Provisional

For participants only

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International Law Commission

Sixty-sixth session (first part)

Provisional summary record of the 3198th meeting
Held at the Palais des Nations, Geneva, on Monday, 5 May 2014, at 3 p.m.

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Present:

Outgoing Chairman:	Mr. Niehaus
Chairman:	Mr. Gevorgian
Members:	Mr. Caflisch
	Mr. Candioti
	Mr. El-Murtadi
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Hassouna
	Mr. Hmoud
	Ms. Jacobsson
	Mr. Kamto
	Mr. Kittichaisaree
	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

Secretariat:

Mr. Korontzis	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

Opening of the session

The outgoing Chairman declared open the sixty-sixth session of the International Law Commission.

Statement by the outgoing Chairman

The outgoing Chairman said that the consideration of the Commission's report had been a high point in the Sixth Committee's deliberations. The Committee had continued its practice of holding an interactive dialogue with those Commission members and Special Rapporteurs who were present in New York. During the discussion, which had been pursued at meetings with legal advisers, delegations had been invited to focus on the topics "Reservations to treaties" and "Crimes against humanity". At the close of the debate on the Commission's report, the General Assembly had adopted resolution 68/112, paragraph 6 of which took note of the Commission's decision to include the topics "Protection of the environment in relation to armed conflicts" and "Protection of the atmosphere" in its programme of work. In paragraph 7 of the resolution, the General Assembly invited the Commission to continue to give priority to the topics "Immunity of State officials from foreign criminal jurisdiction" and "The obligation to extradite or prosecute (*aut dedere aut judicare*)", and in paragraph 8, it took note of the inclusion of the topic "Crimes against humanity" in the Commission's long-term programme of work. The General Assembly had also adopted resolution 68/111, in which it welcomed the completion of the Commission's work on reservations to treaties and took note of the Guide to Practice on Reservations to Treaties annexed to the resolution.

Election of officers

Mr. Gevorgian was elected Chairman by acclamation.

Mr. Gevorgian took the Chair.

The Chairman thanked the members of the Commission for the honour they had conferred on him in electing him to chair the current session. He paid a tribute to Mr. Niehaus, Chairman of the sixty-fifth session, and the other officers of that session for their excellent work.

Mr. Murase was elected First Vice-Chairman by acclamation.

Ms. Escobar Hernández was elected Second Vice-Chairman by acclamation.

Mr. Saboia was elected Chairman of the Drafting Committee by acclamation.

Mr. Tladi was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/665)

The provisional agenda was adopted.

Following a brief exchange of views, **the Chairman** suggested that the Enlarged Bureau should be convened for discussions of substantive issues.

It was so decided.

The meeting was suspended at 3.50 p.m. and resumed at 4.55 p.m.

Organization of the work of the session (agenda item 1)

The Chairman drew attention to the programme of work for the first two weeks of the session. If he heard no objection, he would take it that the Commission wished to adopt the proposed programme of work.

It was so decided.

Protection of persons in the event of disasters (agenda item 4) (A/CN.4/668 and Corr.1 and Add.1)

Mr. Valencia-Ospina (Special Rapporteur), introducing his seventh report on the protection of persons in the event of disasters (A/CN.4/668 and Corr.1 and Add.1), said that the debate on the topic had been planned so as to facilitate the adoption of all the draft articles on first reading during the first part of the session. The text would then be ready for transmission to Governments for comments and observations.

His report consisted of four chapters. Chapter I briefly summarized the consideration of the topic by the Commission at its previous session and by the Sixth Committee at the sixty-eighth session of the General Assembly.

Chapter II dealt with the protection of relief personnel and their equipment and goods. It contained a proposal for an additional draft article 14 *bis*, entitled "Protection of relief personnel, equipment and goods", which read: "The affected State shall take all necessary measures to ensure the protection of relief personnel, equipment and goods present in its territory for the purpose of providing external assistance."

International humanitarian missions were confronted with significant risks for their personnel, most commonly in cases where international actors had to operate in situations of armed conflict or in States affected by a general deterioration of security conditions. Relevant in that regard was Security Council resolution 2139 (2014) of 22 February 2014, on the situation in Syria, in which the Council condemned "all acts or threats of violence against United Nations staff and humanitarian actors, which have resulted in the death, injury and detention of many humanitarian personnel". The Security Council also urged "all parties to take all appropriate steps to ensure the safety and security of United Nations personnel, those of its specialized agencies, and all other personnel engaged in humanitarian relief activities, without prejudice to their freedom of movement and access".

Clearly, the situation that had given rise to that Security Council resolution was an armed conflict, to which international humanitarian law applied. However, in other disaster situations, the possibility that relief personnel and their equipment and goods might face risks was no less real. Accordingly, such situations must be covered by the legal regime of protection being formulated by the Commission.

The specific duty to ensure the protection of personnel, equipment and goods attached to relief operations did not overlap with the parallel though distinct obligation embodied in draft article 14, namely, the facilitation of external assistance. Even if the guarantee of protection of civilian and military relief personnel and their goods and equipment might, broadly speaking, be assimilated to facilitation of external assistance, its specific nature and scope differed from the measures envisaged in draft article 14. Whereas the primary objective of that article was for the affected State to guarantee the existence of a domestic legal order facilitating external assistance, the purpose of draft article 14 *bis* was for that State to endeavour to establish the security conditions required for the conduct of relief operations, thus making it possible to guarantee the protection of personnel, equipment and goods. The proposed new draft article had been numbered 14 *bis* in recognition of its relationship with article 14.

The need to maintain as distinct the obligations pertaining to the facilitation of external assistance, on the one hand, and those concerning the protection of relief personnel, equipment and goods, on the other, was clearly reflected in international practice, as evidenced in universal, regional and bilateral treaties as well as in soft-law instruments.

Section C of chapter II dealt with categories of relief personnel and their equipment and goods in the light of the relevant provisions of international treaties and instruments and the draft articles provisionally adopted by the Commission. Some basic limitations were explicitly incorporated in the relevant treaties, for example, the requirement that relief personnel, equipment and goods should be considered as such only when they were so designated by the States parties to the treaty. However, provisions found in several of the existing treaties did not specifically include or exclude other categories of humanitarian personnel that might become part of the relief effort.

The absence of specific exclusions could not be interpreted as implying that any person or entity present in the territory of the affected State with the aim of providing support in the relief efforts could automatically qualify as being entitled to coverage under the provisions affording protection. Treaties constantly reaffirmed a basic tenet of humanitarian assistance in the event of disasters, namely, the need to secure the consent of the affected State for the provision of external assistance and the primary role of that State in the direction, coordination and supervision of assistance and relief activities undertaken by various actors. The goal of the obligation of protection embodied in the relevant international treaties was to induce States to act with due diligence, making their best efforts to guarantee the safety and security of those humanitarian actors whose support had been accepted, as well as of the goods and equipment to be used in connection with their participation in disaster relief.

Section D of chapter II made reference to the measures to be adopted by affected States to fulfil their duty to protect relief personnel and their equipment and goods. Such measures might differ in content and could imply different forms of State conduct.

A preliminary requirement was for affected States to respect the negative aspect of such an obligation, so as to prevent their State organs from being directly involved in pursuing detrimental activities with regard to relief personnel and their equipment and goods. In that sense, the obligation was one of result. The fulfilment of the obligation through the positive action to be inferred from the duty to protect raised rather more complex issues. In order to avoid detrimental activities of that kind, carried out by individuals in their private capacity, affected States were required to show due diligence in taking the necessary preventive measures. The duty to protect disaster relief personnel, goods and equipment could, therefore, be qualified as an obligation of conduct and not of result.

Obligations of conduct required States to endeavour to attain the objective of an obligation rather than to succeed in achieving it. Measures to be taken by States in the realization of their best efforts to achieve the expected objective were, consequently, context-dependent. With regard to disaster situations, a series of circumstances might be relevant in evaluating the appropriateness of the measures to be taken.

At the same time, security risks should be evaluated bearing in mind the comprehensive character of relief missions and the need to guarantee to victims an adequate and effective response to a disaster. International humanitarian actors could themselves contribute to the realization of the goal sought by adopting a series of mitigation measures geared to reducing their vulnerability to security threats. In spite of any preventive measures that might be adopted, harmful acts could still be committed against relief personnel, their equipment and goods. Those unlawful activities should be prosecuted by

the affected State, exercising its inherent competence to repress crimes committed within its jurisdiction. In that regard, a useful role might also be played for the States parties thereto by the Convention on the Safety of United Nations and Associated Personnel of 1994 and the Optional Protocol of 2005. That treaty required States parties to ensure the security and safety of certain categories of personnel and to repress specific crimes listed in the Convention, based on a prosecute-or-extradite approach. However, in order to give application to those provisions, United Nations and associated personnel must be involved in one of the missions identified in the Convention.

The applicability of the Convention to humanitarian relief personnel responding to a disaster was restricted by the requirement that the Security Council or the General Assembly should make a declaration of exceptional risk. However, to date, no such declarations had ever been adopted by either of those organs.

The Optional Protocol extended the application of the Convention, without the added requirement of a declaration of exceptional risk, to operations conducted for, among other things, the purpose of delivering emergency humanitarian assistance. While the latter scenario was relevant to a series of missions conducted in the framework of disaster response, the host State was authorized under the Protocol to make a declaration to the Secretary-General that it would not apply its provisions with respect to "an operation … which is conducted for the sole purpose of responding to a natural disaster". To date, the possibility to opt out thus offered had never been utilized by States parties.

Chapter III of the report proposed three draft articles that contained general or saving clauses relating to the interaction of the draft articles with other rules of international law applicable in disaster situations. Draft article 17, entitled "Relationship with special rules of international law", read: "The present draft articles do not apply to the extent that they are inconsistent with special rules of international law applicable in disaster situations."

Draft article 18, entitled "Matters related to disaster situations not regulated by the present draft articles", read: "The applicable rules of international law continue to govern matters related to disaster situations to the extent that they are not regulated by the present draft articles."

Draft article 19, entitled "Relationship to the Charter of the United Nations", read: "The present draft articles are without prejudice to the Charter of the United Nations."

Section A of chapter III concerned the relationship between the draft articles and special rules of international law. To seek guidance in formulating a provision aimed at harmonizing that relationship, section A examined existing multilateral treaties of a universal or regional nature, as well as "soft law" instruments and documents prepared by authoritative bodies, which addressed issues of disaster prevention and response from a general perspective. The survey made of those various instruments suggested that, whenever States and expert bodies proceeded to regulate the relationship between, on the one hand, a disaster-related instrument with a broad scope of application, and on the other hand, treaties or other rules of international law having a more specific focus, the prevalent solution had been to confer primacy to the latter category of norms. It would, after all, be incongruous to give primacy to provisions establishing general rules for international cooperation in the event of disasters, such as those contained in the Commission's draft, over the specific norms contained in bilateral or multilateral treaties.

The Commission had already addressed the relationship between the rules enshrined in its draft articles and a special branch of international law when it dealt with the possible interaction between the draft articles and international humanitarian law. In its commentary to draft article 4, the Commission had endorsed the commonly accepted view that international humanitarian law represented the special law applicable during armed conflicts and should take precedence over the draft articles. However, the Commission had

also emphasized in the same commentary that draft article 4 should not be interpreted as warranting the blank exclusion of the applicability of the draft articles during armed conflicts unfolding on a territory struck by a disaster, as that would be detrimental to the protection of the victims of the disaster. Thus, while prevalence was given to international humanitarian law as the special body of laws applicable in armed conflict, the concurrent applicability of the present draft articles was preserved during armed conflicts unfolding on a territory struck by disaster. Draft article 17 on the relationship between the draft and special rules of international law mirrored the wording of draft article 17 of the draft articles on diplomatic protection.

Section B of chapter III concerned rules of international law covering disaster-related matters not regulated by the draft articles. The subject was addressed in draft article 18, which reproduced, *mutatis mutandis*, article 56 of the articles on the responsibility of States for internationally wrongful acts. The insertion of such a provision, intended to complement draft article 17, would help to shed light on the interaction between the present draft articles and international customary law applicable in disaster situations. It would also make it clear that the content of the draft articles did not interfere with treaty law having a different scope.

Section C of chapter III concerned the relationship of the draft articles to the Charter of the United Nations, which was the subject of draft article 19, itself worded in the light of Article 103 of the Charter. Like various treaties and other international instruments concerning disasters, the draft articles highlighted the cardinal role played by some principles enshrined in the Charter — sovereign equality of States, non-intervention, cooperation and non-discrimination — in defining the rights and duties of States in the event of disasters. The inclusion of a provision reaffirming the primacy of Charter obligations might also help to strengthen the leading role played by the United Nations in disaster management.

The seventh report concluded with draft article 3 *bis*, entitled "Use of terms", the text of which was included in document A/CN.4/668/Add.1. Draft article 3 *bis* read:

"For the purposes of the present articles:

(a) 'Affected State' means the State upon whose territory persons or property are affected by a disaster;

(b) 'Assisting State' means a State providing assistance to an affected State at its request or with its acceptance;

(c) 'Other assisting actor' refers to an international organization, non-governmental organization, or any other entity or person, external to the affected State, which is engaged in disaster risk reduction or the provision of disaster relief assistance;

(d) 'External assistance' refers to relief personnel, equipment and goods, and services provided to an affected State by assisting States or other assisting actors, with the objective of preventing, or mitigating the consequences of disasters or meeting the needs of those affected by a disaster;

(e) 'Equipment and goods' includes supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects necessary for the provision of disaster relief assistance and indispensable for the survival and the fulfilment of the essential needs of the victims of disasters;

(f) 'Relevant non-governmental organization' means any organization, including private and corporate entities, other than a State or governmental or intergovernmental organization, working impartially and with strictly humanitarian

motives, which because of its nature, location or expertise, is engaged in disaster risk reduction or the provision of disaster relief assistance;

(g) ‘Relief personnel’ means specialized personnel, including military personnel, engaged in the provision of disaster relief assistance on behalf of an assisting State or other assisting actor, as appropriate, having at their disposal the necessary equipment and goods;

(h) ‘Risk of disasters’ means the probability of harmful consequences or losses with regard to human life or health, livelihood, property and economic activity, or damage to the environment, resulting from a disaster.”

The inclusion of a provision on the use of terms was in conformity with the Commission’s past practice. Such a provision could be formulated most efficiently when all of the draft articles on a given topic had been adopted. Since the current draft included provisions on the text’s scope (draft article 1) and purpose (draft article 2) and on the definition of disaster (draft article 3), the draft article on the use of terms was provisionally numbered 3 *bis*, without prejudice to its ultimate location.

In elaborating his proposal, he had focused first on terms that, according to the commentaries, had already been singled out for definition, on terms often encountered in the draft articles themselves and on terms of art. On that basis, he had identified the following key terms: “affected State”, “assisting State”, “other assisting actor”, “external assistance”, “equipment and goods”, “relevant non-governmental organization”, “relief personnel” and “risk of disasters”. He had next examined the commentaries to ascertain whether some elements of a definition had already been adopted by the Commission before turning to the applicable definitions found in other instruments. Having recourse to all of those sources, he had arrived at a list of composite definitions, either taking elements from different sources, as appropriate, or using one as a basis but modifying it to reflect the language and decisions embodied in the draft articles already adopted.

Mr. Hmoud asked what legal value the Special Rapporteur assigned to draft article 14 *bis*: did it fall into the category of customary law?

Mr. Valencia-Ospina (Special Rapporteur) said that he would respond to the question when summing up the debate, but in the meantime, he looked forward to hearing Mr. Hmoud’s thoughts on the subject, given his experience as one of the framers of the Optional Protocol.

Mr. Murase said that he saw two problems with draft article 14 *bis*. First, a clear distinction should be drawn between civilian and military relief personnel, since a distinct legal regime governed each. Secondly, attention should be paid not only to the protection of relief personnel, but also to the protection of the population of the affected State from any harmful acts that might be committed by such personnel.

The exceptions or special benefits enjoyed by civilian relief personnel, who were subject to the domestic law of the affected State, were distinct from the privileges and immunities enjoyed by military personnel by virtue of agreements concluded between the sending and affected States. Draft article 14, paragraph 1 (a), referred, incorrectly, to the “privileges and immunities” of both civilian and military personnel, and that wording should be amended.

Following major disasters, military forces were virtually the only means for carrying out relief activities. As self-supporting units, they were well placed for conducting widespread operations systematically and swiftly, unlike civilian personnel, representatives of NGOs and volunteers.

In paragraph 43 of his report, the Special Rapporteur referred to the use of “armed escorts” in relief operations, but the activities requested of military forces in actual disaster situations extended beyond the mere provision of armed escorts. In addition, the assertion

in that paragraph that the security concerns surrounding relief operations in disaster situations were generally far less serious that those present in situations involving armed conflict was not entirely accurate. It overlooked the fact that in some cases, desperate disaster victims turned into mobs, looting stores and attacking police stations. Lastly, the Special Rapporteur indicated in paragraph 44 of his report that the preservation of law and order was a duty reserved for the military and police forces of the affected State. However, it was not always possible to maintain those forces in a full state of readiness. Therefore, affected States should always be prepared to receive foreign military assistance.

It was admittedly a sensitive matter for an affected State to invite a foreign military force into its territory without a status-of-forces agreement (SOFA). The lack of a SOFA was also a source of insecurity for the sending State. Yet in the immediate aftermath of a disaster, the affected State often did not have the capacity to negotiate a SOFA. It was for that reason that he had suggested in 2012 that the Commission should develop a model SOFA and annex it to the draft articles. The States concerned could then agree to the provisional application of the model until a more detailed agreement could be negotiated, and the latter could be worked out more expeditiously thanks to the availability of the model. Although his proposal had not been accepted, the draft articles should at least refer to the need for States concerned to prepare a SOFA in the pre-disaster phase in order to facilitate the swift reception and deployment of a foreign military force and to safeguard the population of the affected State from illegal acts that might be committed by the military personnel of the sending State.

Consequently, he proposed the insertion of a new draft article 14 *ter*, which would read: “States are encouraged in the pre-disaster phase to negotiate a status-of-forces agreement (SOFA) for relief activities conducted by military personnel in the event of disasters, detailing, among others, exemption from entry and departure procedures, freedom of movement, wearing of uniforms, exemption from duties or taxes and export-import restrictions on goods and equipment, other privileges and immunities, communication issues, use of vehicles, vessels and aircrafts, and temporary domestic legal status, including the scope of immunity from jurisdiction of the host country and settlement of claims”.

With regard to the saving clauses in draft articles 17, 18 and 19, consideration should be given to merging them into a single article. He was in favour of referring all the proposed articles, including article 3 *bis* on the use of terms, to the Drafting Committee.

The meeting rose at 6 p.m.