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Held at the Palais des Nations, Geneva, on Wednesday, 7 May 2014, at 10 a.m.

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Present:

Chairman:	Mr. Gevorgian
Members:	Mr. Al-Marri
	Mr. Caflisch
	Mr. Candioti
	Mr. El-Murtadi
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Hassouna
	Mr. Hmoud
	Mr. Kamto
	Mr. Kittichaisaree
	Mr. Laraba
	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. Vázquez-Bermúdez
	Mr. Wisnumurti

Secretariat:

Mr. Korontzis	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

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

The Chairman invited the Commission to resume its consideration of the seventh report on the protection of persons in the event of disasters (A/CN.4/668 and Corr.1 and Add.1).

Mr. Murphy said that the issue of protection of relief personnel and their equipment and goods was not well anchored in national laws. Laws that dealt with disaster situations focused on the admission of personnel and goods and generally did not address their protection. Any protection available for disaster relief personnel and goods deployed from one State to another was embedded in relevant bilateral or multilateral international agreements. Accordingly, it made sense to look to international agreements and instruments for guidance, as the Special Rapporteur was doing.

Those instruments reflected a consistent belief that States receiving assistance in disaster-related operations in which foreign personnel were deployed were under an obligation consisting of three elements: a legal obligation to ensure protection, or at least to take reasonable steps to protect; the imposition of that obligation upon the State receiving the assistance; and the inclusion of both personnel and their goods and equipment within the scope of the obligation. There appeared to be no significant contrary practice in which States receiving assistance denied any responsibility to take appropriate measures for the protection of personnel or goods. In his view, the obligation had thus passed into customary international law. Draft article 14 was the logical place to capture it.

The question arose, however, as to whether the exact text of the proposed draft article 14 *bis* accurately expressed the obligation. The wording of the article — "the affected State shall take all necessary measures to ensure the protection of relief personnel, equipment and goods" — was rather strong and might be viewed as imposing an obligation of result. Consequently, a failure by a State to take the measures necessary to ensure the required protection would constitute a violation of the obligation.

However, it was clear from the Special Rapporteur's report that two types of obligation were at issue: an obligation of result and an obligation of conduct. For matters directly under its control, the affected State was under an obligation of result, requiring it, for example, to prevent its own organs from being directly involved in detrimental activities with regard to relief personnel. By contrast, with respect to the activities of non-State actors, the affected State was under an obligation of conduct, which only required it to undertake due diligence in endeavouring to guarantee protection.

The distinction was borne out to a certain extent by treaty practice. Treaties that addressed situations when the conduct of the receiving State itself posed the major risk to foreign personnel formulated the obligation as one of result: the State must ensure protection. By contrast, treaties dealing with disaster situations in which such risks came from non-State actors adopted a more cautious approach, only requiring States, for example, to make their best efforts to provide protection.

However, the distinction between obligations of result and of conduct was not reflected in the proposed draft article 14 *bis*. The proposed language — an obligation to "take all necessary measures to ensure the protection of relief personnel" — could be construed as an obligation of result, whereas he believed the Special Rapporteur had intended to blend obligations of result and conduct. In order to avoid ambiguity, the draft article could be reworded to contain two different standards: one imposing an obligation of result with respect to the affected State's own treatment of relief personnel and equipment, and the other imposing an obligation of conduct with respect to risks from non-State actors.

The current wording of draft article 14 *bis* might suffice for the former, while one of the formulations proposed by Mr. Park might be appropriate for the latter.

With respect to draft articles 17, 18 and 19, he agreed with Mr. Murase that consideration should be given to collapsing them into a single article, since they overlapped.

If one assumed that the draft articles would not ultimately become a treaty, then draft article 17 would probably not be necessary, since even if some or all of the draft articles were found to be customary international law, States could conclude treaties that would have precedence. However, if one assumed that the draft articles would become a treaty and one wanted prior agreements to prevail over the new rules to be contained therein, then draft article 17 should be retained. The Drafting Committee might then consider replacing the words "special rules of international law" with "treaties" in order to avoid overlap with draft article 18.

As to draft article 18, he would insert the word "customary" before "international law" in order to make clear that the draft articles did not, as *lex specialis*, wholly displace other rules in customary international law. Draft article 19 seemed unnecessary, given that the Charter of the United Nations trumped customary law and other conflicting treaties.

Draft articles 3 *bis*, 14 *bis*, 17, 18 and 19 should all be referred to the Drafting Committee.

Mr. Al-Marri said that the domestic legal order of the affected State must enable the provision of international assistance in situations of disaster, but more importantly, measures should be taken to ensure the safety and security of humanitarian personnel deployed in the territory of that State throughout the relief operation.

The host State's consent was required for the provision of external assistance. Such a requirement was contained in various instruments defining the legal framework of international assistance and relief operations in affected States, which comprised the obligation of non-State actors to seek the affected State's consent to receive assistance; the role of that State in coordinating assistance efforts with relief actors; and its duty to protect relief personnel and their equipment and goods. In that regard, the Special Rapporteur had distinguished between an obligation of result and an obligation of conduct. A duty to protect could be equated with a commitment to act. Beyond its efforts to protect relief personnel, their equipment and goods, therefore, a State was required to prosecute the perpetrators of illegal acts.

Generally speaking, the draft articles should reflect the pertinent norms contained in international instruments in order to avoid any discrepancy. Similarly, they should echo the norms of customary international law.

The report was characterized by clarity, balance and inclusiveness. The proposed new draft articles were acceptable and were compatible with all the draft articles already adopted by the Commission.

Mr. Hmoud said that, on the whole, he endorsed the new draft articles proposed by the Special Rapporteur and recommended sending them to the Drafting Committee.

Regarding draft article 14 *bis*, he said that the capacity to conduct relief operations was significantly hampered if the safety of relief personnel, equipment and goods was at risk. Hence the need for the draft articles to provide sufficient legal protection for the latter without placing an undue burden on the affected State during situations of vulnerability, when its capacity to assume legal responsibilities might be undermined. He agreed with the Special Rapporteur that the affected State's obligation in that context was one of conduct, not of result. That obligation was centred on the positive measures that the affected State

had to take to prevent attacks on and mitigate risks to the safety and security of relief workers, including any risks that might result from acts by the State's own organs or agents.

However, the proposition set out in paragraph 36 went beyond such safety and security measures, suggesting that affected States should extend immunity from their jurisdiction to relief personnel. That had no basis in general international law, and several of the instruments cited in the report made it clear that the duty of protection was distinct from the issue of immunity. It was therefore important to clarify in the commentary to draft article 14 *bis* that its scope was confined to measures designed to ensure the safety and security of relief personnel and their equipment and goods and did not extend to immunity. The affected State and relief actors involved must be left to resolve the question of immunity in their bilateral and multilateral agreements. That would be consistent with the premise of the entire set of draft articles, which created a well crafted balance between the rights and obligations of the various actors.

He agreed with the Special Rapporteur that the goal of draft article 14 *bis* was to create an obligation of conduct, giving the affected State a margin of appreciation in deciding which measures needed to be adopted to ensure the safety of relief workers, as long as it exercised due diligence in difficult and unpredictable circumstances. The wording of the text should reflect those considerations.

Turning to the other new draft articles, he agreed that the special rules in bilateral and multilateral instruments should prevail over any general rule in the draft articles that was inconsistent with them. Draft article 17 merely expressed that general rule on *lex specialis*, however, and he was therefore flexible about its inclusion. Draft article 18 appeared useful in that it indicated that the rules contained in the draft articles were intended to be binding and general in nature. While not strictly necessary, draft article 19 might have positive policy consequences regarding the primacy of the legal principles contained in the Charter.

With respect to article 3 *bis*, the definition of "affected State" should include not only the State's territory but also the territory under its control. That was especially pertinent since the protection offered under other legal regimes might not be sufficient during a disaster situation.

Mr. Wisnumurti said that he supported the inclusion of draft article 14 *bis* in the set of draft articles, but thought that its wording should be less prescriptive, in order to more adequately reflect the principle that the obligation to protect relief personnel, equipment and goods was an obligation of conduct, not of result. One way to accomplish that would be to replace the words "necessary measures" with "appropriate measures". A more detailed description of the nature of that obligation could then be included in the commentary to the draft article.

He shared the Special Rapporteur's view that, in order to minimize the security risks for relief personnel, the affected State should be required to show due diligence by taking the necessary preventive measures. Similarly, before sending relief personnel to the affected State, the assisting State should take measures to reduce any danger that such personnel might take advantage of the chaos caused by the disaster to engage in unlawful activities that were detrimental to the security interests of the affected State.

He concurred with the Special Rapporteur that the manner in which draft article 17 was currently worded was to be preferred to a "without prejudice" clause. Draft article 18 was essential for further clarifying the scope of the draft articles and supplementing them, and draft article 19 was an important umbrella provision aimed at ensuring that the draft articles did not undermine the basic principles embodied in the Charter of the United Nations. With those comments and suggestions, he was in favour of referring all five draft articles to the Drafting Committee.

Ms. Escobar Hernández suggested that, given the close relationship between draft article 14 on facilitation of external existence and the proposed draft article 14 *bis*, they might be recast as two paragraphs of a single article. That would have the advantage of providing a full view of the obligations imposed on the affected State regarding the provision of external assistance in its territory. She fully endorsed the notion that the obligation enunciated in draft article 14 *bis* was one of conduct; however, that did not preclude taking into consideration its clearly results-based aspect, which was to ensure the protection of relief personnel, equipment and goods. Lastly, for the wording of the draft article, she shared the preference expressed by others for the expression "appropriate measures" over that of "necessary measures".

Draft articles 17, 18 and 19 were all aimed at defining the relationship between the draft articles and other international rules that might be applicable to disasters and the protection of persons in the event of disasters. Although the Special Rapporteur had made a laudable attempt to catalogue all the permutations of that relationship, with a formulation for each, she was not sure that such an endeavour was either desirable or necessary. In her view, draft article 19 was superfluous; the primacy of the obligations arising from the Charter of the United Nations was achieved through the direct application of Article 103 of the Charter and did not depend on the establishment of additional rules of international law. Moreover, in view of the Commission's status as an organ of the United Nations, any reference to the compatibility of the Charter with draft articles elaborated by the Commission was totally unnecessary.

It was unclear why proposed draft articles 17 and 18 had been based on separate models, and the Special Rapporteur's arguments to support that choice were not entirely convincing. The distinction between the two contingencies described those texts would have been justified had each referred to a different category of rules, such as rules of customary and treaty-based law, but that did not seem to be the case. She therefore did not see the utility of including draft article 18 in the project. Perhaps the Drafting Committee might find language that could cover both contingencies in a single article, whose focus would primarily be that of draft article 17, or else resolve the Special Rapporteur's concern by means of a reference in the commentary to draft article 17. Subject to that suggestion, she was not opposed to referring all three draft articles to the Drafting Committee, if that was the consensus of the majority of the members of the Commission.

Generally speaking, she shared the Special Rapporteur's views with regard to draft article 3 *bis* but had several comments to make. First, with regard to the definition of "affected State", she proposed that a reference to the territory under the State's jurisdiction or territory under its jurisdiction or control should be inserted ["*territorio sometido a su jurisdicción*" o "*territorio sometido a su jurisdicción o control*"]. The stated objective of the draft articles fully confirmed that they referred to all the territories that might be under the jurisdiction or control of the affected State, which might not be limited exclusively to its territory itself.

Secondly, there was a contradiction in draft article 3 *bis*, subparagraphs (c) and (f), between the meaning ascribed to the phrase "any other entity or person" in the first instance and to "private and corporate entities" in the second. In subparagraph (c), the implication was that the subjects in question were distinct from NGOs, whereas in the second instance, they were given as an example of a relevant NGO. Although the Special Rapporteur explained the reasons for referring to those entities differently in each case, she did not find his arguments to be sufficiently persuasive. If the objective was to include any private entity that provided disaster relief assistance, irrespective of the way that that entity had been set up, then it was sufficient to use the term "non-governmental organization" without further addition or qualification. Moreover, subparagraph (f) added nothing new to the generic concept of non-governmental organization that was already defined in

subparagraph (c). On the contrary, the addition of the adjective "relevant" seemed risky and not very useful, given the variety of NGOs that participated in the system of disaster relief assistance, not to mention the practical problems that could arise when attempting to determine whether a particular NGO was "relevant". Perhaps the concerns that had prompted the Special Rapporteur to include that definition in the draft article and to draw a distinction between subparagraphs (c) and (f) might be resolved in the commentary to draft article 3 *bis*.

Thirdly, she agreed with the view that draft article 3 and draft article 3 *bis* should be recast as a single article. Maintaining draft article 3 as a separate provision was justified only if it was intended to define the scope of application of the draft articles; however, that did not appear to be the Special Rapporteur's aim. Thus, if the Commission was going to adopt a general article on the use of terms, as was proposed in draft article 3 *bis*, the definition of "disaster" should be included with the other definitions and, given its importance, it should be placed at the top of the list.

Mr. Šturma said he agreed with the Special Rapporteur that the obligation of protection was an obligation of conduct. As a result, he would prefer the obligation imposed on the affected State to be for it to take "all appropriate measures" rather than "all necessary measures". That said, the difference between obligations of conduct and obligations of result referred to by Mr. Murphy was worth taking up in the Drafting Committee. He recommended referring draft article 14 *bis* to the Drafting Committee.

With regard to the general provisions contained in draft articles 17, 18 and 19, he did not find it necessary to have two separate provisions, one on *lex specialis* (art. 17) and the other on other applicable rules of international law (art. 18). While the first was fully justified and well supported by examples of treaty practice, the second seemed superfluous and unclear. Although similar provisions had been included in article 56 of the text on responsibility of States for internationally wrongful acts, the two situations were actually quite different: State responsibility represented a large corpus of customary norms of international law, whereas the present topic relied mostly on treaty law and soft law instruments, thus, to a large extent, involving the progressive development of international law. The outcome of the Commission's work on the topic should preferably be a framework convention that included general rules.

As to draft article 19, even though it might seem unnecessary to include an express reminder that the draft articles were without prejudice to the Charter of the United Nations, he was nevertheless in favour of retaining it. Despite the fact that, in most cases, the protection of persons and disaster response operated on the basis of a voluntary offer of external assistance and its acceptance by the affected State, that legal framework could change radically. For example, a disaster might be of such magnitude that the Security Council adopted a binding resolution on an international operation to provide humanitarian assistance to its victims. In such a case, the Security Council resolution would take precedence over the general rules contained in the draft articles and even over special bilateral or multilateral agreements. He was consequently in favour of referring draft articles 17 and 19 to the Drafting Committee.

He would also recommend referring draft article 3 *bis* to the Drafting Committee, and was convinced that it would benefit from several drafting improvements, such as the insertion in subparagraph (a) of the words "or under whose jurisdiction" and "environment".

Mr. Tladi suggested that the legal situation outlined by Mr. Šturma would prevail, even without the inclusion of the draft article 19 in the draft articles: under Article 103 of the Charter of the United Nations, a Security Council resolution of the kind just described would always override the draft articles, would it not?

Mr. Šturma said that he considered draft article 19 to be useful but not essential. He agreed that the legal value of the obligations arising from the Charter would be the same, irrespective of whether an express provision such as the one in draft article 19 was included in the draft articles.

Mr. Hassouna said that a separate provision on the protection of relief personnel, equipment and goods, such as that proposed in draft article 14 *bis*, was an apt addition to the draft articles and was in keeping with the main universal and regional treaties that dealt with disasters. Although the Special Rapporteur had explained in his report that the measures adopted by the affected State to provide such protection might differ in content, the language of the proposed text itself was rather terse, providing merely that the affected State "shall take all necessary measures". He agreed with the proposal to replace the term "necessary measures" with "appropriate measures" and proposed that a clear indication as to what sorts of measures were meant should be included in the commentary. He further proposed to indicate explicitly in the draft article that the affected State must have consented to the presence of any relief personnel, equipment and goods that were in its territory.

The question of whether and under what circumstances the protection of relief personnel should be reserved to the military and police forces of the affected State could benefit from further elaboration in the commentary or even in the draft article itself. In addition, draft article 14 *bis* should indicate that the necessary measures were related to security concerns, while leaving it to the commentary to explain the context. The Special Rapporteur's point that international humanitarian actors could help to mitigate security risks by taking steps to reduce their own vulnerability might also be highlighted in the commentary.

The affected State's international obligation to "ensure the protection" of relief organizations under article 14 *bis* should be limited by the State's capacity during the disaster. In some major disaster situations, the State's ability to meet its basic obligations towards its citizens was questionable at best. Although the report used flexible language, suggesting that "best efforts" and "cooperation" were at the centre of the obligations in article 14 *bis*, the wording overall seemed to create a more mandatory framework.

The report did not resolve the problem of unwillingness or inability on the part of the sending State to ensure the protection of the aid it provided. In such a case, it might have to negotiate a bilateral agreement with the affected State or despatch aid through a neutral organization like the United Nations, for example.

Since draft articles 17 and 18 dealt with closely related matters, they could be merged. In addition, draft article 18 should specify which were the "applicable rules": rules of general international law or other sources of international law, such as custom.

He questioned the need for a separate provision like draft article 19, although he recognized that it would strengthen the leading role of the United Nations in disaster management. The fact that obligations under the Charter took precedence over others was universally recognized. However, if the draft articles were subsequently adopted in the form of a convention, a reference to the Charter might be included in the preamble.

The methodology used for establishing the definitions in draft article 3 *bis* was commendable, but he shared the view that, in subparagraph (a), a reference to the environment should be added and the term "territory" should be defined as the territory under the effective jurisdiction of the State. The criterion of effective jurisdiction, rather than mere territory, defined the obligation of a State towards individuals, as recognized in the case law and in paragraph 7 of the addendum to the report. While he understood the Special Rapporteur's wish to avoid a debate on extraterritorial jurisdiction, which was more the exception than the rule, he considered it advisable to make the scope of the State's

obligations as comprehensive and clear as possible. Subparagraph (f), containing the definition of relevant non-governmental organizations, raised some difficult issues and needed to be refined, and some other terms frequently used throughout the draft articles, such as "victims of a disaster", could be added to the list of definitions. In conclusion, he supported the referral of all the draft articles to the Drafting Committee.

Mr. Saboia said that in his seventh report, the Special Rapporteur had given convincing factual examples and legal precedents for the need to have a separate provision on protection of relief personnel, equipment and goods from the security risks to which they might be exposed in the aftermath of serious calamities. He endorsed the comment made earlier that only those States and non-State actors that had actually received the consent of the affected State to their presence in its territory were entitled to such protection. He also endorsed the suggestion to replace "all necessary measures", with "all appropriate measures", a more flexible formulation. However, it was difficult and perhaps unnecessary to draw a distinction between what constituted an obligation of conduct and an obligation of result. In paragraph 36 of the report, the Special Rapporteur referred to the negative obligations assumed by the affected State with regard to the conduct of its own agents, as opposed to the positive obligations applicable to the control of other agents. He understood the former to be stricter and subject to a higher threshold of diligence than the latter. Ultimately, however, what mattered most was the circumstances on the ground and the ability and willingness of the affected State to exercise its authority.

Articles 17 to 19 could be referred to the Drafting Committee. The same applied to draft article 3 *bis*. Like other members, he was in favour of including a reference to the territory over which the State exercised jurisdiction, to make the text more comprehensive and more in line with other instruments on the protection of the human person.

El-Murtadi observed that much of the debate had focused on draft article 14 *bis* and how to define an obligation of conduct as opposed to an obligation of result. Concerning draft articles 17 to 19, he had no particular difficulty with the wording of draft article 17, which reflected that used in the draft articles on diplomatic protection. He saw no need for further discussion on draft article 19, as the primacy of the obligations under the Charter of the United Nations over obligations under other international agreements was self-evident. The terminology issue raised in connection with draft article 3 *bis* should be dealt with in the Drafting Committee. In conclusion, he was in favour of the referral of all the draft articles to the Drafting Committee.

Mr. Candioti said that the Commission was about to conclude its work on a very topical subject, as borne out by a recent United States Government report on the proliferation of natural disasters caused by climate change. He agreed on the need for draft article 14 *bis* and welcomed Mr. Murase's comment on the importance of a distinction between military and civilian personnel and Mr. Murphy's remark on the characteristics of State compared with non-State agents. As to the wording of draft article 14 *bis*, the proposal to replace "all necessary measures" with "all appropriate measures" would afford greater flexibility and should be taken up in the Drafting Committee, which should also consider the question of qualifying the term "territory".

He shared the view that, since they were general provisions, articles 17 to 19 were not necessary but useful. If they were included in the text, he would prefer them to appear as separate articles.

Draft article 3 *bis* was essential but required further work by the Drafting Committee. Under the current topic, the term "person" referred exclusively to human beings, whereas in the area of diplomatic protection there was a distinction between natural and legal persons; perhaps that point could be clarified in the commentary. Furthermore, since there would eventually be more than 20 draft articles, the Drafting Committee might

wish to reorganize them and consider the possibility of drafting a preamble to provide greater clarity.

Mr. Singh said that in principle he supported the inclusion of draft article 14 *bis*. The seventh report described in detail the legal basis for the duty of the affected State to protect the personnel, equipment and goods of the assisting State or entity. The draft articles adopted so far recognized a basic tenet of humanitarian assistance: that external assistance during a disaster situation took place with the consent of the affected State, which also had the primary role in the control, supervision and coordination of relief activities. Paragraph 32 of the report stated that once the affected State had accepted the offers of assistance submitted by relevant external actors, it should endeavour to guarantee the protection of the relief personnel, equipment and goods involved. He endorsed the statement in paragraph 38 of the report that the duty to protect relief personnel, their goods and equipment was an obligation of conduct and not of result, requiring States to act in a reasonably cautious and diligent manner to guarantee protection by attempting to avoid harmful events.

He was in favour of the referral of draft article 14 *bis* to the Drafting Committee, subject to the review of the "all necessary measures" clause. He expressed support for draft article 17 and its referral to the Drafting Committee and endorsed Mr. Murase's suggestion to merge it with draft articles 18 and 19. Lastly, he agreed that draft article 3 *bis* should also be referred to the Drafting Committee.

Mr. Kittichaisaree said that the draft articles contained in the seventh report must be understood in the light of the draft articles provisionally adopted thus far, especially with respect to sovereignty and the consent of the affected State. He endorsed the views expressed by Mr. Park on draft articles 17 and 18 and shared the doubts of Mr. Hassouna and other members about the need for draft article 19.

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

Mr. Saboia (Chairman of the Drafting Committee) said that the Drafting Committee on the topic of protection of persons in the event of disasters was composed of Mr. Forteau, Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Ms. Jacobsson, Mr. Murase, Mr. Murphy, Mr. Park, Mr. Petrič, Mr. Singh and Mr. Vázquez-Bermúdez, together with Mr. Valencia-Ospina (Special Rapporteur) and Mr. Tladi (Rapporteur), *ex officio*.

The meeting rose at 12.55 p.m.