draft article 5 and new draft article A. Was the purpose merely to elaborate or was it to establish a limitation?

78. In conclusion, he wondered whether the Commission could still hold that there was no duty to provide assistance in the event of very serious natural disasters entailing such heavy casualties that there might be grounds for the Security Council to intervene.

The meeting rose at 6 p.m.

3139th MEETING

Tuesday, 3 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Al-Marri, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (continued) (A/CN.4/650 and Add.1, sect. C, A/CN.4/652, A/CN.4/L.812)

[Agenda item 4]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their examination of the Special Rapporteur’s fifth report on the protection of persons in the event of disasters (A/CN.4/652).

2. Mr. HASSOUNA congratulated the Special Rapporteur on his well-documented report, which furnished a sound basis for debating important issues of law and policy. At that stage in its work, the Commission should not have

¹⁷⁴ *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee, 21st meeting (A/C.6/66/SR.21), para. 85.*

¹⁷⁵ See Security Council resolutions 1706 (2006) of 31 August 2006 and 1769 (2007) of 31 July 2007.

¹⁷⁶ See footnote 141 above.