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Summary record of the 3178th meeting

Topic:
Protection of persons in the event of disasters

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expressed during the debate when it came to preparing the commentaries. In doing so, he might find that there was no great need to cover the legal issues addressed in that section, which were not central to the overall project.

36. He agreed with much of what had been said by Mr. Murase, Mr. Park and Mr. Tladi, particularly the concerns expressed by Mr. Tladi with regard to the dual-axis approach recommended in paragraph 36 of the report. The title of the section in question—“Prevention as a principle of international law”—encapsulated the problems he had with that part of the report. What was meant by “principle of international law” in that context, given that unlike “rule”, the term “principle” had many meanings, some quite vague? And what was meant by “prevention”? Prevention by whom, and of what? The mention in paragraph 40 of “the overarching principle of prevention, which lies at the heart of international law” did little to clarify matters for the Commission, and nor did the reference in paragraph 41 to “an international legal obligation to prevent harm, both in its horizontal and vertical dimensions”, which “finds support in human rights law and environmental law”.

37. Each of the many examples given by the Special Rapporteur of the use of the word “prevent” in legal and other texts was taken from a very specific context; each had a particular object, and was subject to particular interpretation. They could not easily be grouped together to form an overall “principle of prevention”. Mr. Murase had said much that he himself would have wished to say about the references to environmental law, particularly with regard to the precautionary principle. Mr. Park had drawn attention to the statement, in paragraph 50 of the report, that “[t]he existence of an obligation to mitigate has been recently addressed in relation to climate change”, which seemed out of place in a section dealing with human rights and did not appear to be well supported by the authorities cited by the Special Rapporteur. The two cases cited in paragraph 51—*Öneryıldız v. Turkey* and *Budayeva and Others v. Russia*—could hardly be said to lead to a general obligation for States to take appropriate steps to prevent and mitigate disasters in less predictable situations. Mr. Tladi had also shown that the judgments of the European Court of Human Rights could not be read as establishing a “general principle to prevent” under international law—still less could one rely on separate or dissenting opinions or passages from the writings of doubtless learned authors. Mr. Park, like others, had emphasized the need to distinguish human-made disasters from natural disasters and had drawn attention to the statement in paragraph 53 of the report that the European Court of Human Rights had “articulated the same duty regarding natural and man-made disasters”. That was not how he himself had read the judgment in *Budayeva and Others v. Russia*, particularly since in paragraph 135, the Court stated that operational choices in terms of priorities and resources needed to be taken into consideration and must be “afforded even greater weight in the sphere of emergency relief in relation to a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature”.

38. In conclusion, he believed that the wording of the two draft articles could be improved significantly, and he looked forward to working with the Special Rapporteur and the members of the Drafting Committee to that end.

He therefore supported referring draft articles 16 and 5 *ter* to the Drafting Committee.

The meeting rose at 12.45 p.m.

3178th MEETING

Thursday, 11 July 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (*continued*) (A/CN.4/657, sect. B, A/CN.4/662, A/CN.4/L.815)

[Agenda item 4]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the sixth report of the Special Rapporteur on the protection of persons in the event of disasters (A/CN.4/662).
2. Mr. SABOIA said that, unlike other members of the Commission, he thought that the Special Rapporteur had drawn well-founded conclusions about the current legal framework for prevention, risk reduction, preparedness and mitigation of disasters, the duties to prevent and cooperate and the principle of due diligence. He had solidly established the pertinent analogies to human rights law and environmental law. The dual-axis approach he had adopted was perfectly valid for the current stage of consideration of the topic. Brazilian domestic legislation took the same approach.
3. Concern had been expressed with regard to the Special Rapporteur’s alleged failure to draw a distinction between natural and human-made disasters: true, it might have been useful to examine the distinction more closely. Insufficient attention had purportedly been paid to differences in the capabilities of States. Yet the Special Rapporteur had clearly stated that the duty to prevent and the principle of due diligence had to be seen in the light of the economic, scientific and technological level of a country, although a State’s economic level could not discharge it from its responsibilities. In the work on the topic, emphasis should be placed on poverty and lack of development as obstacles to adequate prevention, preparedness, mitigation and post-disaster reconstruction. Haiti was a dramatic example of a

country caught in a vicious circle of poverty and disasters that had thwarted its efforts at economic and social recovery. Express mention should be made, either in the draft articles or in the commentaries, of risk reduction for particularly hazardous industrial activities that could harm human health or life, such as the dumping of toxic waste in impoverished peripheral areas. Land-use regulations and construction standards were also important factors in risk reduction, although they were frequently disregarded due to negligence or corruption on the part of the authorities.

4. With regard to the two draft articles, which should be referred to the Drafting Committee, he suggested the inclusion in draft article 16 of a reference to appropriate monitoring of the implementation of the measures and to the need to consult with and take into account the needs of the local population. He favoured the retention of the references to responsibilities and accountability mechanisms.

5. Mr. HMOUD said that the Special Rapporteur's assessment of the various legal instruments indicated that States placed broad emphasis on preparing for disasters, mitigating their effects and reducing risk. However, the key question was whether there was a principle of customary international law or an emerging norm on the obligatory nature of disaster prevention. It was also important to determine whether there was any legal principle that would be inconsistent with developing a rule on prevention. Even if there was no legal impediment, it had to be demonstrated that there was a need for such a rule in the context of the protection of persons in the event of disasters. The wide range of existing instruments indicated that positive acts by States to reduce the risk of disasters were expected and needed, but did not show the need for a separate general rule that created any obligation for States outside the existing frameworks and mechanisms. A mere two cases before the European Court of Human Rights were clearly not sufficient to indicate that need. There did not seem to be a direct link between the various principles of international human rights law and environmental law cited in the report and a rule on the prevention of disasters. It was not sufficient to argue that because the principle of prevention existed in a certain field of the law, it existed, or should exist, by analogy, in other areas of law.

6. International instruments like the International Covenant on Civil and Political Rights imposed no obligations upon States to prevent disasters. They did require States to prevent human rights violations by third parties, but disasters could not be said to be third parties or, *per se*, to violate human rights. It was argued in paragraph 46 of the report that the supposed duty to prevent or mitigate a disaster arose from States' universal obligation to ensure certain general rights, such as the right to life and food, clothing and shelter. However, in order for that duty to arise in the context of a disaster, there had to be direct consequences for such rights, something that was not established in the report. In addition, the Human Rights Committee's general comment—of dubious legal value—on article 6 of the Covenant⁹⁰ referred only to foreseeable

disasters. The argument about the right to an adequate standard of living under article 11 of the International Covenant on Economic, Social and Cultural Rights also lacked a link to the supposed obligation to prevent disasters. The most plausible basis for establishing a duty to prevent came from the reasoning advanced by the European Court of Human Rights in the *Öneryıldız v. Turkey* and *Budayeva and Others v. Russia* cases to the effect that a duty might exist in relation to foreseeable disasters and that failure by the State to take feasible measures in such situations might be considered a violation of the right to life.

7. Environmental law and protection in disaster situations were two entirely separate fields of law, and the principles operative under the former did not carry over into the latter. He did not see how the precautionary principle in environmental law, for example, could be applied to risk reduction in the context of disasters. The same was true of due diligence, although it could be used to assess whether a State had made its best efforts to reduce the risk of disaster.

8. He agreed with the Special Rapporteur that the duty to cooperate in connection with prevention was part of the overall duty to cooperate set out in draft article 5. It would be illogical to accept that principle for disaster relief but not in relation to risk reduction, mitigation and preparedness.

9. In closing, he said that he supported sending the two draft articles to the Drafting Committee. While the duty to prevent did not have sufficient legal underpinning for codification, it might nonetheless be appropriate for progressive development if confined to foreseeable disasters.

10. Mr. ŠTURMA said that certain concepts used in the draft articles and in the report, such as prevention, precaution, damage, risk, responsibility and accountability, had not been clearly defined, and some theoretical conclusions did not follow from the documents and cases cited. While he agreed with the emphasis on the principle of prevention as a key element of the topic, he also agreed with the critical comments made by Mr. Murase, Mr. Tladi and others.

11. He shared the concerns expressed about the use of the dual-axis approach, involving horizontal and vertical obligations, without sufficiently defining the obligations. While he could accept that a State had certain obligations to its population in the event of a disaster, in other words vertical obligations, he had some doubts about the horizontal dimension, namely in relations between the affected State and third States.

12. The Special Rapporteur had based his arguments on international human rights law and environmental law, but although there were some similarities, the structure of obligations was not the same. In the field of human rights, the best basis for State obligations was sovereignty. International environmental law seemed *prima facie* to be a solid basis for the obligation of prevention, but many legal arguments that were valid in the context of transboundary harm could not be transferred to the relation between the affected State and third States in the event

⁹⁰ Report of the Human Rights Committee, 16th session (1982), general comment No. 6 on article 6 (Right to life), *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, p. 93.

of disasters. He was not sure that there were any general legal obligations in respect of prevention, cooperation and assistance outside the context of special treaty regimes.

13. While the principle of prevention was certainly a part of international law *de lege lata*, the precautionary principle seemed to be *lex ferenda*, although it might have developed into positive legal obligations in particular regimes. Although prevention was also a key concept in the context of protection of persons in the event of disasters, the precautionary principle was hardly applicable, particularly in the event of the natural disasters that often took the form of *force majeure*.

14. If the Commission restricted itself to a very general restatement of the obligation of prevention, it might not be necessary to distinguish between different kinds of risks and disasters, since preventive measures were advisable in all cases, although they had to be reasonable and appropriate to the nature of the risks involved. However, differentiation was extremely important when it came to the legal consequences of the failure to comply with the obligation of prevention. On that subject, the report and draft article 16 were far from clear. One problem might be that a distinction was not made between the obligation to reduce the risk of disasters and the obligation to mitigate the effects of disasters. Another problem seemed to reside in the different nature of risks and disasters. The failure of a State to fulfil its preventive obligation entailed greater legal consequences in cases of industrial and other human-made risks and disasters than in cases of unpredictable and unavoidable natural disasters.

15. The responsibility and accountability mechanisms should be clarified. It was not entirely clear whether draft article 16 referred to State responsibility or international liability, or perhaps civil liability under internal law. The concept of accountability did not necessarily amount to State responsibility for internationally wrongful acts.

16. In spite of his critical comments, he supported referring draft articles 16 and 5 *ter* to the Drafting Committee.

17. Mr. CAFLISCH said that the Special Rapporteur's sixth report revealed the existence of a considerable body of national and international rules, mechanisms and institutions in the field of disaster prevention and described the impact that recourse to them, or lack of such recourse, could have on individuals. The available mechanisms might well serve as the basis for the development of comprehensive rules. Although the report conveyed the impression that the topic was a relatively well-known field of study, the task ahead of the Commission was only partly one of codification, in his opinion.

18. The Special Rapporteur had rightly included the international protection of human rights, in particular the right to life, among the pillars of international law upon which the project should rest, the very title of which contained the phrase "protection of persons", giving it a human rights dimension. In paragraphs 51 to 53 of his report, the Special Rapporteur discussed two cases of the European Court of Human Rights that established a link between the right to life and the duty of States to protect

persons from life-threatening disasters. Citing portions of the relevant judgments, he expressed the hope that they would provide a solid basis for a rule that imposed on States a duty of prevention, mitigation and compensation when, in the face of life-threatening natural or human-made disasters, a State had not taken the necessary, feasible steps to prevent them or to mitigate their effects. It seemed appropriate to include in the commentaries to draft articles 16 and 5 *ter* the ideas outlined on that point by the Special Rapporteur.

19. The law of transboundary relations, the principle of *sic utere tuo ut alienum non laedas*, the precautionary principle, the principle of due diligence and the provisions of national and international instruments cited in the report provided an adequate basis for the draft articles proposed by the Special Rapporteur. Although there were still some doubts about the existence of a general customary rule in the area of prevention, he was in favour of referring both draft articles to the Drafting Committee.

20. Mr. MURPHY said that the chapter on prevention of the Special Rapporteur's sixth report presented a terminological problem: it was entitled "Prevention", and draft article 16 was entitled "Duty to prevent", even though they both addressed not only prevention, but also mitigation and preparedness. In his view, the broad term that covered all three was not "prevention" but "risk reduction". As noted in paragraph 37 of the report, prevention was distinct from mitigation and preparedness, each of which lay at different points of the continuum of actions undertaken in advance of a disaster. Given that many of the instruments cited in the report used the term "disaster risk reduction" when referring to the three concepts, he encouraged the Special Rapporteur to consider changing the title of draft article 16 to read: "Duty to undertake measures for disaster risk reduction", which would also parallel the title of draft article 5 *ter*. The term "disaster risk reduction" could be used in the commentaries when referring collectively to the three concepts.

21. A second problem was that he did not find the sources cited in the section on prevention as a principle of international law to be compelling evidence of the existence of a duty of disaster risk reduction. That section focused exclusively on prevention, but the sources did not directly support a duty relating to mitigation or preparedness. Even with respect to prevention, however, the arguments given were unconvincing: to suggest that prevention was *per se* a general principle of international law was an unduly broad assertion. Any principle of prevention must have the effect of preventing a specific thing, such as transboundary environmental damage. Moreover, prevention was analysed in the context of international environmental and human rights law, but no explanation was given as to exactly how that type of prevention related to prevention under the current topic and whether the conditions to be met in the other contexts also applied in the current context. Even if many States had accepted obligations regarding the well-being of their nationals under the International Covenant on Economic, Social and Cultural Rights, those obligations were conditioned in article 2 of the Covenant in very important ways, only one of which appeared in draft article 16: the caveat of taking "appropriate" measures.

22. Similarly, it was quite a leap to assert that a State's treaty obligation not to arbitrarily deprive persons of life supported a general duty to prevent disasters, or more broadly, to undertake disaster risk reduction measures. At best, the statements by the Human Rights Committee and the decisions of the European Court of Human Rights cited in the report supported the narrow proposition that, in the context of the specific provisions of the relevant treaties, a State must take appropriate measures to prevent life-threatening, foreseeable and imminent disasters. Yet none of those conditions was reflected in draft article 16.

23. International environmental law was primarily concerned with the prevention of transboundary harm or harm to common areas, such as the seas, and not with harm within national boundaries. Most international environmental treaties and case law, as well as the Commission's 2001 draft articles on prevention of transboundary harm from hazardous activities,⁹¹ had no direct bearing on the way a State acted internally with regard to its own environment. Although there were some exceptions in international environmental law, the Convention on biological diversity being a prime example, such exceptions seemed to prove the general rule that States pursued their internal environmental policies as they wished, provided that they did so in a manner that was consistent with their treaty commitments and that did not cause significant harm to other States.

24. The section on prevention as a principle of international law broached subjects on which there were sharply contrasting views. The precautionary principle provided that in the event of the threat of serious or irreversible damage, a lack of full scientific certainty must not be used as a reason for postponing measures to prevent environmental degradation. That principle, too, was subject to caveats, and its meaning and effect continued to generate disagreement. The Special Rapporteur should therefore not place much reliance on the precautionary principle.

25. He also had doubts about anchoring a duty of disaster prevention to instruments that were specifically geared towards addressing climate change. Doing so would suggest that the Commission's project was directly concerned with long-term climate change, not with sudden and unforeseen events, as was in fact the case.

26. In short, rather than to use international human rights law and international environmental law to prove the existence of a legal duty with regard to disaster risk reduction, it would be better simply to recognize that a duty of preventive action existed in other fields of international law and to view them as possible analogies. Any duty to undertake measures of disaster risk reduction arose, not from other areas of international law, but from the extensive State practice that related specifically to disaster risk reduction. The sections of the report on international cooperation on prevention and on national policy and legislation were full of examples of States signing instruments and adopting laws that demonstrated their acceptance of important obligations with respect

to disaster risk reduction. That was where the duty expressed in draft article 16 should be anchored. If those examples of State practice could be regarded as revealing the emerging acceptance of a duty to prevent, then the Commission could indeed put forward that duty in draft article 16, but not without a careful explanation of its reasoning in the commentary.

27. Attention had to be paid to the sources of the duty to prevent when establishing the contours of that duty. Some disaster risk reduction measures were found in instruments related solely to human-made disasters, while other measures applied only to natural disasters. For that reason, natural and human-made disasters could either be covered jointly by draft article 16, or addressed in separate articles. It might be prudent to introduce in draft article 16 wording such as "with a view to protecting persons", so as to maintain the focus on protection of persons and not to inadvertently expand the scope to environmental protection.

28. Careful consideration should be given to the list in draft article 16, paragraph 2, of the types of actions that a State should undertake in the pre-disaster phase. The various regional and global instruments and national laws mentioned in the sixth report contained a wide range of measures which were equally as effective as the three specific actions currently identified in that paragraph. Perhaps a different list should be drawn up or a generic term such as "appropriate measures" used, with the commentary spelling out what was meant.

29. The Special Rapporteur's analysis of bilateral treaties dealing with the obligation to cooperate, when read in conjunction with the memorandum by the Secretariat,⁹² supported the idea that cooperation extended beyond disaster relief to disaster prevention, mitigation and preparedness. The contents of draft article 5 *ter* should therefore be incorporated into draft article 5 *bis*, by simply inserting at the beginning of the list of activities in which States should cooperate the phrase "the taking of measures intended to reduce the risk of disasters".

30. Mr. FORTEAU, responding to comments from members who apparently considered that, since the principle of prevention was drawn from environmental law, it concerned only transboundary harm and therefore fell outside the scope of the draft articles, said that paragraph (5) of the commentary to draft article 1 provisionally adopted by the Commission at its sixty-second session made it clear that a disaster did not have to be transboundary in nature in order to trigger the application of the draft articles.⁹³ It was therefore quite appropriate to rely on the principle of prevention in the draft articles.

31. Mr. PETER said that, unlike many of the dry, abstract topics studied by the Commission, the protection of persons in the event of disasters had great immediacy and relevance in daily life. Since the Commission had embarked upon its consideration of that subject, hundreds of disasters had caused death and destruction, at great cost to national economies, especially in developing countries.

⁹¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98. The articles on prevention of transboundary harm from hazardous activities, adopted by the Commission at its fifty-third session, are reproduced in the annex to General Assembly resolution 62/68 of 6 December 2007.

⁹² A/CN.4/590 and Add.1–3 (mimeographed; available from the Commission's website, documents of the sixtieth session), para. 26.

⁹³ *Yearbook ... 2010*, vol. II (Part Two), p. 185, para. 331.

Those factors lent urgency to the Commission's work to develop rules regulating disaster situations.

32. The terms of reference restricted the focus of the topic to activities aimed at the prevention and mitigation of the effects of disasters and the provision of humanitarian relief in their wake and did not allow for investigation of the causes of disasters. Moreover, the definition of a disaster in draft article 3 did not facilitate the search for ways to avoid disasters. Different kinds of disasters called for different kinds of intervention in terms of prevention and mitigation. Only when the real causes of disasters were perceived could effective modes of prevention be developed. The majority of recent disasters could be ascribed to human activity and climate change and had had disproportionate effects on the developing countries in terms of deaths and property damage.

33. Although the Commission had handled the issue of international cooperation for disaster relief very well in draft articles 5 to 15, it had yet to examine the consequences of assistance. The following issues should be tackled in the commentaries. First, the State providing assistance might deliberately use it as an opportunity to interfere in the internal affairs of the disaster-stricken State: fear of such interference could lead to the refusal of help. Second, negligence by the providers of assistance could also have damaging effects.

34. Bilateral agreements on disaster relief and cooperation in disaster prevention required closer scrutiny by the Commission. Some of the agreements mentioned in paragraphs 76 to 81 appeared to be of questionable value, and clarification of their efficacy was required.

35. He had no objections to the two draft articles proposed in the sixth report, or to their referral to the Drafting Committee. He hoped that the next report would contain some draft articles and commentaries on the causes of disasters, an analysis of various types of disasters and suggestions regarding means of preventing them and mitigating loss.

The meeting rose at 11.30 a.m.

3179th MEETING

Friday, 12 July 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Later: Mr. Pavel ŠTURMA (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Tribute to the memory of Sir Ian Sinclair, former member of the Commission

1. The CHAIRPERSON said that he had received the sad news of the death, on 8 July, of Sir Ian Sinclair. Sir Ian had been a member of the Commission from 1982 to 1986. He had served as legal adviser to the Foreign and Commonwealth Office of the United Kingdom and to the delegation of the United Kingdom at numerous international conferences. He had also been a member of the Institute of International Law and had published many books on public international law, including one highly regarded book on the Vienna Convention on the law of treaties⁹⁴ and another on the International Law Commission.⁹⁵ The Chairperson proposed that the meeting of 17 July be dedicated to the memory of Sir Ian Sinclair.

It was so decided.

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

Protection of persons in the event of disasters (continued) (A/CN.4/657, sect. B, A/CN.4/662, A/CN.4/L.815)

[Agenda item 4]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

2. Mr. PETRIČ said that he agreed with Mr. Peter that the topic under consideration was important and urgent. The central concern was the protection of persons, although there were many other related elements, such as State sovereignty, certain general aspects of human rights, protection of the environment and sustainable development. In essence, therefore, the draft articles and related commentaries should be concerned with the protection of persons. It was in the light of that core element that the Special Rapporteur, in his report (A/CN.4/662), had recommended the adoption of a dual-axis approach, which had provoked a number of reactions. Whatever name it was given, the approach should continue to be based on the horizontal rights and obligations of the affected State and the assisting States or entities, such as international organizations, and on the vertical rights and obligations of the State *vis-à-vis* the persons to be protected—in fact, it could be considered to be a triangular approach, since the affected State and the assisting entities should act jointly and in good faith for the benefit of those affected, namely the victims of the disaster, who were at the top of the triangle.

3. The Special Rapporteur's sixth report was excellent and well structured. In the section on prevention as a principle of international law, the Special Rapporteur had compiled the sources of international law on which the "duty to prevent" was based. In that connection, he considered that the title of draft article 16 should be reworded and he supported the suggestion made by Mr. Murphy in that regard. The sources for the draft

⁹⁴ *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester, Manchester University Press, 1984).

⁹⁵ *The International Law Commission* (Cambridge, Grotius, 1987).