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Summary record of the 3201st meeting

Topic:
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which reflected the wording used in the articles on diplomatic protection.³⁹ 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.

47. 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".

48. 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.

49. 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.

50. Mr. SINGH said that, in principle, he supported the inclusion of draft article 14 *bis*. In his seventh report, the Special Rapporteur 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.

³⁹ General Assembly resolution 62/67 of 6 December 2007, annex. See the draft articles on diplomatic protection adopted by the Commission at its fifty-eighth session and the commentaries thereto in *Yearbook ... 2006*, vol. II (Part Two), pp. 24 *et seq.*, paras. 49–50.

51. 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.

52. Mr. KITTICHAISAREE said that the draft articles contained in the seventh report must be understood in 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 (*continued*)

[Agenda item 1]

53. Mr. SABOIA (Chairperson 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. Kittichaisaree, Ms. Jacobsson, Mr. Murase, Mr. Murphy, Mr. Park, Mr. Petrič, Mr. Singh, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Mr. Valencia-Ospina (Special Rapporteur) and Mr. Tladi (Rapporteur), *ex officio*.

The meeting rose at 12.55 p.m.

3201st MEETING

Thursday, 8 May 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Al-Marri, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, 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.

Protection of persons in the event of disasters (*continued*) (A/CN.4/666, Part II, sect. C, A/CN.4/668 and Add.1, A/CN.4/L.831)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

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

2. Mr. VÁZQUEZ-BERMÚDEZ said that the obligations covered by draft articles 14 and 14 *bis* did not overlap with each other. Nonetheless, the obligation provided for in the latter was an obligation of conduct and, in order not to impose a disproportionate burden on an affected State, when it was already in a difficult situation, it would be preferable to request it to take, not “all necessary measures”, but rather “appropriate measures” at its disposal.

3. In order to define the relationship between the draft articles and the special rules of international law that dealt with similar matters (draft article 17), it would be preferable, as Mr. Forteau had suggested, to choose a simpler expression establishing the primacy of *lex specialis*. Draft article 18 was not essential because the scope of the draft articles was well defined in article 1. Draft article 19 was not necessary either, since Article 103 of the Charter of the United Nations was applicable without the need for a reference thereto. The proposal to draft a preamble warranted consideration.

4. In draft article 3 *bis*, reference should be made to territories under control, since if a disaster took place at sea or in a place such as Antarctica, for example, there would be no affected State. Furthermore, the definition should mention the environment, which could also be affected by disasters.

5. Mr. KAMTO said he also considered that the phrase “all necessary measures” in draft article 14 *bis* was maximalist and risked confining the affected State to a strict obligation that it would not always be able to fulfil. In certain cases, some measures might be deemed necessary but were not available to or at the disposal of the affected State.

6. Draft article 17, which indicated that the draft articles set forth dispositive norms that would be applicable when the required norms were not provided for under international law or *lex specialis*, clearly limited the scope, which was useful. Draft article 18, which explained that the draft articles did not establish a comprehensive regime with regard to the protection of persons in the event of disasters, should also be retained. On the other hand, draft article 19, gave rise to ambiguity by needlessly explaining that the draft articles were “without prejudice to the Charter of the United Nations”, when Article 103 of the Charter of the United Nations already addressed the hierarchy issue; stating that fact could imply that it might be otherwise. Finally, the definitions contained in draft article 3 *bis*, even though they needed to be refined, were very useful.

7. Mr. CANDIOTI said that referring to “appropriate measures” would not resolve the problem that an affected State might be unable to take those measures. Moreover, it raised the issue of the degree of State responsibility in the event of non-fulfilment of the obligation to protect. Perhaps reference could be made instead to “measures at the disposal of the affected State taking into account the specific situation”.

8. Mr. FORTEAU observed that, in many respects, the debate was conditioned by choices already made by the Commission concerning draft article 16, where the

commentary indicated that the phrase “necessary and appropriate measures” was intended to reflect the obligation of due diligence and the different ways in which States could give effect to that obligation.⁴⁰

9. Mr. MURPHY said that there were other differences in terminology between the two draft articles, such as the use of the verb “ensure” in draft article 14 *bis*, which emphasized the strict nature of the obligation. A more maximalist approach should be adopted with regard to the instructions that a State could give its police forces to protect relief personnel, whereas a more flexible formulation would be preferable with respect to States’ expected capacity to ensure protection against acts by non-State actors.

10. Mr. NOLTE said that the verb “ensure” was used in all the treaties cited by the Special Rapporteur and that, together with “appropriate measures”, it did not emphasize the strict nature of the obligation.

11. Mr. PETER said that the issue was knowing how far to go in terms of the protection of relief personnel, in other words, the scope of the duty of the affected State. As noted by other members, the phrase “necessary measures” was rather strong and commanding. Instead of replacing it, it was necessary to clarify its meaning in draft article 14, according to which an affected State should take the necessary measures “within its national law”. In draft article 14 *bis*, one could refer to “all necessary measures” to take “in the circumstances of the disaster involved and its impact” or “within its means and capacity”. That would take into account the fact that different types of disasters called for different measures and that States had different capacities.

12. With regard to the definition of a “relevant non-governmental organization” in draft article 3 *bis*, he noted that, in the confusion of a disaster situation, it was difficult to assess the impartiality and motives of NGOs, never mind the fact that it was hardly a priority at that time. Furthermore, it was important not to be too prescriptive as to the nature, location or expertise of those considered capable of providing assistance. Finally, he questioned the usefulness of referring to “special rules of international law” in draft article 17.

13. Mr. MURPHY, noting that several members had said that they were in favour of including the words “or otherwise under the jurisdiction or control” after “territory” in draft article 3 *bis*, subparagraph (a), asked what those notions covered, even if it seemed at first glance that the objective was not to cover territories occupied following an armed conflict because that was already mentioned in draft article 4.

14. Mr. HMOUD noted that the aim of draft article 4 was not to create an exception for occupied territories, but to fill in possible gaps where the rules of international humanitarian law were not applicable.

15. Mr. NOLTE recalled that he had been the first to raise that matter. His idea had been to draw attention to

⁴⁰ *Yearbook ... 2013*, vol. II (Part Two), p. 61, paras. (9) and (11) of the commentary to draft article 16.

cases where the territory of a sovereign State affected by a disaster was not under that State's control but under that of a third State, whether following an occupation linked to armed conflict or by virtue of a treaty. It was important to cover those scenarios and to know which State was bound by the obligation set out in article 14 *bis*.

16. Mr. FORTEAU emphasized that the commentary to draft article 4 was very clear in that regard, since it stated that, while the purpose of the draft articles was not to regulate the consequences of armed conflict, they could nonetheless apply in cases where the rules of international law in force, in particular the rules of international humanitarian law, were not applicable.⁴¹

17. Ms. ESCOBAR HERNÁNDEZ said she shared that view, since a major catastrophe occurring within the context of armed conflict could not be ruled out. The cases in which international humanitarian law or the draft articles were applicable should nonetheless be clearly indicated. The concept of “jurisdiction” was a good solution, since it would allow all scenarios to be covered without any need to question the legitimacy of its exercise, while giving the draft article the broadest possible scope, even though, as emphasized by Mr. Nolte, it would be better not to illustrate the concept using examples, in order to avoid a political debate.

18. Mr. FORTEAU said that the issue raised by Mr. Murphy might pose a more general problem since, as a result of draft article 9, paragraph 1, the affected State was obliged, by virtue of its sovereignty, to ensure the protection of persons on its territory. If the concept of territory covered territorial control, and not only territorial sovereignty, there would be a problem between that paragraph and draft article 3 *bis* that would need to be resolved at an appropriate moment.

19. Mr. KITTICHAISAREE said that, in that regard, it was also important to take into consideration the case where a disaster occurred on the territory of a State beset by an armed conflict whose existence, for one reason or another, was not recognized by that State. The Commission should therefore reflect on how to treat situations where it was unclear whether the rules of international humanitarian law were applicable and consider drafting a proposal providing that in such a case, at the very least, international human rights law was applicable.

20. Mr. VALENCIA-OSPINA (Special Rapporteur) suggested, in view of the comments and concerns expressed, which would be duly reflected in the commentaries, that the plenary meeting refer to the Drafting Committee the five proposed draft articles, as requested by the overwhelming majority of members. In order to conclude the debate, he wished to briefly restate the arguments given in support of each draft article.

21. With regard to draft article 14 *bis*, unanimously supported by the members, the question had been raised as to whether it was logical to impose the duty of protection on an affected State when external assistance was provided

following withholding of consent that was deemed arbitrary. That question implied reopening the debate on a text that had already been adopted on first reading. He considered it appropriate to draw attention to Security Council resolution 2139 (2014) of 22 February 2014, in which the Security Council recalled “that arbitrary denial of humanitarian access and depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access, can constitute a violation of international humanitarian law”. In order to respond to the concerns of certain members (tenth paragraph of the preamble), he deemed it opportune to replace the adjective “necessary” with “appropriate”. Regarding the extent of the obligation and the circumstances to be taken into account in order to define the measures to be taken in that regard, reference could be made to the behaviour of relief personnel—as already emphasized in the seventh report—or other circumstances, in order to determine the margin of appreciation granted to States; listing specific measures did not seem to be appropriate. With regard to mitigation measures to be adopted by humanitarian actors themselves, it was sufficient to mention them in the commentary, since they digressed too far from the scope of the draft articles. The relationship between draft articles 9 and 14 *bis* could be further clarified in the commentary by reflecting the position expressed in paragraph 30 of the report.

22. Regarding the proposal to split draft article 14 *bis* into two separate provisions according to the purpose of the obligation in question, it would be sufficient to draw a clear distinction in the commentary between situations in which State bodies were directly responsible for acts of violence against humanitarian actors and those in which the failure to adopt preventive measures could lead to a violation by the affected State of its obligation of conduct. In addition, both scenarios would be covered if reference was made to “appropriate” measures.

23. At the current stage, it was preferable not to merge draft articles 14 and 14 *bis*, whose provisions had a different approach and purpose. As to the relevance of human rights to draft article 14 *bis*, insofar as the protection of relief personnel could enhance the human rights of victims of disasters by enabling them to receive humanitarian assistance, there was clearly a valid policy and legal argument, which was already in the report. The commentary could mention that in order to justify the inclusion of draft article 14 *bis*.

24. With regard to the need to draw a distinction between the protection of the people of the affected State against harmful acts that could be committed by relief personnel, the Commission had already considered the matter in a different context, that of draft articles 7 (Human dignity) and 8 (Human rights) which clearly already responded to the concerns expressed, since they implied standards of behaviour for humanitarian actors aimed at preventing their activities from harming the local population. Furthermore, it was largely a matter of the “common” repression by States of harmful activities carried out on their territory. Even if relief personnel were accorded privileges and immunity, they were obliged to comply with the national law of the affected State. The commentary could mention that point and refer to draft articles 7 and 8.

⁴¹ *Yearbook ... 2010*, vol. II (Part Two), p. 188, para. (3) of the commentary to draft article 4.

25. Concerning the necessity to distinguish between civilian and military personnel in draft article 14 *bis*, he said that the distinction had no legal basis. Regarding the use of armed escorts to provide security services, he drew the Commission's attention to basic best practices on the use of armed escorts to protect humanitarian actors, which were among the main documents drafted by the Inter-Agency Standing Committee (IASC).⁴² Those documents should be mentioned in the commentary to avoid any "militarization" of humanitarian assistance, since otherwise draft article 14 *bis* might induce States to attribute too much importance to matters of security, thereby creating additional hurdles for humanitarian personnel.

26. With respect to the need for the States concerned to prepare a status-of-forces agreement in the pre-disaster phase to regulate the "relief activities conducted by military personnel in the event of disaster" and the proposal for a new article 14 *ter*, he pointed out that it was hardly valuable to focus solely on military personnel, who often played only a marginal role in relief operations, and that the Commission had already rejected the idea of drafting a model agreement in 2012. The commentary could nonetheless encourage States to conclude such agreements.

27. Regarding the proposal to merge draft articles 17, 18 and 19, he said that aside from the fact that the first two addressed different legal problems, the provisions of the draft articles served different interests and that it would be preferable to keep them separate. It would also be preferable not to depart from the usual practice of the Commission, which had thus far addressed such final provisions in separate articles.

28. The preference stated by one member for inserting a "without prejudice" clause in draft article 17 had received scarcely any support and it would be preferable to maintain the text in its current form. Regarding the utility of draft article 18, he noted that certain examples given in paragraph 77 of the report, particularly the rules on the responsibility of both international organizations and States and certain provisions on the law of treaties, were good illustrations of rules of international law that might apply. Furthermore, he drew attention to article 23 of the Treaty on the Functioning of the European Union addressing consular assistance and the decision of the European Council 95/553/EC,⁴³ which provided for consular assistance, including repatriation of "distressed" citizens of the European Union (art. 5, para. 1 (e)).

29. Draft article 19 was an umbrella clause that was found in other texts previously adopted by the Commission. Nevertheless, given that certain members had questioned its relevance, it would be advisable for the Drafting Committee to look into the matter. Finally, with regard to draft article 3 *bis*, the different comments and proposals by members would be taken up by the Drafting Committee.

⁴² IASC Non-Binding Guidelines on the Use of Armed Escorts for Humanitarian Convoys, 27 February 2013, available from the website of the United Nations Office for the Coordination of Humanitarian Affairs: www.unocha.org.

⁴³ *Official Journal of the European Communities*, No L 314 of 28 December 1995, decision of the representatives of the Governments of the Member States meeting within the Council of 19 December 1995, regarding protection for citizens of the European Union by diplomatic and consular representations, p. 73.

30. The CHAIRPERSON said he took it that the Commission wished to refer draft articles 3 *bis*, 14 *bis*, 17, 18 and 19 to the Drafting Committee, taking into account the comments made during discussion.

It was so decided.

Expulsion of aliens (*continued*)* (A/CN.4/669 and Add.1, A/CN.4/670, A/CN.4/L.832)

[Agenda item 2]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

31. The CHAIRPERSON invited the members of the Commission to comment on the Special Rapporteur's ninth report on expulsion of aliens (A/CN.4/670).

32. Mr. NOLTE congratulated the Special Rapporteur on his ninth and probably last report on the topic of expulsion of aliens. In that report, the Special Rapporteur examined, with his usual lucidity, the observations and comments made by Governments on the draft articles that had been provisionally adopted and on the commentaries thereto (A/CN.4/669 and Add.1). A significant number of States' observations and comments forcefully challenged the current version of the draft articles. In his view, the numerous specific proposals and observations made by Governments should be debated in the Drafting Committee, not by the Commission in plenary meetings.

33. The Commission should continue to call the outcome of its work on the topic "draft articles". That in no way prejudiced the status and legal value of the provisions they contained. That status and value depended primarily on what States did with the draft articles after their final adoption by the Commission. States could convene a conference in order to draft a treaty, but they could also turn the draft articles into guidelines, or even conclusions. It was up to them to decide, and the Commission should not try to anticipate that decision. The real question was whether and, if so, to what extent, the Commission was claiming that the draft articles expressed current customary international law. States' concerns in that respect were legitimate and had to be addressed. For that reason, while he disagreed with the view of the United States that the project should not "ultimately take the form of draft articles", he was convinced that they were right in asking the Commission to make it clear which aspects of the draft articles reflected progressive development, so as not to leave "the incorrect impression" that all the other draft articles (not so designated) reflected codification.⁴⁴ It would be going too far, however, to follow the recommendation of the United States that the commentary should "include a clear statement at the outset" that the draft articles substantially reflected "proposals for progressive development of the law and should not, as a whole, be relied upon as codification of existing law".⁴⁵ However, it would be honest and prudent to add, in the introductory part of the commentary, a statement to the effect that:

* Resumed from the 3199th meeting.

⁴⁴ See A/CN.4/669 and Add.1, general comments and final form of the draft articles.

⁴⁵ *Ibid.*, final form of the draft articles.

“1. In the following commentary, the Commission has strived to indicate which provisions of the draft articles it considers to be codification of existing law and which provisions it considers to be proposals for progressive development”, and “2. Where the Commission has not given such a specific indication, no presumption applies that the respective provision concerned reflects either codification or progressive development, but its legal status must be derived from the sources which are quoted in support of it in the commentary”.

34. In his opinion, the most fruitful way for the Commission to proceed would be first to have the Drafting Committee consider the individual draft articles and their respective commentaries in light of States’ observations, and then to indicate, as far as it was possible and practicable, if they reflected codification or progressive development. Given that proposed general approach, he would comment only very briefly on some specific draft articles and would reserve his further comments for deliberations in the Drafting Committee.

35. With regard to draft article 1, there was merit in the argument that the distinction between aliens lawfully present in a State and those unlawfully present required clarification. Nevertheless, that was no reason to modify the scope of the draft articles. The recommendation of the United States that draft articles 2 and 11 should be harmonized, mainly in order to establish the intentionality requirement, should be heeded. The Special Rapporteur had demonstrated his readiness to work in that direction. It was also necessary to respond to some States’ concerns about the phrase “the non-admission of an alien other than a refugee”.⁴⁶ As the United States had commented, draft article 3, as it stood, could give the wrong impression that the Commission considered all the draft articles to be binding rules of international law. The deletion of the word “other” would, however, have the opposite effect. The Drafting Committee should examine that point. In draft article 5, paragraph 3, as suggested by the United Kingdom, a distinction should be drawn between aliens who were lawfully present in a country and those who were not. Lastly, several substantial concerns voiced by States with respect to draft article 11 should be addressed.

36. He again thanked the Special Rapporteur for his excellent work and hoped that the Commission would, to quote Tomuschat, allow the draft articles to remain “permeated by a spirit of enlightened modernism which takes the rule of law and human rights seriously, without placing them ahead of any other consideration of public interest”.⁴⁷

37. Mr. FORTEAU said that, in reality, even though expulsion was a legitimate means of protection for States, it was a serious act that had far-reaching repercussions on the life of the persons who had undergone it. Legally speaking, expulsion was an area of general international law where rules had existed for more than a century and, no matter how sensitive a subject it might be, there were no objective grounds for taking issue with the choice of

adopting draft articles. Even disagreement with some of the views of the codifier was no reason to deny that codification was possible, as some States had done. Generally speaking, what was extremely problematic was that the draft articles made no provision for possible derogations along the lines of article 4 of the International Covenant on Civil and Political Rights and it allowed no exceptions to the rights set forth, for example, in draft article 26.

38. Moving on to the individual draft articles, he welcomed the fact that States had not called into question draft article 4, which constituted a substantial step forward, since it made any breach of domestic law a breach of international law in accordance with the interpretation of the applicable treaty law by the International Court of Justice in the case concerning *Ahmadou Sadio Diallo*. On the other hand, he agreed with several States and members of the Commission that it would be wiser to exclude refugees from the scope of the draft articles through a general “without prejudice” clause, because the draft articles were very likely to be inconsistent with refugee law.

39. In draft article 9, it would be inadvisable to refer to the principle of the non-expulsion of nationals. He even wondered whether that provision which, in fact, concerned nationals, really came within the scope of the draft articles. He was also dubious of the merits of draft article 15, paragraph 1 of which did not seem to reflect State practice. Draft article 19 should draw a distinction between detention and detention conditions, and the restrictions on a State’s right to resort to detention for expulsion purposes should be spelled out before the separate matter of detention conditions was addressed.

40. As far as draft article 26 was concerned, it was difficult to state in paragraph 1 (a) that an alien had the right to receive notice of the expulsion decision, since the relevant case law, in particular the judgment rendered in 2010 in the *Ahmadou Sadio Diallo* case, made no reference to that procedural requirement, and it had no place in an international law text. On the other hand, he supported the amendment to paragraph 4 proposed by the Special Rapporteur.⁴⁸

41. The amendment proposed by the Special Rapporteur to draft article 27, which would qualify the scope of the suspensive effect of an appeal, the absolute nature of which had given rise to some legitimate concerns, might make it possible to retain that provision.⁴⁹ When the Commission considered that matter, it would be worth bearing in mind the judgment rendered in 2013 by the European Court of Human Rights in the case of *De Souza Ribeiro v. France*.

42. Lastly, he still thought that draft article 29 was rooted not in the primary, but in the secondary rules of the law of international responsibility, in particular the rules on compensation, and he was inclined, as he had been in 2012, to propose that it be deleted and that its substance be included in the commentary to draft article 31.

The meeting rose at 1 p.m.

⁴⁶ *Ibid.*, specific comments on the draft articles.

⁴⁷ C. Tomuschat, “Expulsion of aliens: the International Law Commission’s draft articles”, in G. Jochum, W. Fritzemeyer and M. Kau (eds.), *Grenzüberschreitendes Recht—Crossing Frontiers: Festschrift für Kay Hailbronner*, Heidelberg, C. F. Müller, 2013, p. 662.

⁴⁸ See the 3199th meeting above, p. 8, para. 16.

⁴⁹ *Ibid.*, p. 8, para. 17.