

Document:-
A/CN.4/3141

Summary record of the 3141st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2012, vol. I

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69. In response to the comments made with regard to the need to make greater reference to the operational aspects of assistance, he recalled that IFRC had specifically requested that the Commission should leave operational matters aside,²¹⁴ as it would risk duplicating the Federation's rules²¹⁵ in areas where its expertise was incontestable. The Commission's task had instead been defined as the provision of a broad general framework of legal rules on the applicable principles of law and the rights and duties of the main actors. Thus, while Mr. Murase's proposal to draft a model status-of-forces agreement for disaster situations was very interesting and might well be useful, the Commission must determine whether such a task would entail a change in the scope of the topic; the Special Rapporteur's views on that proposal would be most welcome.

70. In conclusion, he recommended the referral of the three draft articles to the Drafting Committee and reiterated his thanks to the Special Rapporteur for his outstanding contribution.

The meeting rose at 12.45 p.m.

3141st MEETING

Thursday, 5 July 2012, at 10.10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Al-Marri, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, 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.

Tribute to the memory of Mr. Choung Il Chee, former member of the Commission

1. The CHAIRPERSON said that it was his sad duty to inform members of the Commission of the death of Mr. Choung Il Chee on 1 May 2012. A member of the Commission from 2002 to 2006, eminent jurist and member of various university associations, Mr. Chee had participated in several important international conferences, including on fisheries and the environment. A professor of international public law at Hanyang University in Seoul, he had also been the author of many publications and articles and had made a substantial contribution to the literature of international law. His vast experience, in-depth knowledge and friendly and collegial manner would be remembered by everyone who knew him.

²¹⁴ See the second report of the Special Rapporteur, *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615, para. 28.

²¹⁵ IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (Geneva, 2011). Available from [www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20\(2\).pdf](http://www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20(2).pdf).

At the invitation of the Chairperson, the members of the Commission observed a minute of silence.

2. Mr. PARK expressed thanks, on his own behalf and on behalf of the Permanent Mission of the Republic of Korea to the United Nations Office at Geneva, to members of the Bureau and, more generally, members of the Commission for having taken the initiative to organize the tribute to Mr. Chee. After finishing his studies at the University of Seoul, Mr. Chee had studied international law and international relations at Georgetown University and New York University in the United States of America, where he had taught for 10 years. He had then returned to the Republic of Korea in the mid-1970s, where he had also taught and had carried out important research work. An expert in fisheries, he had participated in a number of conferences on maritime law and had left behind him several authoritative publications in Korean and English.

3. Mr. MURASE said that he had been saddened to hear of the death of Mr. Chee, whom he had encountered several times at meetings of the Japan branch of the International Law Association in Tokyo. He had been a sincere, frank and direct man who hated hypocrisy more than anything. He had made no secret of his feelings about Japan's colonial past in Korea, which he condemned. He sometimes brought up the subject during the Commission's meetings, departing from the topic under discussion, something which he had every right to do, however, since his country had been subjected to such horrendous atrocities. As he himself abhorred hypocrisy, he could understand Mr. Chee's angry reaction and would have reacted the same way. The death, on 15 July 1907, of the Korean diplomat Yi Jun, who had gone to The Hague to plead for Korean independence at the second International Peace Conference, had deeply affected Mr. Chee, who had eloquently argued that such events should not happen again.

4. Mr. CANDIOTTI joined all speakers who had expressed their sorrow at the death of Mr. Chee. He had had the honour of sitting next to Mr. Chee from 2002 to 2006 and remembered a friendly, affable man with a solid knowledge of international law who was particularly committed to the work of the Commission. On behalf of the Group of Latin American and Caribbean States, he expressed his condolences to Mr. Chee's family and to the Republic of Korea.

5. Mr. KAMTO said that the successive announcements of the deaths of former members of the Commission served as a reminder of the fragility of the human condition. There was one lesson that current members could learn: they must perform their tasks to the best of their ability, with rigour and courtesy, in order to preserve the best possible memories of the moments they shared. He had had the privilege and honour of being well acquainted with Professor Chee, who had joined the Commission in 2002, after his own arrival, and had sat near him. He remembered a delightful man with a thorough knowledge of the international situation in the aftermath of the Second World War, and he recalled their conversations about the 1960s, when the Republic of Korea had been at the same level of development as a number of African countries.

6. Mr. Chee had been always ready to help. He had been a man of scruples, with great human qualities, and had exuded honesty. He would remember him fondly, and on behalf of the Group of African States, he requested Mr. Park to convey condolences to Mr. Chee's family and warmest regards to the Government of the Republic of Korea.

7. Mr. PETRIČ said that when he himself had joined the Commission, Mr. Chee had no longer been a member. He had met him twice, however, and had seen that, in addition to his solid legal knowledge, his thinking went far beyond the field of law, revealing a thorough knowledge of international relations and political issues—an essential quality for a jurist. On behalf of the Eastern European and other States, he offered condolences to the deceased's family and to the Government of the Republic of Korea.

**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)

8. Mr. NIEHAUS thanked the Special Rapporteur for his fifth report on the protection of persons in the event of disasters. The document, which was particularly well reasoned, would be a valuable tool for future work on an issue that was topical, as could be seen from the successive natural or man-made disasters that threatened the life of thousands—indeed hundreds of thousands—of people and called for rapid and effective responses. The Commission's work would be useful if the outcome consisted of clear, detailed rules that could help solve major problems.

9. Sir Michael had been right to recall that discussion on the draft articles that had already been adopted should not be reopened and that the Commission must concentrate instead on the content of the fifth report, particularly draft articles A (Elaboration of the duty to cooperate), 13 (Conditions on the provision of assistance) and 14 (Termination of assistance). It would not be easy, since those new draft articles were closely bound up with issues such as the need to promote humanitarian principles and cooperation while ensuring compliance with the principles of State sovereignty and non-interference, on which discussion would probably need to be resumed. In view of the very nature of the topic, the Commission must develop rules that could be implemented rapidly; and they would therefore need to be simple and specific. In that regard, Mr. Murase's proposal to draw up a model status-of-forces agreement, to be applied provisionally until a final agreement had been drafted, was worthy of support.

10. There could, and should, be cooperation in numerous areas, all of which were equally important. For that reason, draft article A on the duty to cooperate was valuable and timely. Draft article 13, which addressed the need to strike a proper balance between the provision of assistance and compliance with the principles of State sovereignty and non-interference, was also worthy of support. The ideas put forward on needs assessment in paragraphs 151 to 153 of the report were of the utmost importance, as were those

on quality control in paragraphs 154 to 156. Experience showed that even where there was a genuine desire to assist, relief assistance of insufficiently high quality could be harmful for recipients. The specific information provided in paragraphs 157 to 160 on the scope and type of assistance was also essential.

11. Another issue that was just as important as needs assessment and quality control, and which arose unfortunately in many areas of activity, in particular that of humanitarian action and cooperation, might also need to be addressed: the issue of corruption. On some occasions in the recent and not so recent past, international assistance had ended up benefiting officials and members of corrupt Governments more than the intended recipients. In 1972, for example, following the earthquake that had destroyed the capital of Nicaragua, Managua, the massive international assistance provided had been largely siphoned off to benefit the family of the dictator Somoza. More recently, following the earthquake in Haiti, part of the international assistance provided had been diverted to other countries and then distributed, for a fee, to victims who should have received it free of charge. Enabling donors to carry out appropriate controls to ensure that such admittedly rare acts were not repeated should therefore be envisaged.

12. With regard to draft article 14, he said that it was important to specify when the assistance was to be terminated by providing for consultations, the modalities for which needed to be determined, between the affected State and the assisting actors. The argument that all States should offer humanitarian assistance, except when it might seriously jeopardize their own economic, social or political conditions, raised the issue of who was to determine the capacity of States. If, as one might imagine, it was up to a State that was supposed to provide assistance to do so, then its objectivity might be called into question: yet another reason why States should be left free to provide, or not, the assistance requested by an affected State. Lastly, it was clear that the right of the affected State to make the provision of assistance subject to certain conditions must be exercised in accordance with its national legislation and international law, as stated in draft article 13. With those comments, he was in favour of referring the draft articles under discussion to the Drafting Committee.

13. Mr. NOLTE joined his colleagues in congratulating the Special Rapporteur, who had presented yet another excellent, thoroughly researched report that in his view was heading in the right direction. The report elucidated the complex and tragic dimensions of the topic, of which Mr. Petrič had spoken so movingly. Before addressing the three new draft articles proposed by the Special Rapporteur, he wished to make his position clear on a few general points raised by the Special Rapporteur himself in his description of the debate in the Sixth Committee and by members of the Commission.

14. Like Mr. McRae and others, he did not wish to reopen past discussion and decisions, but rather to contribute to a reaffirmed consensus that it was not a question of seeking a balance between sovereignty and human rights in the abstract, but of determining the relative importance of the applicable principles and

rules in specific situations and with respect to specific questions. Sir Michael had usefully reminded the Commission of that point of departure.

15. Draft article 10, which concerned the duty of the affected State to seek assistance if the disaster exceeded its national capacity, had been criticized by quite a number of States in the Sixth Committee. Should the Commission discount those statements, as Mr. McRae seemed to believe, and rather emphasize the fact that in practice, States uniformly did seek assistance when a disaster exceeded their national capacity? Or should it follow the view, expressed by Mr. Murphy and others, that practice alone did not demonstrate the existence of the necessary *opinio juris*? The question could not be answered solely by assessing practice and *opinio juris*: the general context of the existing human rights obligations, whether treaty based or customary, must also be taken into account. The fundamental human rights obligation of States to ensure the right to life, to physical integrity and to food necessarily implied that States must seek assistance if a disaster exceeded their national capacity; that did not mean, of course, that States would have to accept any kind of assistance. Taking those legal considerations into account, it could be stated that the actual uniform or quasi-uniform State practice of seeking assistance in cases when a disaster exceeded national capacities was underpinned by a general *opinio juris*. In that sense, the duty to seek assistance, as articulated in draft article 10, was not a new obligation that the Commission would “impose”, but a well-established rule of international law. Draft article 10 thus did not create any additional grounds for State responsibility, and he agreed with Mr. McRae that the Commission could confidently retain the formulation.

16. Some States and new members of the Commission had criticized the wording of draft article 11, paragraph 2, according to which consent to external assistance by the affected State should not be withheld arbitrarily; that raised the classic question of who was to decide that consent had been “arbitrarily” withheld. It was true that the formulation of a legal standard, even one as broad and imprecise as “arbitrarily”, necessarily implied that its applicability was not determined unilaterally by those States to which the standard applied. However, that also meant that the applicability of the standard could not be determined unilaterally by another State or States in accordance with their preferences. The standard in question, which was relatively flexible, was the minimum that should be respected by States, which had the human rights-based obligation to protect life and physical integrity and provide for the basic nutritional needs of the population. Mr. Tladi believed that draft article 11 would remain meaningless unless the word “arbitrarily” was defined. However, the advantage of that word was that it left much room for discretion, while forcing the parties concerned to justify their position in the light of the overall goal of effective disaster relief.

17. Some members thought that draft article 12 on the right to offer assistance reflected a narrow focus on rights and duties, whereas the most important practical issue was cooperation. That criticism could, of course, be applied to all the other draft articles that articulated legal rights and duties in an area where so much depended on voluntary

cooperation, generosity and openness among States and other actors. However, any opposition between the articulation of rights and duties and the encouragement of voluntary cooperation was a false opposition. It was true that the Commission should be mindful of the practical usefulness of its work, a point to which he would return later, but it should also exercise its specific competence, which was to articulate and develop legal principles and rules. The right to offer assistance was not a right that could in any way inhibit the voluntary dimension of the provision of assistance.

18. The same was not true for a possible duty to provide assistance; it was therefore not surprising that States had been virtually unanimous in saying that no such duty existed. Establishing a duty to provide assistance would raise difficult questions of the allocation of responsibility and the determination of the relative capacity of different States. The Commission should therefore not take that route. That being said, it was conceivable that certain situations might arise in which specific States had specific duties to provide assistance. For example, the territory of a State affected by a disaster might be surrounded by that of another State, in which case the neighbouring State could have a duty to permit the delivery of assistance by other States or actors. Such permission would not only be a precondition for the delivery of assistance by third States, but would itself be a form of assistance, which could be conditioned in such a way that it implied no costs for the neighbouring State. More generally, third States could even be said to have a duty to prevent, within the framework of international law and according to their capacities, the commission of the gravest forms of human rights violations in other States. That concept, introduced by the International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, could be developed and applied in the future to certain extreme disaster situations. The Commission should avoid expressing a view on a possible duty to provide assistance, in order to leave room for developments in that area.

19. With regard to draft article A on the duty to cooperate, like many other speakers he had observed a disparity between the rich body of material in the report and the rather limited corresponding draft article. He encouraged the Special Rapporteur to be more ambitious and to try to further flesh out that important text. The principle of cooperation was an accepted legal principle and could imply, in certain situations, fairly concrete obligations, depending on the nature and importance of the goal to be achieved. In that context, the distinction between obligations of conduct and obligations of result was not necessarily very helpful. The goal of providing effective and timely assistance was, after all, the paramount consideration. That goal should be stressed; in certain situations, it could also imply obligations of result. Again, like other speakers, he was sceptical as to how useful it would be to take article 17, paragraph 4, of the articles on the law of transboundary aquifers²¹⁶ as

²¹⁶ 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.

a model. That paragraph was formulated as a unilateral obligation, whereas in explicating the duty to cooperate, the Commission should stress the reciprocal nature of the obligation. The fact that “scientific” cooperation was listed in article 17, paragraph 4, as the first possible form of cooperation was perhaps understandable in the specific context of transboundary aquifers, but it would not seem to be a priority matter in most disaster situations.

20. A number of speakers had noted that draft article 13 relating to conditions that might be placed on assistance was rather limited in view of the extensive material presented by the Special Rapporteur in his report. Again, the Special Rapporteur and the Commission should try to go further along a number of avenues. It should be made clear that the waiving of rules in disaster situations was not only a question of goodwill and generosity but that it also raised important questions concerning the rule of law. Laws could not, and should not, be easily set aside, even in disaster situations, and the Commission should not be seen to encourage a facile disregard of the law in exceptional situations. The real issue was whether there were procedures in certain domestic legal systems that triggered emergency regimes under which certain legislation applicable in normal situations could be suspended. That was a question of preparedness, relating to the pre-disaster phase. In addition, according to paragraph 173 of the report, the principle of sustainable development would support the imposition by the affected State of the condition that assistance must ameliorate, not just restore, previous conditions. As a matter of strict logic, such a condition might be seen as fulfilling the principle of sustainable development, but there was some doubt as to whether it was really helpful in most cases and whether the Commission should be seen to encourage the formulation of conditions that could deter States and actors from providing assistance.

21. With regard to draft article 14, he shared the view of previous speakers that its current formulation could give rise to the misunderstanding that consultations were a necessary condition for the termination of assistance. However, it was not sufficient to merely articulate the right of the affected State to unilaterally terminate the assistance. Given that it was very difficult to formulate a draft article on termination that would not give rise to contradictory interpretations or misunderstandings, he wondered whether draft article 14 should not simply be dropped, on the assumption that the termination of assistance was covered by the general rules on the requirement of consent, the duty not to arbitrarily withhold consent and the right to impose conditions. Another possibility would be to include in draft article 14 a “without prejudice” clause referring to the general principles set out earlier in the text.

22. Lastly, Mr. Murase’s proposal that the Commission should draw up a model status-of-forces agreement and attach it to the body of the draft articles was a very interesting and valuable one. Such a model agreement could indeed be a very useful practical instrument. It was perhaps not advisable, however, to limit the Commission’s work to drafting a model status-of-forces agreement, since that might give the misleading impression that disaster relief was typically and

primarily a military matter. He also wondered whether it would be possible or advisable for the Commission to draw up a full-fledged model status-of-forces agreement. For those two reasons, it was perhaps preferable for the Commission to prepare a set of basic rules on foreign personnel involved in disaster relief that could facilitate the elaboration and negotiation of specific agreements among the parties concerned. In any case, he agreed with Mr. Saboia that it was largely up to the Special Rapporteur to decide whether the Commission should draw up a model agreement of any kind. The same was true regarding the extent to which the Commission should address other practical questions. The Special Rapporteur had usefully reminded the Commission that IFRC had invited it to be mindful of the respective forms of expertise of each body.²¹⁷ Perhaps, as Sir Michael had suggested, the Commission should limit itself to referring to the work of bodies such as IFRC, which had practical expertise that was generally acknowledged.

23. Mr. GEVORGIAN said that the Commission’s work on the topic was very timely, given the frequency and increasing gravity of disasters that cost thousands of people their lives and caused serious material damage. The importance of the topic was confirmed by the fact that, despite its complex nature, the draft articles formulated so far by the Commission had been well received on the whole by the Sixth Committee. As to the form the result of the work should take—draft articles, recommendations or guidelines—it was too early to decide: the Commission would be in a better position to do so at a later date.

24. It was difficult to evaluate the draft articles contained in the fifth report without an in-depth knowledge of matters of principle, and in particular the balance to be struck between sovereignty and cooperation. In that regard, he endorsed the view expressed by Sir Michael concerning the principle of sovereignty and States’ human rights obligations. In the light of the discussion in the Sixth Committee, it was very important that the Commission should address that aspect in a circumspect manner and based on the rules of international law currently in force. It was unlikely that new rules, for example a legal duty to provide assistance, would receive the support of Member States. One must be realistic: the discussion in the Sixth Committee had shown that States were against establishing, in draft article 10, a duty of the affected State to seek assistance. As many speakers, in particular Mr. Hassouna, had rightly said, that raised a whole range of legal issues, including who was authorized to determine that a disaster had taken place or that the disaster exceeded the response capacity of the affected State.

25. Furthermore, if strict legal duties were established, a State failing to fulfil them would incur international responsibility, which raised other issues that could not necessarily be properly addressed. Article 10 should therefore be reformulated, not as a legally binding duty but as a provision intended to guide the action of States. To ensure maximum flexibility, article 10 should set out a moral and political duty and not a legal obligation in the strict sense of the term.

²¹⁷ See the second report of the Special Rapporteur, *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615, para. 28.

26. Similarly, many States had rejected the idea of a duty to provide assistance. As rightly stated by the Special Rapporteur in paragraphs 55 to 78 of his report, in positive international law, States had no legal duty to provide assistance when requested by an affected State. The offer of assistance should be seen within the framework of the implementation of the principle of cooperation between States with a view to the protection of persons in the event of disasters.

27. With regard to the specific arrangements for such cooperation, the work carried out by the Special Rapporteur as reflected in the chapter of his report on the conditions for the provision of assistance was extremely useful, particularly when it came to the conditions that could be imposed by the affected State on that assistance. It was important that draft article 13 should establish the idea that in exercising its sovereignty, the affected State could impose conditions on the provision of assistance. As many members had noted, the draft article was extremely concise: it should be elaborated further in order to prevent affected States from interpreting it too broadly, making their consent to assistance subject to conditions that rendered their consent meaningless.

28. With regard to draft article A, he supported the approach adopted by the Special Rapporteur, who had based that provision on article 17, paragraph 4, of the articles on the law of transboundary aquifers. However, as many members had noted, the term “cooperation” appeared to be used in draft article A in a different sense than in draft article 5, to which draft article A referred. In addition, the words “shall provide” suggested a duty that did not correspond to practice. In his view, the text should be worded so as not to be interpreted as establishing a legally binding duty to provide assistance.

29. Draft article 14 on the termination of assistance also appeared to establish a legal obligation of consultation between the affected State and the assisting actors. That did not seem logical: the provision of assistance required the consent of the affected State, which could impose conditions, but once the assistance had begun, none of the parties could terminate it without consultation. In his view, termination of assistance should be envisaged in a sufficiently flexible way so that an affected State that believed it no longer required assistance, or a State considering that it no longer had the capacity to provide assistance, could terminate the assistance.

30. Mr. Murase’s proposal that the Commission should draw up a model status-of-forces agreement for the entities that provided assistance in the event of disasters was an interesting one. Annexed to the draft articles, such a text would be extremely useful in practice. In the course of his professional duties, he had often fielded difficult questions relating to assistance in the event of disasters: for example, on bringing medicines from abroad into the territory of the affected State in the context of medical assistance or on the quarantine rules applicable to search and rescue dogs and the related documentation required. Dozens of similar questions arose in disaster situations and needed to be answered quickly. For that reason, a model agreement would be very useful, but the Commission was not necessarily the most suitable body to draw up such

an instrument, since the issues involved were extremely technical.

31. Mr. KAMTO said that, from the outset, the Special Rapporteur’s fifth report on the protection of persons in the event of disasters had sparked a lively debate reflecting both concern over general aspects and intense interest in the technical details of the draft articles, particularly the three that had been proposed most recently.

32. Generally speaking, there were two main themes in the discussion: the approach followed by the Special Rapporteur and the vexed issue of the form that the Commission’s final product should take. With regard to the approach, the Special Rapporteur had summarized, in detail and in a remarkably thorough way, the observations formulated by States in the Sixth Committee. Mr. Murphy had rightly held that analysis up as exemplary. However, he himself agreed with Mr. McRae who, supported by Mr. Saboia, had pointed out that the comments of States should not force the Commission into some sort of “Procrustean bed”: the Commission was not a sounding board for every little squeak made by States in the Sixth Committee. It should be attentive, but not subservient, to the Sixth Committee: otherwise, it would lose its own identity and its *raison d’être*. The Commission was and would remain a body of experts—one that was at the service of States, true, but one that hewed to the highest standards of international law. It was on that basis—and not its ability to do the diplomatic or political work of the Sixth Committee—that the Commission would command the respect of the Committee and those that followed its work.

33. The question of the form the final product of the Commission’s work should take was related to the approach to the work and was the logical consequence of the Commission’s obsession with the Sixth Committee. The Commission had a statute that defined its mandate, but lately it seemed to be neither progressively developing nor codifying the law. With its new membership, in particular, the Commission appeared amenable to codification—and codification alone—in only those areas where the rules were so well established in international law that it took no effort to identify them: they were self-evident truths. As soon as international law needed to be progressively developed to any extent in a given area, the Commission lost its nerve. It preferred to hide behind such strange legal entities as study conclusions, guides, guidelines or general principles that were so general that they offered very little practical assistance to States. He was not against innovation: indeed, he admired the imaginative thinking of certain Commission members. It was also true that the final form the work would take would significantly shape its content. The Commission should, wherever possible, propose to States a body of standards that could provide legal order in a given domain, but it should also move international law forward in certain areas. For that reason, he fully supported Mr. Saboia’s proposal that the Special Rapporteur should be asked rather than told what the final form of his work should be. He should try to propose, wherever possible, practical and specific rules based on the international practice acquired over more than a quarter of a century of humanitarian assistance, or “interference”, by the international community. ICRC

and other relevant organizations could contribute to the Commission's work, where possible, but they could not treat it as their own domain. While ICRC had competence in the implementation of international assistance, the progressive development and codification of international law fell to the Commission.

34. In legal and technical terms, disasters implicated and tested the limits of both the territorial jurisdiction and the sovereignty of the affected State. Under international law, a sovereign State was obliged to exercise control over its territory and everything that occurred within it; similarly, the State had a duty to protect its residents. Other States, which were prohibited under international law from encroaching on the first State's jurisdiction, were not immediately involved: they could only intervene if requested to do so by the affected State. That principle had been clearly established by the Special Rapporteur.

35. On the other hand, the duty to cooperate, the existence of which in international law was indisputable—at least as a general principle, and in some areas as a specific norm and rule of law that was directly applicable and binding—could not be imposed on States in the event of a natural disaster. States were not obliged to cooperate in absolute terms; they were supposed to cooperate as far as possible since, as other speakers had pointed out, no duty to cooperate in the event of natural disasters had been objectively established in positive law. To say that States had a duty to cooperate in the exploitation of shared resources or the protection of an endangered species was one thing, but to say that they had a duty to cooperate by providing assistance in the event of disasters was another. In both cases, it was a duty to cooperate—whether to achieve results or to provide the necessary means was irrelevant. While cooperation was a fairly firm obligation in the context of relations between the affected State and United Nations bodies and Red Cross and Red Crescent Societies, it could be more flexible in the context of relations among States and between third States and the affected State.

36. The principle of the duty to cooperate was established in draft article 5, and the task in draft article A was therefore not to affirm that principle but to explain what the content or substance of cooperation should be. Replacing the current title of draft article A by wording such as “Content of the duty to cooperate” would perhaps accomplish that task.

37. With regard to draft article 13 (Conditions on the provision of assistance), the terse reference to “international law” appeared all the more imprecise given that it was not yet known which rules of international law applied to disasters. Instead of the phrase “which must comply with its national law and international law”, the expression “which must comply with its national law and the current draft articles as well as other rules of international law” would be more comprehensive and more appropriate.

38. Lastly, as other members of the Commission had noted, the current wording of draft article 14 on termination of assistance was much too succinct. The text could be expanded, taking into account a number of suggestions.

The current text could constitute paragraph 1, and two other paragraphs could be added, with the following wording:

“2. The affected State may terminate assistance at any time, if prolonging the assistance might jeopardize its national security and independence.

“3. The external assistance provider shall not remain in the territory of the affected State beyond the date of termination of assistance set by that State.”

39. The reference to national independence in paragraph 2 of his proposal was based on the fundamental principle that assistance, or cooperation, in the event of a disaster, must respect the sovereignty of the affected State and must in no way be intended to jeopardize its independence. Security was mentioned because of practical considerations. The principle set out in his paragraph 3 was intended to reassure the affected State that, on the one hand, the sole aim of the assistance provided to it in the event of a disaster was to help it deal with a critical situation and that, on the other hand, when a date for termination of assistance had been fixed—either at the initiative of the affected State, which considered that there was no longer any reason for the assistance to continue or for the assistance provider to remain on its territory, or by mutual agreement with the assistance provider—the date would be respected.

40. The proposals were largely based on the analysis carried out by the Special Rapporteur in paragraphs 184 to 186 of his fifth report. He was in favour of referring draft articles A, 13 and 14 to the Drafting Committee.

41. Ms. JACOBSSON, after commending the Special Rapporteur on his fifth report on the protection of persons in the event of disasters and the valuable summary of the debate in the Sixth Committee he had included therein, said that she was impressed with the way he had managed to focus on the protection of the individual while maintaining the basic presumption that the State had the primary role in the direction, control, coordination and supervision of disaster relief and assistance in its territory.

42. In introducing his report, the Special Rapporteur had referred to the “cycle of a disaster” as a recurring concept in the documents of the United Nations, IFRC and other organizations, rightly considering that the concept should also be reflected in the work of the Commission.

43. Mr. Murase's proposal that the Commission should draw up a model status-of-forces agreement was worthy of consideration, given the important contribution made by military personnel to assistance operations. However, in some countries, including hers, the emergency response structure was different: civilian authorities were in charge of emergency planning and relief operations, at both national and international level. That did not mean, of course, that military personnel and equipment were not involved. In her view, a model status-of-forces agreement was not enough; a more comprehensive model agreement was required, as reflected in certain bilateral treaties Sweden had concluded in that area. She gave the example of the cooperation agreement recently concluded between

Sweden and Latvia on collaboration within the field of emergency prevention, preparedness and response,²¹⁸ which contained both an article on general conditions for border crossing and one on situations when the assistance providers were military personnel, State ships and aircraft and military vehicles, in which case special permission for entry was required.

44. While a model status-of-forces agreement could be of great practical use, a model assistance agreement was also essential. Assistance agreements were most often concluded before a disaster occurred and covered all three phases of the disaster, before, during and after—in other words, the entire cycle of disaster. They often provided for cooperation measures such as common training and exercises that not only served a practical purpose but were also an important way of reducing tension between countries.

45. She suggested that a model assistance agreement and a model status-of-forces agreement could be annexed to the draft articles on the protection of persons in the event of disasters. They would not necessarily run counter to the Model Act²¹⁹ and the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance²²⁰ developed by IFRC in 2011 and 2007 respectively, since those documents had different purposes.

46. Like the Special Rapporteur, she thought that it was difficult to establish the existence—at least in customary international law—of a duty to provide assistance when requested by the affected State. However, States had concluded bilateral and regional agreements in which they undertook to provide assistance to other States, mainly neighbouring States. Sweden, for example, had signed numerous bilateral treaties on a variety of matters relating to the initiation of cooperation between the parties in the event of an emergency.

47. She was not convinced that the lack of responses to the request for information from States on their national legislation meant that there was a lack of legislation. It was perhaps necessary to put the question differently and ask what kind of bilateral and regional agreements existed and how they were reflected in national legislation and in practice.

48. Similarly, she was not convinced of the need to task an independent body with assessing compliance by States with their obligations under draft articles 9 and 10. If a State failed to fulfil its obligations under international law, the usual diplomatic recourse and dispute settlement procedures would be available. She did not see the value

of setting up a new body for that purpose, nor what kind of body it would be. For obvious reasons, none of the existing bodies or organizations—ICRC, IFRC or United Nations entities or institutions—could take on that role. Bilateral treaties on mutual assistance often included dispute settlement provisions, which had an important preventive effect.

49. Like other members of the Commission, she did not believe that a balance needed to be struck between human rights and State sovereignty. Human rights existed irrespective of whether or not a State's sovereignty was infringed. Reciprocity was not required. The fact that a State might derogate from its obligations did not mean that human rights ceased to exist.

50. She welcomed the fact that the Special Rapporteur had chosen to elaborate, in a new draft article, what the duty to cooperate implied. Some members had argued that the examples of cooperation given in draft article A did not correspond to what was usually meant by “duty to cooperate”. She understood that view. However, cooperation between States could take many forms. A duty to cooperate was enunciated 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,²²¹ and there were numerous treaty-based obligations to cooperate. In both cases, a failure to meet the obligation was a breach of the law. The fact that different forms of cooperation existed did not present a problem in the context of the Commission's work. The only thing that needed to be done was to change the title of the draft article, which could be renamed, for example, “Cooperative measures”, a title used in many intergovernmental agreements.

51. The reasoning behind draft article 13 (Conditions on the provision of assistance) was clear and consistent. The draft article was based on existing agreements, model laws and guidelines, including the IFRC Model Act, something that lent it weight, in view of the fact that the rationale behind it was already widely accepted.

52. Like other members of the Commission, she would like to see an expanded version of draft article 13, elaborating in greater detail on the obligation of assisting actors to cooperate in compliance with national legislation and identifiable needs and quality control. In addition, the limitations on conditions under international and national law should be addressed in a separate draft article 13 *bis*, in which it should be clearly stated that the affected State could not make the provision of assistance subject to conditions that ran counter to principles of humanity, neutrality, impartiality and non-discrimination, with the reasons being given in the commentary to the draft article. That would provide an opportunity to clarify the relation between non-discrimination and the requirement of meeting specific needs. Equally, limitations could not be imposed on human rights unless they were derogable. The fact that disasters implicated numerous human rights, such as the rights to food and water and the right to adequate housing—as the Special Rapporteur had stated

²¹⁸ Agreement between the Government of the Republic of Latvia and the Government of the Kingdom of Sweden on collaboration within the field of emergency prevention, preparedness and response (Riga, 17 June 2002), United Nations, *Treaty Series*, vol. 2301, No. 41019, p. 283.

²¹⁹ 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).

²²⁰ IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (Geneva, 2011). Available from [www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20\(2\).pdf](http://www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20(2).pdf).

²²¹ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

in paragraph 170 of his report—was one thing; accepting that such rights could be subject to a general limitation was quite another.

53. She welcomed the fact that the Special Rapporteur had specifically cited the Hyogo Framework for Action 2005–2015²²² and mentioned the need to adopt a gender perspective, since taking into account the specific needs of men and women, as well as cultural diversity and other elements, would make the assistance much more effective, rapid, suitable and cost-effective. While gender aspects were increasingly being mainstreamed in humanitarian assistance, they were being left out to some extent in disaster situations, as had been observed at the most recent International Conference of the Red Cross and Red Crescent, held in 2011.

54. Like others, she was of the opinion that draft article 14 required further elaboration since as currently drafted, its implications were not entirely clear. She would be in favour of the three draft articles proposed by the Special Rapporteur being sent to the Drafting Committee.

55. Ms. ESCOBAR HERNÁNDEZ commended the Special Rapporteur on his solid, well-reasoned fifth report on the protection of persons in the event of disasters, which would further advance the Commission's work. As the Special Rapporteur had rightly highlighted in his reports, the duty to cooperate, and more generally the principle of cooperation, went to the very core of the issue of protection of persons in the event of disasters; she therefore welcomed the importance now being attached to it in the fifth report. The care with which the Special Rapporteur had sought to strike a balance between the need for assistance and respect for State sovereignty was also to be commended.

56. The attempt that could be discerned in draft article A to take into consideration the practical aspects of assistance was also very commendable. However, and notwithstanding the fact that the wording of the new draft article appeared on the whole to be acceptable, she did not share the Special Rapporteur's point of view concerning the nature of the text and its relationship to the duty to cooperate. In her view, the duty to cooperate (covered in draft article 5) and the forms of cooperation (draft article A) were different in nature. Draft article 5 was structural and established a principle, while the new draft article A was operational. The new text did not explain the duty to cooperate but set out what it entailed. While it could usefully be included within the draft articles as a whole, deciding where it should be placed was a task that should no doubt be given to the Drafting Committee.

57. She found the arguments advanced by the Special Rapporteur in his report with regard to draft article 13 and conditions on the provision of assistance to be very cogent. However, draft article 13 mentioned only extremely limited conditions, mostly linked to compliance with national law and international law. While it could be interpreted in a different, less restrictive way if the two parts of the text were taken separately, the fact remained

that it did not cover all the essential questions relating to conditions for assistance raised by the Special Rapporteur in his report. Perhaps the Special Rapporteur could consider rewording the draft article and adding a paragraph or preparing additional draft articles. Treating the issue of conditionality in a more comprehensive manner would enhance the legal safety net, avert the ever-present threat of arbitrariness and strengthen the legal regime for the protection of persons in the event of disasters.

58. With regard to draft article 14, there was no doubt that the termination of assistance was a situation in which the dialectical relationship between protection of persons in the event of disasters and respect for State sovereignty clearly arose, as did the need to strike a balance between the two. The context in which termination occurred was important: the affected State had accepted the assistance of a third State and had been able to impose conditions on the provision of the assistance. Important work had been carried out by various actors and the persons affected had started to receive help, giving rise to expectations and probably also rights that would be threatened by the termination of assistance. All those elements needed to be taken into account when deciding to terminate assistance. From that point of view, draft article 14, while useful, seemed quite limited, being concerned more with the definition of the overall duration of assistance than with the time at which assistance ended and the circumstances and conditions in which it could be terminated. The Special Rapporteur might find it useful to draw up additional proposals that took into account the various aspects that came into play in the termination of assistance and to review the wording of draft article 14.

59. In addition, she found Mr. Murase's proposal that the Commission should draw up a model status-of-forces agreement well worthy of consideration. Armed forces very often took part in relief operations in the event of disasters, and in some countries, such as Spain, military units were tasked with assistance in emergency situations or natural disasters. Mr. Nolte's proposal to broaden the Commission's work to include the definition of the legal status of the various categories of personnel involved in the provision of assistance was also very interesting.

60. With regard to whether the Commission's consideration of protection of persons in the event of disasters should be expanded to include certain forms of cooperation relating to disaster preparedness, prevention and mitigation, she said that the way the discussion of the subject was evolving and its handling by the Special Rapporteur attested to its importance. The Special Rapporteur might indeed wish to give it more in-depth consideration in future.

61. Lastly, she recommended that, in view of the obvious value of the draft articles submitted by the Special Rapporteur in his fifth report, they should be submitted to the Drafting Committee.

62. Mr. SINGH said that the Special Rapporteur had helpfully summarized the comments made by States in the Sixth Committee's discussions on the topic. As the Special Rapporteur had indicated, delegations had emphasized the topic's importance and timeliness in the light of the rising number of losses produced by natural

²²² 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".

disasters and had recognized that the Commission's work of codification and progressive development would greatly contribute to the development of disaster response law. They had commended the Commission's efforts to clarify the specific legal framework pertaining to access in disaster situations, something that would help to improve the efficiency and quality of humanitarian assistance and mitigate the consequences of disasters. As the Special Rapporteur had noted, several representatives had praised the Commission for striking the proper balance between the need to protect persons affected by disasters and respect for the principles of State sovereignty and non-interference. Some delegations had emphasized that responses to disasters should always be based on full respect for the sovereignty of the affected State and that humanitarian assistance must not be allowed to be politicized or used as an excuse for interfering in the internal affairs of the affected State. The importance of international solidarity in the event of disasters had also been emphasized. With regard to the question posed by the Commission in its report on the work of its sixty-third session (2011), namely on whether the duty of States to cooperate with the affected State in disaster relief matters included a duty to provide assistance when requested by the affected State,²²³ the Special Rapporteur, after discussing the responses of States and examining a number of international agreements on disaster mitigation, rightly reaffirmed his conclusion that the duty to cooperate in disaster relief matters did not currently include a legal duty for States to provide assistance when requested by an affected State. The responses of States from which assistance was requested were generally based on their capacity to provide such assistance, and in practice, States did provide assistance in the event of disasters on the basis of the principle of solidarity. In paragraph 80 of his report, the Special Rapporteur rightly emphasized the fact that cooperation played a central role in the context of disaster relief and that it was an imperative for an effective and timely response to disaster situations. That essential role called for further elaboration of the functional requirements of the duty to cooperate outlined in draft article 5 and the kind of coordination required by affected States and assisting actors. The Special Rapporteur noted that in identifying the contours of the duty of cooperation, the nature of cooperation had to be shaped by its purpose, which in the current context was to provide disaster relief assistance, and that States' duty to cooperate in the provision of disaster relief must strike a fine balance between three important aspects, with which he himself agreed: such a duty could not encroach upon the sovereignty of the affected State; it had to be imposed on assisting States as a legal obligation of conduct; and it had to be relevant and limited to disaster relief assistance.

63. With regard to draft article A, which was based on a detailed and comprehensive study of the nature of the duty to assist States as well as the categories of assistance, he agreed with the Special Rapporteur's enumeration of the specific areas in which third States should provide assistance. The inclusion of the words "other cooperation" was useful, as it provided flexibility in responding to the needs of particular situations. The wording of draft article 13 concerning conditions on the

provision of assistance was appropriate, since the affected State retained the right, under its national law, to direct, control, coordinate and supervise such assistance within its territory. However, as some members had pointed out, the article needed further elaboration.

64. The Special Rapporteur had noted that in determining the extent of appropriate conditions, it was necessary to reiterate the core principles of State sovereignty and non-intervention and that the affected State could impose conditions on the provision of assistance, including compliance with its national laws and fulfilling demonstrated needs. He had, however, emphasized that the core principles of State sovereignty and non-intervention should be considered in the light of the responsibilities undertaken by States, in the exercise of their sovereignty, with regard to other States and individuals within a State's territory and control. Therefore, any condition imposed by the affected State must be reasonable and must not undermine the duty to ensure the protection of persons in its territory. Furthermore, the affected State had a corresponding duty to facilitate the prompt and effective delivery of assistance, which might include the waiver of national laws as appropriate. In paragraphs 120 to 181 of the report, the Special Rapporteur examined in detail a number of issues, such as the duty to facilitate entry of assistance teams, equipment and tools, which needed to be more concretely reflected in the text.

65. Draft article 14 on termination of assistance was also a useful and practical provision, since the consultations it envisaged would allow the affected State and the assisting State to make the necessary practical arrangements, including for continuing any relief work that might still be required after the withdrawal of the assisting State: that aspect should be reflected in the draft article. Mr. Kamto had proposed the insertion of a new provision on unilateral termination of assistance by the affected State in the event of non-compliance with the conditions imposed. In his own view, that was a different matter which, while important, should be covered in a separate draft article. Mr. Murase's proposal that the Commission should draw up a model status-of-forces agreement was interesting. He shared Mr. Nolte's view that such an agreement should not be limited to military personnel but should include all foreign disaster relief personnel.

66. Mr. CANDIOTI said that, generally speaking, he agreed with the way the Special Rapporteur was tackling the topic. Draft articles 1 to 12 had been adopted on first reading and did not require further consideration. He shared the Special Rapporteur's views concerning the question raised by the Commission in chapter III of its report on the work of its sixty-third session (2011): the duty to cooperate in the event of disasters did not currently mean that States had a legal obligation to provide assistance. True, there was a duty to offer assistance, but not necessarily to provide it, unless there were specific agreements for such a duty or unless the duty was imposed by the relevant international disaster relief organizations. With regard to the wording of the issues on which the comments of States would be of particular interest to the Commission, it was essential to ensure closer cooperation between the Commission's Rapporteur, who was responsible for chapter III of the Commission's annual report, and the special rapporteurs, chairpersons of working

²²³ *Yearbook ... 2011*, vol. II (Part Two), para. 44.

groups and others. In the chapters of his own report on elaboration on the duty to cooperate and the conditions for the provision of assistance, the Special Rapporteur had presented a remarkable analysis of the duty to cooperate and of the conditions on the provision of assistance that brought to light the complexity of, and the problems posed by, those issues, but also a number of possibilities in respect of the provision of assistance in the event of disasters. The new draft articles proposed by the Special Rapporteur, in particular draft articles A and 13, should perhaps be supplemented by texts that gave examples or set out the main forms and arrangements for cooperation. As regards the conditions on the provision of assistance, one might thus consider inserting a separate draft article giving examples and listing various conditions on such provision. There would be nothing exceptional about doing that: the articles on the law of transboundary aquifers contained an article of that type that cited the factors to be taken into account to ascertain the fair and reasonable use of aquifers. Similarly, the recent articles on the effects of armed conflicts on treaties contained an indicative list of treaties whose subject matter suggested that they remained in force in the event of armed conflict.²²⁴ Like other members, he believed that draft articles A and 13 should be supplemented and fleshed out in order to specify the scope and meaning of international cooperation, showing what it entailed in terms of assistance and protection of persons in the event of disasters. Draft article 14 could also be improved on the basis of the proposals that had been made. In conclusion, he was in favour of referring the three draft articles contained in the fifth report to the Drafting Committee.

67. Mr. KITTICHAISAREE said that the title of the topic under discussion, protection of persons in the event of disasters, spoke for itself and that the approach adopted was clearly based on persons and not on the sovereignty of the State. In 2011, Thailand had been hit by floods that had been among the worst in its history—they had affected some 60 provinces and had sometimes lasted several months. After that disaster, the National Human Rights Commission of Thailand had held a seminar to record the stories of those who had been most seriously affected. Three lessons had been drawn from the seminar, to which he fully subscribed, and which the Commission should take into account in view of the importance of the experiences of persons who had actually lived through a disaster. First, such persons had the right to receive prompt, accurate information from the Government and the competent bodies, in order to be able to deal with the disaster and thereby attenuate the negative effects and suffering. Second, they should be able to truly participate in disaster prevention and management and be provided by the Government with appropriate opportunities to do so before, during and after disasters. Third, the Government must provide protection from disasters and bring rapid, appropriate and non-discriminatory relief to affected persons, in strict compliance with human rights.

68. That being said, sovereign States had a legitimate interest in protecting their national interests and national security. The Commission therefore needed to strike an appropriate balance between draft article 10, under which

the affected State had a duty to seek assistance, and draft article 11 on consent of the affected State to external assistance, particularly paragraph 2, under which consent to external assistance should not be withheld arbitrarily. The word “arbitrarily” had given rise to much discussion in the Sixth Committee. If the question was viewed from the standpoint of the sovereign State, the latter might understandably be concerned with the need to preserve national security and the national interest. In addition, the phrase “exceeds its national response capacity” was perhaps not appropriate, given the risk of wounding national pride by assuming that a State had only a limited capacity to protect its population and of undermining that State’s status as a recipient of foreign investment. After all, if the State was unable to prevent industrial centres from being affected by floods, that meant it could not protect foreign investment. It would lose credibility, while the cost of insurance would increase. That was an aspect that had not yet been fully explored.

69. In draft article 12 (The right to offer assistance), the term “right” should be replaced by “positive duty”. With regard to draft articles A, 13 and 14, he agreed in principle with the approach adopted by the Special Rapporteur and would make proposals when the texts were reviewed. Lastly, if the Commission ruled out the possibility of reconsidering the draft articles it had provisionally adopted on first reading, he was afraid that the Sixth Committee would ask it to draw up draft guidelines on the subject rather than draft articles on which a future convention might be based.

70. Mr. TLADI said that he was taking the floor again in order to respond in one statement to all of the comments he wished to address, rather than speaking at the end of each intervention. First, Sir Michael had taken issue with his comment that it was necessary to strike a balance between human rights and sovereignty in the draft articles, arguing that human rights had their own internal balancing mechanism and that trying to balance them in any other way was dangerous. That was legally problematic from a number of perspectives. First, human rights were not, *a priori*, internally balanced: the “mechanism” referred to by Sir Michael was not inherent in human rights at all and actually consisted of the limitations imposed in human rights instruments drawn up through negotiations. Second, even if human rights contained an internal balance—whatever was meant by that—the same was true of sovereignty. That was not an absolute concept either, and nobody was seeking to balance it with anything else. In fact, very few legal concepts were absolute. While Sir Michael seemed to have made his comments in a humorous vein, they were nevertheless reflected in the records, and he himself therefore wished to correct certain inaccuracies. Whether Sir Michael’s statement about the nature of human rights was true or false, the fact remained that in the first part of the session, in the context of the expulsion of aliens, he himself, supported by Mr. Saboia, had said that it was necessary to strike a balance between human rights and sovereignty. At the first meeting of the second part of the session, he had indicated that it was necessary to strike a balance between the key principles underlying the provision of humanitarian assistance in the event of disasters, namely respect for the sovereignty of the affected State and the need to assist affected persons.

²²⁴ General Assembly resolution 66/99 of 9 December 2011. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2011*, vol. II (Part Two), paras. 100–101.

Sir Michael had also suggested that the draft articles in question—presumably draft article 11, paragraph 2, and draft article 10, which were the only provisions that he himself considered to be problematic—were in reality not based on State practice, but that the Commission should retain them nonetheless. That contradicted Mr. McRae's arguments, to which he would revert later. Sir Michael's remark was curious for a number of reasons. First, the Commission's summary records showed that it was Sir Michael who consistently insisted that State practice should be the basis for the Commission's work, as could be seen in the interesting debates he had had with Mr. Dugard on the matter. He for one would be pleased if Sir Michael adopted the same approach when the Commission came to consider the immunity of State officials from foreign criminal jurisdiction. Second, and contrary to Sir Michael's assertion, the draft articles in question had in fact been based on State practice, according to the Special Rapporteur's fourth report. Assuming that Sir Michael was correct and that the purported basis for the articles was not State practice, then what was the basis for those texts? Sir Michael had declined to offer an alternative basis on the grounds that he did not want to get into the substance of matters that had already been discussed.

71. He himself was going to play devil's advocate. Perhaps Sir Michael, in his desire to ensure the greatest protection to those affected by disasters, would contend that the draft articles were based on logic. However, as he had noted earlier and Mr. McRae had amplified the point, States did not as a rule refuse assistance, especially when a disaster exceeded their capacity. It was therefore hard to see how the obligations set out in draft articles 10 and 11 could be based on the desire to ensure maximum protection. Mr. Petrič had rightly noted that there could be situations in which Governments acted in bad faith. However, in those exceptional cases, which he would describe as "situations of lunatic Governments", it was doubtful, as had been observed by Mr. Murphy, that Governments would be convinced by esoteric obligations alone, unaccompanied by coercive measures, when even the threat of collective action generally had little effect. All of that led, inexorably, to a single conclusion: draft article 10 and draft article 11, paragraph 2, were not based on the practice of States, nor were they based on any necessity.

72. Mr. McRae had made the point that "arbitrariness" was a common concept in law: he had mentioned the law of the World Trade Organization (WTO) as an example. However, that organization had a dispute settlement mechanism capable of clarifying such vague and indeterminate terms as arbitrariness, whereas the draft articles drawn up by the Commission did not envisage a dispute settlement mechanism of any kind, let alone one like that of WTO. As Mr. Hassouna had noted, in a system where the content of a text was governed by its interpretation, important and sensitive questions such as the ones under consideration should not be left solely to the good faith of States. Mr. Nolte had put forward an excellent argument about the point of using arbitrariness as a criterion: it was precisely because there would always be a reason for not accepting assistance that arbitrariness could not be considered a relevant criterion. The problem was knowing whether the reason was a convincing one, not whether a reason existed. If the affected State refused assistance for a reason that was

not deemed adequate by most of the actors involved, what happened? He doubted whether a debate on the suitability of the reason for a State's refusal to accept assistance would help persons affected by a disaster very much, as in the example of Ethiopia cited by Mr. Petrič. Even if the obligation set out in draft article 11, paragraph 2, had existed at the time, that country would probably not have agreed to the calls for it to accept foreign assistance.

73. Contrary to the views expressed by Sir Michael, Mr. McRae had suggested that the draft articles were indeed based on State practice. The practice he cited was the fact that States routinely and consistently offered and accepted assistance. Mr. Murphy, eloquently parrying that argument, had contended that that was not the kind of practice that could lead to the creation of rights and duties. More importantly, if States were so willing to receive and offer assistance, then why was there any need for the provisions in question to be grounded in rights and duties? Mr. McRae believed that the fact that States regularly agreed to seek assistance should create a duty to provide assistance. However, States had generally rejected that point of view, which Mr. Forteau alone among all the Commission's members espoused. Mr. Nolte had raised a very interesting point, namely that existing human rights instruments already provided for the duty to seek assistance and the duty not to refuse assistance in an arbitrary manner. However, he himself found it hard to believe that the right to life, for example, constituted a manifestation of *opinio juris* in favour of the duty to seek assistance and the duty not to refuse assistance in an arbitrary manner. The case law of the International Court of Justice showed clearly that *opinio juris* must be based on a specific rule and that one could not use one rule to create another: if that was the case, then the right to life would require the prohibition of the death penalty.

74. Lastly, since Sir Michael had found his comments harsh, he wished to state that he endorsed the aim of the draft articles, which was to encourage States to seek, offer and accept assistance. However, he doubted that the best way to proceed was to adopt an approach based on rights and duties, and he would be proposing amendments when the draft articles were considered on second reading.

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

[Agenda item 1]

75. Mr. McRAE (Chairperson of the Drafting Committee) said that the Drafting Committee on protection of persons in the event of disasters would consist of Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Murase, Mr. Nolte, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Wisnumurti and Sir Michael Wood, who had been members at the previous session, and Ms. Escobar Hernández, Mr. Forteau, Mr. Kittichaisaree, Mr. Murphy, Mr. Park and Mr. Tladi, new members of the Commission, and Mr. Šturma (*ex officio*).

The meeting rose at 1 p.m.

* Resumed from the 3137th meeting.