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For participants only

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International Law Commission

Sixty-eighth session (first part)

Provisional summary record of the 3292nd meeting

Held at the Palais des Nations, Geneva, on Tuesday, 3 May 2016, at 10 a.m.

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Present:

Chairman: Mr. Comissário Afonso

Members: Mr. Caflisch
Mr. Candiotti
Mr. El-Murtadi
Ms. Escobar Hernández
Mr. Forteau
Mr. Hassouna
Mr. Hmoud
Mr. Huang
Ms. Jacobsson
Mr. Kamto
Mr. Kittichaisaree
Mr. Kolodkin
Mr. Laraba
Mr. McRae
Mr. Murase
Mr. Murphy
Mr. Niehaus
Mr. Nolte
Mr. Park
Mr. Peter
Mr. Petrič
Mr. Saboia
Mr. Singh
Mr. Šturma
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Mr. Wako
Mr. Wisnumurti
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

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

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

The Chairman invited Mr. Vázquez-Bermúdez to read out the composition of the Working Group on Identification of customary international law.

Mr. Vázquez-Bermúdez (Chairman of the Working Group on Identification of customary international law) said that the Working Group would be composed of the following members: Mr. Forteau, Mr. Hmoud, Mr. Murase, Mr. Kittichaisaree, Mr. Commissário Afonso, Mr. Kolodkin, Mr. Murphy, Sir Michael Wood and Mr. Park, *ex officio*.

Protection of persons in the event of disasters (agenda item 2) (continued) (A/CN.4/697)

The Chairman invited the Commission to resume its consideration of the eighth report on the protection of persons in the event of disasters (A/CN.4/697).

Mr. Forteau thanked the Special Rapporteur for the meticulous care he had taken in preparing his report. He said that, in line with the structure of the report, he would make some general remarks before commenting on some of the draft articles, restricting himself to matters of principle, while leaving it to the Drafting Committee to consider the more technical issue of the formulation of the draft texts, including the draft preamble, which at the current stage required no particular comment, except that it would be useful to refer therein to the needs of persons affected by disasters. The Committee could perhaps also suggest how to renumber the draft articles. In that regard, he expressed support for the proposal to place draft article 16 before draft articles 14 and 15, as set out in paragraph 273 of the Special Rapporteur's report.

In general, he noted with satisfaction that States had supported the text adopted on first reading, which should allow the Commission to adopt the draft articles on second reading without too many difficulties during its current session. Although some adjustments were needed, the delicate balance between the rights of persons and the interests of States that the Commission had achieved in 2014 could nevertheless be maintained.

He expressed support for explicitly including the concept of the responsibility to protect in the draft articles but noted that, overall, States did not share that view. The concept was, however, implicit in the draft, particularly if articles 2, 6, 7, and 12 to 16 were read together.

As some members of the Commission would doubtless recall, the hypothesis that a State would arbitrarily refuse to accept external assistance was unlikely, and it was therefore important to focus on measures to encourage, incentivize or promote prevention rather than on the rights and obligations of States. One could not, however, completely ignore the obligations of States in the event of disasters, which were also mentioned in the Sendai Framework for Disaster Risk Reduction, particularly paragraph 6 thereof.

The main general issue to consider was the purpose of the draft articles, as that would determine the final form that they would take. Some international institutions had questioned whether the draft articles were sufficiently operational — and therefore sufficiently detailed — and whether it would not be better to supplement them with more detailed annexes. The Commission could take up that matter in the years to come but, for the moment, it had achieved its objective, namely adopting a set of framework rules that States would subsequently be able to apply in practice, including by adopting domestic legislation or operational agreements. There was therefore no need at the current stage to reorient the Commission's work as set out in the draft articles adopted on first reading.

With regard to the adjustments to be made to some of the draft articles, various States and international organizations had pointed out, first, that reference should be made to the concept of resilience. In fact, that concept occurred frequently within the Sendai Framework and, albeit to a lesser extent, in United Nations General Assembly resolution 70/107. In those texts, building resilience was almost systematically associated with disaster risk prevention, with the Sendai Framework itself making it one of its four priorities. It would be useful for the Special Rapporteur to give his view as to whether the concept should be included in the draft articles and to indicate which of the provisions it should be linked to, if appropriate.

On draft article 2, while some States had wanted, for the sake of balance, to see the rights of States mentioned alongside the rights of persons, he considered that that would not be appropriate. In its relationship with persons, the State did not, strictly speaking, have “rights”; as a legal person, it had a function to fulfil, namely serving the general interest. In the present case, the function of the State was to protect persons affected by a disaster. It was therefore entirely justified for article 2 to focus on the rights of persons and their essential needs, without mentioning the “rights” of States.

Draft article 3, which had been the subject of many comments, should be merged with draft article 4. It would also be necessary to specify that the definition of disasters, as well as all the definitions set out in draft article 4, were valid only for the purposes of the draft articles under consideration. He was not convinced by the Special Rapporteur’s argument that the definition of disasters merited a separate, autonomous provision, as that would give too much importance to that definition while, in practice, it might be necessary or appropriate to refer to the draft articles in borderline situations where, even if no real disaster within the meaning of the draft articles had occurred, they could nevertheless serve as a useful guide. The core of the draft articles was not to define disasters, but rather to lay down principles and framework rules guiding the action to be taken in the event of a disaster. That was an argument for moving the content of draft article 3 into draft article 4.

With regard to draft article 4, he agreed with the European Union and Switzerland in saying that the reference to military personnel in subparagraph 4 (e) should be accompanied by the clarification given in the Oslo Guidelines and the MCDA Guidelines, under which international military assets should be used only as a last resort, when civilian alternatives had been exhausted, as recalled in the preamble to General Assembly resolution 70/107. Unlike the Special Rapporteur, however, he considered that, as it concerned a substantive clarification and not an element of a definition, it should not be inserted into draft article 4 but rather into draft articles 15 or 16, or else should form the subject of a new provision.

Neither did he share the Special Rapporteur’s view that the reference to risk reduction should be deleted from subparagraphs 4 (d), 4 (e) and 4 (f). Insofar as reduction was the subject of at least two draft articles (draft articles 10 and 11), the reference should be kept.

As several States had observed, draft article 6 was probably too general and too vague, particularly with regard to the possibility of derogating from certain human rights under treaty provisions. Adding the terms “protection” and “fulfilment”, as proposed by the Special Rapporteur, was an improvement. It could also be specified that persons were entitled to the respect, protection and fulfilment not of “their human rights”, which was a rather vague formulation, but of “their rights under international human rights law”, which would more clearly express the fact that, in certain cases, treaty provisions permitting certain derogations might apply, under the conditions and within the limits set out in the treaties concerned.

As various States and international organizations had remarked, the wording of draft articles 8, 9 and 10 on cooperation should be reviewed. The aim of those provisions should

also be clarified. While he was convinced that they followed a logical order, as the Special Rapporteur had underlined in his report, he considered that in practice their wording did not really make that order clear. In the interests of clarity, one might for instance alter the title of draft article 9 to read “Cooperation in the area of relief and assistance in the event of disasters” and incorporate that clarification into the text of the article by inserting, after “cooperation”, the phrase “in the area of relief and assistance”. That would make it easier to highlight the fact that article 8 carried a general obligation to cooperate in two respects: with regard to relief and assistance (the subject of article 9) and with regard to disaster risk reduction (the subject of draft article 10).

Draft article 11 was one of the fundamental provisions of the draft articles. Indeed, only risk reduction could effectively protect persons from disasters. It would therefore be useful to maintain the reference in the title to a duty to reduce risk, which was perhaps more a matter of progressive development of law than codification, but which seemed welcome, even necessary. The same did not hold true of the clarification that risk reduction was intended to “prevent the creation of new risk and reduce existing risk”, which the Special Rapporteur had added. That wording actually made it harder to understand the duty to reduce the risk of disasters. After all, one might think that there was a duty not only to reduce existing risk, but also to prevent it. Draft article 11, including its title, should therefore not be amended.

With regard to draft article 12, some States had considered it preferable to talk about the “responsibility” rather than the “role” or “duty” of the State. Given that the term “role” was not terribly meaningful, legally speaking, it would be better to replace it throughout draft article 12 with the term “responsibility” and to replace the term “duty” with the term “responsibility” in paragraph 1. That would allow the double principle underpinning the draft article to be brought out more clearly: the State, by virtue of its sovereignty, had the role of protecting persons; it must also be in charge of providing such protection. That double principle was perfectly embodied in the word “responsibility”, which encompassed both a duty and a privilege. It was also the term used in the Sendai Framework, as well as in resolution 6 adopted at the Thirty-second International Conference of the Red Cross and Red Crescent in December 2015.

Taking into account the comments made by States, the Special Rapporteur was proposing to turn draft article 13 into a “self-judging” provision by specifying that it was up to the affected State to determine, subjectively, whether a disaster exceeded its response capacity. That proposal was excessive. Between the purely objective formulation of draft article 13 adopted on first reading and the entirely subjective one proposed by the Special Rapporteur, it was doubtless possible to find a happy medium by allowing a “certain discretionary flexibility”, to use the European Union’s phrase. It could, for instance, read “To the extent that a disaster manifestly exceeds its national response capacity”, which would mean that the State affected would not be the only judge but that the obligation provided for in draft article 13 would be triggered only if the State manifestly could not, whatever it might say, tackle the disaster alone.

With regard to draft article 14, there was no need to specify in paragraph 2 that consent could not be withdrawn arbitrarily, as the regime for withdrawing consent was based on draft article 19, not draft article 14. A sentence to that effect could be added at the end of draft article 19. In order to reassure those States that considered paragraph 2 of draft article 14 too vague, it could stipulate that only consent to external assistance “offered in accordance with the present draft articles” could not be refused arbitrarily. In particular, that would meet the legitimate concerns expressed by Thailand and other States that were worried about the risk of unsolicited or inappropriate offers of assistance.

Draft article 16 had prompted contrasting reactions. He recalled that he found it surprising to impose a duty to seek external assistance on an affected State, as draft article

13 did, without at the same time imposing the slightest duty on other States to provide such assistance. Aside from the fact that in some respects that approach represented a retrograde step in terms of current international law, it created an inconsistency insofar as draft article 13 required the affected State to seek external assistance, while draft article 16 did not impose a duty on anyone to offer it. That inconsistency was even more striking given that, under the draft articles, offers of assistance were intended to occur in very specific and particularly exceptional circumstances, namely when the affected State could not itself respond to a disaster, defined in draft article 3 as an event “resulting in widespread loss of life, great human suffering and distress, displacement, or large-scale material, economic or environmental damage”. In such a situation, international solidarity was required, obviously within the bounds of each State’s respective capacities.

Some years previously, when the Commission had asked them the question, some States had affirmed that there was no obligation to provide external assistance. The compromise reached on first reading was to admit that there existed, at the very least, a right to provide such assistance. The Special Rapporteur was currently proposing to take a further step backwards, under the guise of pragmatism, and to say that States and other actors “may address an offer of assistance”. That wording left the draft articles as a whole slightly more unbalanced.

Another possible, and perhaps more satisfying, compromise would be to retain the wording proposed by the Special Rapporteur as paragraph 1 and to add a paragraph 2 stipulating that “to the extent that a disaster exceeds the response capacity of the affected State within the meaning of article 13, other States should offer (or: are encouraged to offer) all necessary assistance to that State, within the limits of their respective capacities”.

He had taken good note of the Special Rapporteur’s proposal to indicate, in draft article 19, that there existed a right to terminate external assistance, but considered that that right must be qualified. Under the terms of draft article 14 (2), State consent to assistance could not be withheld arbitrarily, and a similar restriction should apply to the right to terminate assistance.

With regard to draft articles 20 and 21, while it was indeed necessary to clarify draft article 20 as indicated by the Special Rapporteur, the proposed formulation seemed somewhat complex, particularly because it seemed to limit special and regional law to treaty rules alone. It would probably be sufficient to state that the draft articles were “without prejudice to other rules of international law applicable in the event of disasters, at the universal, regional or bilateral level”. As to the question of how to deal with situations of armed conflict under draft article 21, it was clear that there were two diametrically opposed views. The amendment proposed by the Special Rapporteur was welcome in that it would enable States’ points of view to be reconciled.

The final form that the draft articles and recommendations that the Commission would submit to the General Assembly should take would of course depend on the eventual content of the draft articles as decided following the debate in plenary, the work of the Drafting Commission and discussions on the commentaries. That said, he considered that the draft articles did not really lend themselves to the development of a treaty instrument. He was particularly conscious of the observation made by the International Federation of Red Cross and Red Crescent Societies, which was concerned that “an effort aimed at the development of a treaty might distract from developments at the national level”. He would be more inclined to recommend that the General Assembly should adopt a “framework declaration” incorporating the Commission’s draft articles, with possible amendments, since such an instrument would be a better fit with the content and objectives of the draft articles. That would also enable close cooperation to be established between the Commission and the Sixth Committee on a given subject and to show that, between simply

taking note of the Commission's drafts and adopting a treaty, there were intermediate options which should be explored.

Mr. Kittichaisaree asked Mr. Forteau to clarify what he meant by saying that the responsibility to protect was implicit in some of the draft articles, as it was a contentious issue in the Sixth Committee and several States were opposed to the inclusion of that concept in the draft articles. As could be seen from the Outcome Document of the 2005 World Summit and the report produced by the Secretary-General in 2009, the responsibility to protect rested on three pillars: the State carried the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement; the international community had a responsibility to encourage and assist States in fulfilling that responsibility; and the international community had a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from those crimes. If a State was manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations. The Sixth Committee had underlined time and again that the absence of protection in a situation of national disaster could not be equated to the absence of protection against war crimes, crimes against humanity, genocide or ethnic cleansing. In the past, the Legal Counsel of the United Nations had also told the Commission that the concept of the responsibility to protect had been used for the first time in the context of Libya. He feared that the Sixth Committee might be led to believe that the concept fell within the scope of some of the draft articles, even if the Special Rapporteur had said that that was not the case.

Mr. Forteau explained that he was not proposing that the concept of the responsibility to protect should be explicitly included in the draft articles, but that nothing prevented the Commission from extending the principle underpinning that concept to the area of disasters. It also seemed to him that the principle that lay at the heart of the responsibility to protect was also found in the draft articles, as various members of the Commission had observed since the start of debates on the subject.

Sir Michael Wood thanked the Special Rapporteur for his eighth report and his introduction to it. The report showed that the Commission was well on the way to adopting the draft articles on second reading during the present session, and the many comments and suggestions received showed how much interest there was in the topic. Overall, the Special Rapporteur's recommendations seemed balanced and sensible. In particular, he agreed with the Special Rapporteur's approach to the comments and observations received from States and international organizations. For the most part, if the changes suggested by the Special Rapporteur were adopted, the draft articles would be significantly improved. Although some comments had unfortunately been received very late, they should be taken into account as far as possible in either the draft articles or the commentaries, as some were very detailed and raised interesting points.

He would mention only those points where he had questions about the Special Rapporteur's recommendations. He looked forward to working within the Drafting Committee to produce a final text for adoption by the Commission and to working on the commentaries, which he hoped the Commission would have adequate time for, given that it would be the final reading.

Beginning with a general observation that perhaps concerned the commentaries more than the draft articles, he observed that, given that the Commission had drawn mainly from non-binding legal instruments, it should perhaps be stated, at the outset of the commentaries, that the draft articles represented in large part progressive development of the law rather than codification.

He would be in favour of merging draft articles 3 and 4, which had been suggested by a number of States, as it seemed odd to separate the definition of “disaster” from the other definitions. In any event, as France had suggested, it needed to be made clear that the term “disaster” was being defined for the purposes of the draft articles, which would avoid any *a contrario* argument drawn from the inclusion of those words in draft article 4.

The addition, in draft article 4, of the words “military assets shall be used only where there is no comparable civilian alternative to meet a critical humanitarian need” was hardly convincing. First, it seemed out of place to include a substantive rule in an article given over to definitions, and, if it were to be retained, it should be moved, for example into the commentary. Secondly, the wording “shall be used only where” seemed too strong for a text that might become a legally binding convention. The Oslo Guidelines did not go that far, and they considered the matter in a specific context. They were non-binding statements of policy, primarily intended for use by United Nations humanitarian agencies and their partners. Could it really be right to suggest that States would breach a rule of international law if they used military assets with the consent of the affected State, simply because civilian assets were also available? Would such a rule assist disaster relief? Thirdly, even if it were a matter of a simple statement of policy, States might well have military assets trained for and intended to provide disaster relief, in which case why not use them? As with domestic disaster relief action, many factors would need to be taken into account in deciding whether to use military or civilian assets: speed, availability, skills, efficiency, cost, etc. If the Commission nevertheless decided to retain such a rule, whether in the draft article or in the commentary, the wording should be softened, for instance to something like “should only be used” or “may in particular be used”, and the commentary would need to explain the reasons for the rule and what was meant by the expression “there is no comparable civilian alternative”.

With regard to draft article 5, on human dignity, he shared the view that the concept was overarching and that it would be better placed in the preamble.

Turning to draft article 6, he said that the expression “entitled to the respect, protection and fulfilment” did not really seem appropriate and that it would be preferable to keep the original text. Even if, according to the Special Rapporteur, it was the “standard formula”, the expression was not often used by States and, in English, the notion of “fulfilling human rights” was an odd one.

With regard to draft article 7, the changes suggested were not improvements. The suggested title lacked the clarity and simplicity of the original; the latter was unlikely to lead to confusion with international humanitarian law, as one State feared, since it was perfectly clear that the draft articles were addressing disasters, not international humanitarian law. Indeed, introducing a new term (“humanitarian response”) into the text might itself lead to confusion. Moreover, he was not entirely clear what the “no harm” principle would mean in practice, and he doubted that it could really be seen as a humanitarian principle alongside the principles of humanity, neutrality and impartiality. As the Nordic States had explained, the term seemed to cover a range of disparate matters, and he was not sure what it added in practice. If it were to be retained, it would need very careful explanation in the commentary. Nor did he understand what the word “independence” meant in paragraph 140 of the report. Nothing, at least within the report, explained why the Special Rapporteur proposed to add the term. Finally, adding “in particular” after the word “impartiality” did not improve the original wording, which treated non-discrimination as something distinct from impartiality, while the new formula seemed to reduce impartiality essentially to non-discrimination. If a logical link was needed, then perhaps “including” would be better than “in particular”.

Concerning draft article 8, he considered it unwise to refer expressly to the United Nations Emergency Relief Coordinator. What would happen if there was a reorganization

or if the position was renamed? It would be sufficient, and more prudent, either to have a more generic reference or to include the specific reference in the commentary.

In draft article 13, the change suggested by the Special Rapporteur raised two quite important points. First, to refer to a determination by the affected State rather than to an objective standard might render any obligation set forth in the draft article illusory, and the draft article would become a discretionary provision, as Mr. Forteau had pointed out. Secondly, in the amended version, the words “to the extent that” had been lost, despite the fact that, based on paragraph (3) of the commentary, the Commission had evidently attached some importance to them on first reading. The Drafting Committee would do well to consider the wording suggested by Mr. Forteau, which retained that phrase.

He did not think it was a good idea to add the expression “good faith” to draft article 14 (3). It went without saying that any offer of assistance must be made in good faith and not for some improper motive. That reflected a basic principle of international law and there was no particular reason to include the word in that specific provision.

Draft article 21 raised a most important issue on which clarity was needed: the relationship between the draft articles and international humanitarian law. There was a disconnect between the draft article and the commentary that should be remedied. He was not convinced that the changes suggested by the Special Rapporteur were an improvement and considered that it would be useful to refer them to the Drafting Committee.

With regard to the draft preamble proposed by the Special Rapporteur, the fifth paragraph, or at least its first part, did not seem appropriate. It might be right to reaffirm the primary responsibility of the affected State in the preamble, but it seemed out of place to give such prominence to the principle of non-intervention in what was only a brief preamble dealing with disaster relief. Those matters had been dealt with in a careful and balanced manner throughout the draft articles, in particular in draft article 14, and the paragraph in question might upset that balance. At the end of the preamble, a provision, inspired by the 1969 Vienna Convention on the Law of Treaties, might be added to the effect that: “The rules of customary international law will continue to govern questions not regulated by the present [articles]”.

Turning to the final form of the draft articles, he noted the Special Rapporteur’s recommendation that an international convention be concluded and his explanation that that would be in line with the Commission’s practice since 2001 with regard to various texts on different topics. In most, if not all, of those cases, the Commission had recommended a two-stage approach by the General Assembly: first, the endorsement of the draft articles by annexing them to a resolution, then consideration of the question of the adoption of a convention. In that respect, it would all depend, as Mr. Forteau had said, on what text resulted from the consideration of the draft articles by the Drafting Committee. He proposed that the Special Rapporteur should reflect on the matter informally before making a specific recommendation to the Commission for adoption, probably towards the end of the session.

In conclusion, he expressed support for referring the draft articles and the draft preamble to the Drafting Committee, as recommended by the Special Rapporteur.

Mr. Park thanked the Special Rapporteur for his report, which properly summarized and reflected the comments and observations made by States, international organizations and non-governmental organizations (NGOs). He would air some general views on certain points that he considered important and would raise his specific suggestions within the Drafting Committee.

Recalling that the draft articles were intended to cover the entire disaster cycle, he said that draft articles 1 and 2 did not clearly reflect that idea, particularly the fact that the

draft articles also covered the prevention phase. Even though the Special Rapporteur had explained that the definition of “disaster” was couched in very general terms and that there was no need to make a specific reference in the text to “disaster risk reduction”, he considered it preferable to clarify the scope and purpose of the draft articles.

Although he knew that some States were not in favour of draft article 11, his only question was whether, under paragraph 1 thereof, a third State might invoke a State’s failure to fulfil its “duty to reduce the risk of disaster” as a breach of an international obligation. If so, the structure of the draft article should be re-examined, as there were no identical and uniform measures or international obligations for all States in that area.

He agreed with the Special Rapporteur that certain provisions should not be discussed any further. In his view, no substantive amendments should be made to draft articles 13 and 14, which were the result of intensive debates and were not intended to change the basic nature of contemporary international relations. Those draft articles reflected the delicate balance achieved between the principles of sovereignty and non-intervention, on the one hand, and the protection of human rights, on the other. If the debate were reopened, it would doubtless complicate the adoption of the draft articles on second reading.

He nevertheless wished to seize the opportunity to clarify his position on those important provisions. First, he considered that draft article 13 was *lex ferenda* and that it did not reflect customary international law. Unfortunately, seeking external assistance to the extent that a disaster exceeded a State’s response capacity was still, at the beginning of the twenty-first century, not an obligation, but rather a recommendation addressed to the affected State. In that context, it could not be accepted that a refusal to seek assistance would incur State responsibility. Secondly, even though the Special Rapporteur had amended the wording of paragraphs 2 and 3 of draft article 14, it still did not provide clear answers in all cases: what would happen, for instance, if there was no functioning government to provide consent or if consent was withheld arbitrarily? Moreover, given that the expression “good faith”, which had been inserted in paragraph 3, could, because of its subjectivity, give rise to conflict between the affected state and the State offering assistance, it would be better to delete it.

Draft article 21 was one of the most controversial points. Some States could not see clearly the relationship or demarcation of the scope of application between the draft articles and international humanitarian law. By amending the draft article, the Special Rapporteur had no doubt intended to resolve the inconsistencies between the original wording of the article (“The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.”) and the relevant commentary (“[The present draft articles] can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not apply.”). He understood that, in the amended text proposed by the Special Rapporteur, the preferential application of the rules of international humanitarian law in cases of armed conflict was maintained and that draft article 21 was applicable in complex situations of armed conflict and natural or environmental disasters where the rules of international humanitarian law did not explicitly address disaster-related issues. Consequently, if a conflict arose between various rules, the rules of international humanitarian law would always prevail over the draft articles. He was not certain whether that legal hierarchy would always be acceptable or helpful for the effective protection of victims of a humanitarian crisis.

In draft articles 5, 8, 13, 16 and 19, the Special Rapporteur had replaced “competent international organizations and relevant non-governmental organizations” with “other assisting actors”, which appeared in draft article 4 (c). That change had the merit of concision, but the original wording was the result of intensive debate within the Drafting

Committee, and the expression “other assisting actors” included not only international organizations and NGOs, but also any other entity or individual external to the affected State. Given that the latter category of actor was not mentioned in draft articles 8 (Duty to cooperate) or 16 (Offers of external assistance), the matter required further examination before a global change was made.

With regard to the final form of the draft articles, he favoured a legally binding instrument. Guidelines could obviously provide States with useful information, but it should be remembered that there was currently no universal and legally binding convention on the topic. In his view, the draft articles set out clear rights and obligations for all and struck an appropriate balance for affected States, assisting States and relevant international organizations. International law would be enriched by a new field, that of the “law of disasters”.

Mr. Murphy said that it appeared from the comments and observations that there was considerable interest in the Commission’s work on the topic, but also considerable concern with regard to the formulation of many of the draft articles. As a general matter, there continued to be concern about the characterization of “rights” and “duties” of States in the area in question, even though there was rather thin treaty law, State practice and jurisprudence in support of settled law on most issues. It might indicate that the Commission had not yet achieved the required balance, even if it was very close. The resistance of some States was no doubt attributable to the Commission’s unwillingness so far to be candid in its commentary that most of the draft articles fell within the realm of progressive development of the law, and that there was really not sufficient State practice, let alone treaty law, to support several of the rules it was advancing. He therefore agreed with the Special Rapporteur’s recommendation that the Commission should decide to approach the project as a draft treaty, containing a preamble and perhaps even closing draft articles, as it had already done for some of its projects. He nevertheless took note of Mr. Forteau’s proposal to submit a framework declaration to the General Assembly and added that, if the members of the Commission decided to take that approach, they should perhaps partly review the wording of the draft articles and the introduction to the topic.

The Commission should also include an introductory commentary to the draft articles, similar in nature to the commentary it had used in 2014 with respect to the expulsion of aliens project — “the present draft articles involve both the codification and the progressive development of fundamental rules” — which therefore justified the pursuit of a global treaty in that area.

He supported the recommendation that the Commission should send the draft articles and the draft preamble to the Drafting Committee for revisions based on the comments that the Commission had received, although he believed that changes going beyond those envisaged by the Special Rapporteur should be contemplated. Many Governments and international organizations had also called for changes to the Commission’s commentary, as the Special Rapporteur had indicated in his opening statement.

With respect to draft article 3, a few States had expressed concerns about the definition of “disaster” in the draft articles, but the wording was already broad enough to address those concerns. However, the Special Rapporteur had recommended including in the definition of a disaster any calamitous event that resulted in large-scale “economic” damage that seriously disrupted the functioning of society. In his view, the adjective “economic” excessively widened the scope of the draft articles, which might end up covering events such as a steep rise in interest rates, an economic recession, or a collapse in the price of a particular commodity, such as oil or precious metals. What, then, would it mean to have a duty to reduce the risk of an economic recession? It would also be useful to combine draft articles 3 and 4, as Mr. Forteau and Sir Michael Wood had suggested.

With respect to draft article 4, the United Nations Office for the Coordination of Humanitarian Affairs had said that the definition of “affected State” in subparagraph (a) was too broad. As drafted, any State that had a national located in a disaster zone was an “affected State”, because that State had jurisdiction over its nationals. The Commission had certainly not intended the term to be understood that broadly, and it could change the definition to read: “‘affected State’ means the State in whose territory, or in any territory under its jurisdiction or control, there are persons, property, or the environment affected by a disaster.”

With regard to the Special Rapporteur’s proposal that a new clause should be inserted at the end of subparagraph (e), indicating a preference for the use of civilian assets over military assets, it would be better to include such a provision in draft article 9 or draft article 13, rather than in an article on use of terms. Further, if the reason for expressing such a preference was to capture the spirit of the Oslo Guidelines, it should be completely redrafted, as the Oslo Guidelines recognized the value of military assets in complementing civilian assets, referred to “military and civil defence assets (MCDA)”, operationalized that preference only with respect to United Nations operations, and stipulated that such resources should be “requested”, not that they “shall be used” — the wording used by the Special Rapporteur, which failed to capture all those nuances, so important to the participants in the Oslo International Conference on the Use of Military and Civil Defence Assets in Disaster Relief, and which also did not replicate the spirit of other instruments, particularly certain General Assembly resolutions. Perhaps a second paragraph might be added to draft article 13, to read: “Foreign military and civil defence assets should be requested only where there is no comparable civilian alternative and only when the use of military or civil defence assets can meet a critical humanitarian need.” In any case, the most important thing was to ensure that disaster relief was not impeded by bureaucratic rules. It was not easy to see, for example, how it would be helpful to force the United States not to use its military aircraft for humanitarian assistance — even if the recipient State had asked it to — unless it was certain that no civilian transport aircraft were available.

With regard to draft article 5, although the Special Rapporteur viewed it as a “signal achievement of the Commission”, he agreed with the representatives of Ireland that human dignity was an overarching principle that would be better dealt with in a preamble, as had been decided during the drafting of the International Covenant on Civil and Political Rights. The preamble to the Covenant recognized “the inherent dignity ... of all members of the human family”, and that broad principle then animated the operational rules of the Covenant; but there was no general obligation to protect “inherent human dignity” because the concept was too vague and uncertain to operationalize. Draft article 5 should therefore be moved into the preamble, where reference could also be made to persons affected by disasters, as suggested by Mr. Forteau, while retaining draft article 6, which acknowledged the need to respect the human rights of persons affected by disasters.

With respect to draft article 6, he did not support the insertion of the terms “protection and fulfilment” into the text. The Special Rapporteur asserted that such language would place the draft article in conformance with international human rights law, but such terms did not appear in the major human rights treaties, such as the aforementioned Covenant, not to mention the fact that recent projects of the Commission itself, such as the draft articles on the expulsion of aliens, referred only to “respect for their human rights”. It could be useful, though, to replace the expression “their human rights” with “their rights held by virtue of international human rights law”, as proposed by Mr. Forteau.

With regard to draft article 7, numerous States and the International Federation of Red Cross and Red Crescent Societies had expressed concerns with some of the principles included therein, such as “neutrality” and “non-discrimination”. Although the Special

Rapporteur had noted those concerns in his report, he was not proposing to remove any principles, but rather to add more of them, specifically a “no harm” principle and an “independence” principle, the inclusion of which had been advocated by the Nordic States and the European Union, respectively. He had no idea what those “principles” meant in that context, as the Special Rapporteur had not explained them further, such as by reference to treaties, State practice, or jurisprudence. What did “no harm” mean? Who or what did it apply to? Presumably relief operations required tearing down unstable structures in the aftermath of an earthquake or killing livestock infected with viruses in the aftermath of a cyclone, so in some sense “harm” was done to property and even to life. As for the principle of independence, to what did it refer? Again, who did it apply to? And how could such a principle be defended when various of the draft articles referred to the concept of “cooperation”? Adding such principles, without at least explaining them, would only sow confusion, and he did not therefore favour doing so at that stage.

With regard to draft article 8, he supported the Special Rapporteur’s proposal to change how the text referred to certain actors. He noted that many States had expressed concern about the title of the draft article, arguing that the “duty” to cooperate did not exist under international law. For example, Greece had noted that the use of mandatory language in the form of “shall” indicated the existence of a duty that was not supported by State practice, in which respect the Nordic States and Austria had also expressed concern. The Russian Federation had stated that the duty in the draft article was not a well-established principle of international law. The United Kingdom had expressed the view that using the term “duty” was at odds with the essentially voluntary nature of the principle of cooperation. The Special Rapporteur discussed those concerns in his report, but viewed the 1970 General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations as a sufficient legal basis on which to introduce such a duty. He therefore recommended no changes. While that Declaration could be understood as referring to a legal duty of inter-State cooperation, it could not be viewed as establishing a legal duty for States to cooperate with international organizations or non-State actors, as envisaged in draft article 8. The problem might be minimized by replacing “shall” with “should” or, if “shall” were to be retained, by indicating in the commentary that that was progressive development of the law. Further, the title of the draft article should be changed to read “Cooperation in the event of a disaster”, and consideration should be given to moving draft article 10 into draft article 8.

With respect to draft article 11, again the term “duty” had elicited negative reactions from many States, which disputed that international law obliged States to reduce the risk of disasters. France, the Islamic Republic of Iran, the Republic of Korea and the United States had expressed the view that there was no general obligation under international law to take measures to prevent, mitigate and prepare for disasters, while Austria had asserted that the issue exceeded the original mandate of the protection of persons in the event of disasters. Other States, such as Australia and South Africa, had questioned whether States had the capacity or resources to take such measures, leading the Russian Federation to propose that a qualifier of “within their capacity” should be added and that the entire provision be framed as a “recommendation”, a proposal that he considered to have some merit. That might be done by replacing the term “shall” with “should” or by redrafting paragraph 1 simply to read: “As necessary and appropriate, each State shall pursue disaster risk reduction measures.” Like Mr. Forteau, he did not favour the Special Rapporteur’s proposal to insert the phrase “the creation of new risk and reduce existing risk”, which was unnecessary and confusing.

With respect to draft article 12, some States had disputed that there was a “duty” to accept assistance. The Islamic Republic of Iran had expressed the view that it was not an “internationally wrongful act” for a State to refuse international aid. The Russian

Federation had maintained that, while a State had a responsibility to take measures to ensure the protection of persons on its territory, it did not have a legal obligation to do so. There, too, the term “should” might be used, or perhaps “shall” but with an indication in the commentary that that was progressive development of the law. But it did not really seem sensible to replace “role” with “responsibility”, as suggested by Mr. Forteau, as the term “role” had been carefully chosen and reflected exactly what the draft article was intended to mean.

With respect to draft article 13, numerous States, including Austria, France, Indonesia, Malaysia, the Russian Federation and the United Kingdom, had all expressed the view that there was no duty under international law to accept assistance. Some, such as Austria, the Russian Federation and Poland, had enquired what the consequences of a breach of that duty would be. China had suggested that the Commission should avoid the term “duty”, and the Islamic Republic of Iran had suggested rephrasing the draft article using the word “should”. To get round that difficulty, the Special Rapporteur proposed to specify at the beginning of the draft article that the duty was only triggered if the affected State “determines that a disaster exceeds its national response capacity”. He considered that adding that phrase did nothing to change the fact that there was probably no such duty under international law, not to mention the fact that the Special Rapporteur’s proposal might have the perverse effect of discouraging affected States from asking for help, so as to avoid triggering any such “duty”. Perhaps the Commission should simply replace the words “has the duty to” with “should” or “shall” but identify in the commentary that that was progressive development of the law. He took note, in that regard, of the comment made by Mr. Park, who considered the provision *lex ferenda*. He also proposed changing the title of the draft article to read: “Pursuit of external assistance by the affected State”.

With respect to draft article 14, many States had questioned both what “consent” required in paragraph 1 and what “arbitrarily” meant in paragraph 2.

With regard to paragraph 1, it was understood that the notion of consent did not mean that some type of express, written consent was needed from a Government every time others (including NGOs) engaged in disaster relief activities. Simply issuing visas to medical personnel from Doctors without Borders, for example, presumably constituted the necessary “consent” within the meaning of paragraph 1. It might be useful to make that clear in the commentary.

As for paragraph 2, several States had rejected the idea that there was a legal obligation under customary international law not to deny aid arbitrarily. Other States had sought additional clarification on the meaning of “arbitrariness” and who would determine whether a State’s decision to withhold aid was arbitrary. Still others had worried that if consent was withheld arbitrarily, then the draft article might be read as allowing other States to act without consent, or at least to pass judgment on the affected State. One might add that there was a tension with the new wording for draft article 19 proposed by the Special Rapporteur, which would refer to a right of the affected State “to terminate external assistance at any time”, without reference to a standard of arbitrariness. For reasons such as that, some States had proposed changing the language in draft article 14 to “should not” instead of “shall not”, while others had suggested that the draft article should in some fashion be expressed as a political or moral recommendation. It would be a good idea for the Drafting Committee to consider the various proposals, or at least to address the issue in the commentary.

With respect to draft article 16, he expressed support for the amendments proposed by the Special Rapporteur, precisely because moving away from the language of “rights” and “duties” was more likely to encourage desirable behaviour. It would be for the Drafting Committee to decide whether it would be better to say “may offer assistance” rather than “may address an offer of assistance”.

With respect to draft article 21, numerous States and organizations, such as Mongolia, Austria, Switzerland, the European Union and the International Committee of the Red Cross (ICRC), had noted an apparent conflict between the text of the draft article and its commentary. In its current wording, the draft article excluded armed conflict entirely from the scope of the draft articles, while the commentary stated that there were some “complex emergencies” where both the draft articles and international humanitarian law could apply. The Special Rapporteur recommended modifying draft article 21 to be a “without prejudice” clause, but then it would not be needed at all, as it would duplicate draft article 20. Moreover, it could be incorrect to say simply that the draft articles were “without prejudice” to international humanitarian law. Although sometimes the rights and duties of a belligerent under international humanitarian law were less than what appeared in the draft articles, and sometimes they were greater, there was an undeniable overlap and sometimes conflict between the two sets of rules. When conflicts arose, a simple “without prejudice” provision left it unclear which set of rules applied, as it created no hierarchy. If the intention was for the draft articles not to apply when there was overlap or a conflict between the two sets of rules, then perhaps draft article 21 should be left in its current form. Many States (Austria, Colombia, Cuba, Greece, India, Israel, Mongolia, the Netherlands, the Nordic States, Poland, the Russian Federation, Spain, Sri Lanka, Thailand and the United States) had spoken in favour of it. ICRC had considered the current wording satisfactory and that overlaps should not be created between the draft articles and international humanitarian law. Similarly, the International Federation of Red Cross and Red Crescent Societies had asserted that the draft articles should not apply in situations of armed conflict, as doing so could inadvertently undermine the protection offered by international humanitarian law.

If, despite those concerns, the intention was that the draft articles might displace international humanitarian law when there was overlap or a conflict between the two sets of rules, the implications of doing so should be considered. Treaties on the law of armed conflict contained many provisions that set out in detail the rights and duties of belligerents, particularly with respect to relief activities, including consignments of medical supplies, food and clothing, cooperation with national Red Cross and other societies, and treatment of relief personnel. Those rules of international humanitarian law were much more detailed and specific than the draft articles. Was it sensible, for instance, to give precedence to the application of draft article 7, when article 70 of Additional Protocol I to the Geneva Conventions was much more comprehensive and detailed? One referred only to the principle of “non-discrimination” in disaster relief, while the other specified that, when distributing “relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers”. And over what aspects of articles 23, 55, 59 to 63 and 109 to 111 of the Fourth Geneva Convention, or of Additional Protocol I, articles 69 to 71, or Additional Protocol II, article 18, would the draft articles take precedence?

Many Governments would not be happy to see the Commission rewriting the rules of international humanitarian law that applied to armed conflicts. Austria had said it should not do so. Switzerland had warned that adding another set of rules would allow a belligerent to choose whichever set it preferred. The United Nations Office for the Coordination of Humanitarian Affairs had expressed concern, suggesting that the Commission should make clear that the draft articles only applied where international humanitarian law did not address the specific disaster-related issue. The European Union had expressed a similar view, though it had said that the matter could be addressed in the commentary. In his view, however, the issue was too important to be relegated to the commentary.

On the assumption that the Commission was not trying to alter international humanitarian law, it would perhaps be sufficient to leave draft article 21 unaltered or to

amend it to read: “The present draft articles do not affect the rights and obligations of States in situations of armed conflict.” Such an approach was in accord with the views expressed by most States and organizations and with other existing treaties, such as in the area of aviation and the law of the sea. Further, if it was agreed that international humanitarian law served as the *lex specialis* in that context, then it was important to say so clearly in the commentary, otherwise it would simply sow confusion, to the detriment of those the Commission sought to assist.

Mr. Kittichaisaree recalled that, during the Drafting Committee’s debates on the protection of the environment in relation to armed conflict, it had been decided to replace “international humanitarian law” with “law of armed conflicts” to reflect the Commission’s practice on the topic of the effects of armed conflicts on treaties. In that case, the Commission had established that there was a distinction between the law of armed conflicts and international humanitarian law, and had considered that international humanitarian law was an area of the law of armed conflicts; hence it was preferable to use the term “law of armed conflicts” in its work. However, the term “international humanitarian law” was the one used in the report of the Special Rapporteur, without objection. Clarification was therefore needed on that point, and, as far as possible, a degree of consistency should be ensured in the work of the Commission.

The meeting rose at 11.50 a.m.