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Summary record of the 3293rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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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 this. The ICRC had also considered the current wording satisfactory and felt that overlaps should not be created between the draft articles and international humanitarian law. Similarly, the IFRC 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.

69. 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 the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) 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" (art. 70, para. 1). And over what aspects of articles 23, 55, 59 to 63 and 109 to 111 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), of articles 69 to 71 to Protocol I, or of article 18 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), would the draft articles take precedence?

70. 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. OCHA had also 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, although 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.

71. 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.

72. 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.[23] 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 eighth 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.

3293rd MEETING

Wednesday, 4 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, 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.

Tribute to the memory of Boutros Boutros-Ghali, former Secretary-General of the United Nations (*concluded*)*

1. The CHAIRPERSON said that the 3293rd meeting of the Commission was dedicated to the memory of

* Resumed from the 3291st meeting.

[23] See *Yearbook … 2015*, vol. I, 3281st meeting, pp. 286–287, para. 8.

Boutros Boutros-Ghali, former Secretary-General of the United Nations and former member of the International Law Commission.

2. Mr. HASSOUNA said that he was grateful to the Commission members for having organized the tribute to the memory of a prominent Egyptian, scholar, professor of international law, well-known journalist, outstanding diplomat and active international civil servant – one who had been a long-standing member of the International Law Commission and the first African and Arab United Nations Secretary-General. Boutros Boutros-Ghali had also been a personal friend of his, and a mentor who had advised and inspired him in his own academic research and diplomatic career.

3. In the field of Egyptian diplomacy, Mr. Boutros-Ghali's contribution had been impressive. As Minister for Foreign Affairs, he had brought an academic dimension to diplomacy by encouraging analysis, research and the training of young diplomats. Actively strengthening and developing his country's relations with other African countries and supporting their struggle for independence and development, he had been a strong advocate of the policy of non-alignment, which had played an important role in world politics during the cold war period. Owing to his strong belief in the necessity of achieving a just and lasting Arab–Israeli peace, he had accompanied President Anwar Sadat on his historic journey to Jerusalem in November 1977 – a development that had led to the revival of the Middle East peace process and to the eventual signing of the Treaty of Peace between Egypt and Israel.[24]

4. Shortly after his appointment as Secretary-General of the United Nations, Mr. Boutros-Ghali had stressed the importance of an independent Secretary-General, as envisioned in the Charter of the United Nations. At the request of the Security Council, he had presented his report entitled "An Agenda for Peace",[25] which had proposed a new approach by the United Nations to international security and stability in the post-cold war era with a view to enhancing the Organization's capacity for preventive diplomacy, peacekeeping and peacemaking. Through "An Agenda for Peace" and his subsequent agendas for development[26] and democratization,[27] Mr. Boutros-Ghali set out ground rules for enabling a proactive United Nations to address the most pressing challenges of the contemporary world.

5. Also during his tenure as Secretary-General, a series of major United Nations world conferences – on environment and development, human rights, population and development, social development, women, and human settlements – had been organized to address critical transnational problems. At the request of the Security Council, Mr. Boutros-Ghali had proposed the establishment of an international tribunal to try the war criminals of the former Yugoslavia, thus laying the groundwork for the first United Nations war crimes tribunal and reaffirming the individual responsibility of persons who committed or ordered grave breaches of the 1949 Geneva Conventions for the protection of war victims or violations of international humanitarian law.

6. Although he had regrettably been denied a second term of office as Secretary-General of the United Nations, when one member of the Security Council had vetoed his re-election, Mr. Boutros-Ghali, in recognition of his competence and experience, had subsequently been appointed Secretary-General of the International Organization of la Francophonie, and had succeeded in enlarging that body's membership and increasing its activities. Following his retirement, he had been asked to chair the newly founded Egyptian National Council for Human Rights, a position in which he drew on his long experience in the field of human rights, including his strong support for the African Charter on Human and Peoples' Rights and the Arab Charter on Human Rights.[28] A true intellectual, Mr. Boutros-Ghali had actively continued to write, lecture and give interviews, despite his advanced age. Gradually, however, he had begun withdrawing from all the boards of academic and cultural institutions to which he had belonged, except that of The Hague Academy of International Law – a clear demonstration of the value he attached to the Academy and its role in the teaching and wider dissemination of international law.

7. On his death, Mr. Boutros-Ghali's legacy had been praised extensively throughout the world. Secretary-General Ban Ki-moon had referred to him in his statement of 16 February 2016 as "a memorable leader who rendered invaluable services to world peace and international order".[29] By his friends, he would always be remembered as a warm and modest human being with a sharp intellect and a great sense of humour. He would be missed by all.

8. Mr. MURASE said that Boutros Boutros-Ghali would be remembered as a man of courage and conviction, an excellent national leader, brilliant negotiator, accomplished diplomat and outstanding Secretary-General. In the International Law Commission, he had impressed everyone with his keen intellect, warm heart and great sense of humour. He should also be recognized for his contribution to international law research, education and dissemination. As President of the Curatorium of The Hague Academy of International Law from 2002 until his death, Mr. Boutros-Ghali had been energetic and passionate about international law and its transmission to the many students from around the world who attended the Academy's summer courses each year. His mind had remained very sharp until the end, and when the members of the Curatorium had wished to pay tribute to his past accomplishments on the occasion of his ninetieth birthday, his

[24] Treaty of Peace signed at Washington, D.C., on 26 March 1979, United Nations, *Treaty Series*, vol. 1136, No. 17813, p. 100.

[25] "An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping", Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 21 January 1992 (A/47/277-S/24111).

[26] "Development and international economic cooperation: an agenda for development", Report of the Secretary-General (A/48/935).

[27] A/51/761, annex.

[28] Arab Charter on Human Rights, adopted by the Summit Conference of the Arab League Council in its 16th ordinary session, held in Tunis, in May 2004, and entered into force 15 March 2008 (see CHR/NONE/2004/40/Rev.1, or *Boston University Law Journal*, vol. 24, No. 2 (Fall 2006), pp. 147–164).

[29] Available from the United Nations website: www.un.org/sg/en/content/sg/statement/2016-02-16/statement-secretary-general-death-boutros-boutros-ghali.

remarks had revealed less of an interest in the past than in the future of international law and The Hague Academy.

9. Mr. KAMTO said that the former Secretary-General had had the rare privilege of enjoying a long life and an exceptional professional career that had been replete with success and achievement. While it was difficult to rival the brilliant tribute paid to the former Secretary-General at his funeral in Cairo by Yves Daudet, Secretary-General of The Hague Academy of International Law, which had been published in the *Revue générale de droit international public*,[30] he wished to express his profound appreciation for the kindness and attention Mr. Boutros-Ghali had unfailingly shown him personally over the years, particularly in 2015 at the time of his election to the Curatorium of The Hague Academy of International Law, as well as when he had stood as a candidate for election to the International Court of Justice.

10. Mr. WAKO said that over the years, he had had the privilege of taking part in many discussions with Boutros Boutros-Ghali, a Coptic Christian Arab at home in Africa as well as in the broader English-speaking and French-speaking worlds and a true global citizen, on the relationship between Christians and Muslims, on human rights and Islam and on the universal nature of human rights irrespective of religion. He would mourn the loss of a man for whom he had felt great affection and who had contributed to his own development in the field of international law. Most notably, Mr. Boutros-Ghali, during his tenure as Secretary-General of the United Nations, had appointed him as his Personal Envoy to East Timor, a role in which he had ultimately contributed to the self-determination of Timor-Leste.

11. Mr. VALENCIA-OSPINA said that he was honoured, on behalf of all Latin American members of the Commission, to pay tribute to the memory of Boutros Boutros-Ghali, who had been a great source of inspiration to him in his work. While the list of Mr. Boutros-Ghali's achievements was long, it must not fail to include his sharp wit and well-rounded background, not only in law but also in humanities, especially art. The world had lost a great man, one who had, with dignity and foresight, represented the perspective of the developing and non-aligned countries within the United Nations.

12. Mr. FORTEAU said that he saluted the memory of Boutros Boutros-Ghali, a great internationalist who, as Secretary-General of the United Nations, had contributed substantially to peacekeeping and peacemaking in the world through his report entitled "An Agenda for Peace", in which he had recognized that development, democratization and preventive diplomacy were essential for international peace. As a young student writing his doctoral thesis on the law of collective security, he personally had admired, and indeed was still impressed by, the innovative quality, conceptual richness and usefulness of the above-mentioned work and its companion report entitled "An Agenda for Development". Mr. Boutros-Ghali had been an eminent scholar of international law with a distinguished teaching career spanning five decades. He had published three courses, all in French, for The Hague Academy of International Law, the last of which was entitled *Le droit international à la recherche de ses valeurs: paix, développement, démocratisation*.[31]

13. Mr. Boutros-Ghali had been an ardent champion of the French language, the culture of the French-speaking world and its role on the international diplomatic stage and he had served as the first Secretary-General of the International Organization of la Francophonie from 1997 to 2002. The attachment that he had shown throughout his life to the world's linguistic and cultural richness and diversity and to the aims, principles and aspirations of the United Nations constituted a valuable legacy which should always remain a source of inspiration for the Commission's members.

14. Mr. WISNUMURTI said that Boutros Boutros-Ghali had had a distinguished career as a statesman, diplomat and legal scholar. He personally remembered Mr. Boutros-Ghali as a Secretary-General who had shown determination, leadership, independence and courage during the difficult period faced by the Security Council in the 1990s. His landmark report on conflict resolution, entitled "An Agenda for Peace", was still relevant. It was deeply regrettable that he had failed to secure the unanimous endorsement of the members of the Security Council for a second term of office.

15. Mr. HUANG said that he had been greatly saddened to learn of the death of Boutros Boutros-Ghali who, in the course of more than 20 visits to China, had helped to forge friendly relations between that country and Egypt. In fact, in January 2016, President Xi Jinping, acting on behalf of the Government of China, had conferred on Mr. Boutros-Ghali an award for his outstanding contribution to Sino–Arab friendship.

16. He personally respected Mr. Boutros-Ghali highly as a world-class statesman and diplomat and in 1991, at the thirtieth annual session of the Asian–African Legal Consultative Organization (AALCO), held in Cairo, he had been privileged to hear an address by Mr. Boutros-Ghali, in his capacity as Minister for Foreign Affairs of Egypt, the host State. The wisdom and erudition of Mr. Boutros-Ghali had been impressive, as had been his dedication to fostering world peace and development during his term of office as Secretary-General of the United Nations. In that capacity, he had safeguarded the legitimate rights and interests of developing countries and had dealt constructively with a plethora of international and regional crises.

17. Mr. Boutros-Ghali had also been a distinguished international jurist and had taught international law and international relations in universities around the world. The International Law Commission had benefited from his vast knowledge and wisdom during his membership of that body from 1979 to 1991. He had been firmly committed to defending the Charter of the United Nations as a cornerstone of modern international relations and international law, and to maintaining peace, promoting development and advocating democracy, dialogue and

[30] "*In memoriam*: Boutros Boutros-Ghali (1922–2016)", *Revue générale de droit international public*, vol. 120, No. 1 (2016), pp. 5–8.

[31] *Collected Courses of The Hague Academy of International Law*, 2000, vol. 286, pp. 9–38.

cooperation. He had dedicated his whole life to furthering the establishment of a more just and equitable world.

18. Mr. PETER said that Boutros Boutros-Ghali had been one of the five great African masters of international law who had greatly inspired him when he had been a young undergraduate student. Mr. Boutros-Ghali's time as Secretary-General of the United Nations, although short, had been momentous, since it had been marked by the establishment of the International Tribunals for the Former Yugoslavia and the International Tribunal for Rwanda, which had furthered the development of jurisprudence on genocide, crimes against humanity, aggression and related offences.

19. After leaving the United Nations, Mr. Boutros-Ghali had been very active in public life. Among his appointments, from 2003 to 2006 he had served as the Chairperson of the Board of the South Centre in Geneva, an intergovernmental research organization for developing countries. His death was a great loss to Africa and the international community as a whole.

20. Mr. PETRIČ, speaking on behalf of all Commission members from Eastern European States, said that the Commission would remember Boutros Boutros-Ghali as an excellent international lawyer, academician, politician, humanist and man of integrity. He personally believed that Mr. Boutros-Ghali's most historic achievement had been his contribution to the signing of a peace treaty between Egypt and Israel. He had also played an important role in securing the peaceful settlement of disputes among non-aligned States, and had achieved the establishment of the International Tribunal for the Former Yugoslavia, a forerunner of the International Criminal Court. During the break-up of the former Yugoslavia during his term of office as Secretary-General, Mr. Boutros-Ghali had quickly understood that the Socialist Federal Republic of Yugoslavia, at that time a respected member of the international community, really comprised several nations that were striving for independence.

21. The CHAIRPERSON said that he wished to join his colleagues in paying tribute and expressing his profound respect for Boutros Boutros-Ghali, a distinguished member of the International Law Commission and a great son of Africa. Recalling his own involvement in the campaign to promote an African candidate for the post of Secretary-General, he said that, following Mr. Boutros-Ghali's appointment, the African States and the entire membership of the United Nations had quickly recognized that they had elected a noble man of integrity to the post. Mr. Boutros-Ghali had taken office at a time of great turbulence and a change of paradigm in international relations. Under his leadership, the number of United Nations peacekeeping missions worldwide had multiplied, and the important report entitled "An Agenda for Peace" had been issued. That document and its companion report "An Agenda for Development" were part of the intellectual legacy that Mr. Boutros-Ghali had left to the United Nations system. Mr. Boutros-Ghali had also been a great friend of Mozambique and had played an active personal role in the peace process there.

22. Mr. HASSOUNA thanked the members of the Commission for their tributes, which he would convey to the Government of Egypt and the family of Mr. Boutros-Ghali.

Protection of persons in the event of disasters (*continued*) (A/CN.4/696 and Add.1, A/CN.4/697, A/CN.4/L.871)

[Agenda item 2]

Eighth report of the Special Rapporteur (*continued*)

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

24. Mr. CAFLISCH thanked the Special Rapporteur for his clear and balanced report. He agreed with Mr. Forteau that the proposed draft articles as a whole might form some kind of framework declaration, although he would reserve his final position on that point. He was in favour of referring the preamble and text of all of the draft articles, as proposed by the Special Rapporteur, to the Drafting Committee.

25. It would be appropriate to mention in the preamble that the draft articles involved a considerable amount of progressive development. As both articles 3 and 4 contained definitions, they should be merged; however, the second clause of article 4 (*e*), which was not a definition, should be moved elsewhere. Moreover, the substantive rule contained in that clause was formulated in excessively rigid terms, since the main point was that assistance should be forthcoming, provided that the use of military assets, whether personnel or equipment, should not lead to abuses.

26. The content of draft article 5 on respecting and protecting the inherent dignity of the human person should be moved to the preamble. As the Commission had previously established, such protection was not a human right as such, but rather the source of most or all of the specific rules protecting human rights. Moreover, the protection of specific human rights was taken care of in draft article 6.

27. Regarding draft article 7, the response to disasters was without doubt based on the principle of humanity and should take place without distinction, which explained the references to neutrality, impartiality and non-discrimination; however, the reference, in the French text, to the principle of *non-malfaisance* was incomprehensible. If it was not deleted, it would have to be explained in the commentary.

28. With regard to draft article 11, some had said that a duty to reduce the risk of disasters did not exist. While that was partially true in general terms, draft article 11 involved the progressive development of international law, which he hoped would be mentioned in the preamble. Furthermore, such a duty did seem to exist in the narrower context of obligations of good neighbourliness. As for draft article 12, paragraph 1, he understood why a proposal had been made to replace the word "duty" (*devoir*) with "responsibility" (*responsabilité*); however, since, in

French, *responsabilité* referred to the legal consequence of violating a duty, it would be preferable to retain the existing text. He wondered whether it might be possible to merge draft articles 20 and 21 into a single provision stating that the rules in the draft articles were without prejudice to other rules of international law.

29. Mr. CANDIOTI said he was concerned that some Commission members saw a need to warn readers that certain of the draft articles were a result of progressive development. That was a departure from the standard practice of the Commission, since it had not previously made a clear distinction between codification and progressive development, both of which were part of its mandate. He did not understand why it was now thought necessary to do so, especially as the implication seemed to be that progressive development was somehow dangerous or negative.

30. Mr. CAFLISCH said that the progressive development of international law was far from being a bad thing; however, it was necessary to state clearly that positive law and the development of positive law were two different concepts.

31. Mr. PETRIČ said that he too was concerned at the proposal to indicate which elements of the draft articles derived from progressive development. It was understood that the draft texts produced by the Commission were a combination of progressive development and codification and, in any case, it would be difficult to identify which specific elements were an exercise in progressive development and which represented codification. In cases where a provision did not clearly represent the codification of an existing rule, the Commission could perhaps use the word "should" rather than "shall". If the commentaries were to indicate that a particular element involved progressive development, it would give the impression that progressive development was somehow secondary to codification.

32. Mr. KAMTO, recalling that the Commission had engaged in similar debates at previous sessions, said that, as he understood it, the question now was where, rather than whether, progressive development should be mentioned. While some members wished to indicate which specific provisions were an exercise in codification or progressive development, he suggested that, by way of compromise, the Commission should, as a general policy, merely indicate in the general introductory commentary that the proposed texts were a combination of the two elements. That should not be problematic, given that virtually all of the Commission's work, including on such topics such as "Responsibility of international organizations", "Expulsion of aliens" and even "Law of treaties", represented a combination of codification and progressive development.

33. Mr. CANDIOTI said that, in its past practice, the Commission had never distinguished between codification and progressive development. In any case, all codification of an unwritten rule of customary law involved an element of progressive development, since, through codification, the rule was clarified and defined in greater detail. He was concerned that singling out progressive development in the Commission's projects would give progressive development a negative connotation, as it suggested a lack of legal certainty. The Commission had a clear mandate to engage in progressive development and to consider new topics in response to the international community's urgent needs; there was therefore no need to add caveats in that regard.

34. Mr. CAFLISCH said that he had never suggested that everything in the current topic was a result of progressive development nor that each individual principle needed to be qualified as an exercise in progressive development or codification. However, it was necessary to mention – perhaps in the general commentary, as well as in the preamble – that the draft articles involved a combination of the two elements.

35. Mr. MURPHY said that the Commission had in fact often indicated in the introductory commentary to the final version of draft texts that it had been engaged in a combination of progressive development and codification, as a reminder that the project, as a whole, involved both elements. Such an approach had been followed for the draft articles on the expulsion of aliens[32] and the draft articles on the responsibility of international organizations,[33] among others, and he hoped that the Special Rapporteur would consider doing the same for the current draft articles. Furthermore, it could not be asserted that the Commission had never made a distinction between codification and progressive development in relation to individual provisions: in the commentary to the draft articles on the expulsion of aliens, for example, the Commission had candidly acknowledged that some rules contained therein constituted progressive development of international law and explained how it had formulated them. Such candour was positive in terms of maintaining the legitimacy of the Commission's work. In some cases where certain members had expressed doubts as to whether a particular rule should be advanced, owing to a paucity of evidence in State and treaty practice, the compromise approach had been to indicate that the rule was an exercise in progressive development. If that wording was problematic, a different formulation could perhaps be found.

36. Mr. CANDIOTI said that, while he would search for precedents in the Commission's earlier work, he still questioned the need to indicate that a particular rule constituted progressive development in cases where there was no general agreement as to its existence, given that the Commission had a mandate to develop new rules if so required by the international community. It was not clear to him why each provision that reflected progressive development should be identified. Furthermore, if the Commission were to do so for each provision arrived at through progressive development, it would also have to identify every provision resulting from the codification of customary law.

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[32] The draft articles on the expulsion of aliens adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2014*, vol. II (Part Two), pp. 22 *et seq.*, paras. 44–45.

[33] The draft articles on the responsibility of international organizations adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

37. Sir Michael WOOD said that it was important not to generalize, as the usefulness of indicating, either in the general commentary or in relation to specific provisions, that the work contained elements of progressive development or of codification varied from topic to topic. There was obviously nothing wrong with progressive development, and it could be very useful to highlight it, especially for practitioners seeking guidance as to whether the Commission's draft texts reflected existing law or constituted proposals for new law. In the current context, the matter could be left in the hands of the Special Rapporteur.

38. Mr. ŠTURMA said that the proper place to indicate that the Commission's work involved a combination of progressive development and codification was in the general commentary. The commentaries to specific draft articles should make reference to progressive development only in exceptional cases, since sometimes the Commission was divided on such issues. Furthermore, rules that were currently elements of progressive development could become customary rules over time, and the Commission should not prevent such development. States might also have a role to play in indicating, in their discussions in the Sixth Committee and elsewhere, whether they considered a particular rule to be an exercise in progressive development or codification.

39. The CHAIRPERSON said that it had been a valuable discussion. He welcomed the proposal to indicate in the general introductory commentary that the draft articles were a combination of codification and progressive development, although a decision on the issue did not have to be taken at that time.

40. Mr. NOLTE said that he wished to thank the Special Rapporteur for his excellent eighth report, in which he had diligently considered the wealth of comments received from States and organizations. The importance of the topic under discussion lay not only in the number of disasters that the world had experienced in recent years and the likelihood of yet more to come, but also in the recognition by States, international organizations and civil society of a responsibility and a need for global solidarity to reduce the risks associated with disasters and to mitigate their consequences. The Commission's work on the topic had a crucial role to play in recognizing and crystallizing that responsibility and need in an appropriate legal form.

41. There was, however, no easy answer to the question of the form that the Commission's work on the topic should take. The current draft text contained elements of both codification and progressive development, with many draft articles reflecting existing law, even though the proposed wording of those articles might not correspond exactly to that used by States to accompany their practice. Where a particular draft article constituted progressive development, the Commission should be candid and say so. It would be going too far, however, to make a general statement in the commentaries that would result in a presumption that the draft articles represented progressive development of the law rather than its codification. It should be borne in mind that the Commission's mandate to promote the progressive development of international law did not mean that it had a mandate to make customary international law. Rather, its mandate was to submit proposals to the General Assembly on how international law should be progressively developed; it did not itself have the political competence to make the decisions that progressive development entailed.

42. International law had long recognized that the main purpose and responsibility of the State was to protect its people. Although that obligation had sometimes been overshadowed by a misleading debate about the "responsibility to protect", the Commission did not need to involve itself in that debate in the context of the current topic. The idea that States had a general obligation to protect, by virtue of their sovereignty, had already been authoritatively articulated almost one hundred years earlier, in the *Island of Palmas* case, in which it had been stated that "[t]erritorial sovereignty … has as corollary a duty: the obligation to protect within the territory the rights of other States" (p. 839 of the award). Following the post-1945 universal recognition of human rights, on both a customary law and treaty law basis, the general obligation to protect was no longer limited to inter-State relations. However, it was not focused on the prevention of international crimes, nor must it carry any implications regarding a possible right of States to intervene in the domestic affairs of other States. It entailed certain more specific obligations that were spelled out in the draft articles as a matter of *lex lata*, such as the duty of the affected State to seek external assistance if a disaster exceeded its capabilities. On the other hand, the draft articles contained certain other rules that were in the area of progressive development, for example regarding prevention.

43. The need to indicate whether a particular draft article purported to reflect existing law or not would depend on the intended outcome of the project. In that regard, it might be wise for the Commission to refrain from expressing a clear preference for either a draft treaty or for a draft declaration by the General Assembly and to leave it to States to choose the path they wished to pursue. In any event, it was clear that the draft articles would have the character of a framework for action or of principles; they would not constitute a set of specific rules.

44. Concerning draft article 3, he agreed with other speakers that it would be going too far to include the adjective "economic" in the definition of a "disaster". Its inclusion might wrongly suggest that the Commission had given careful consideration to the difficult questions raised by the dire consequences of international economic shocks and the ensuing need for international cooperation.

45. Regarding draft article 4 (*a*), there was no need to restrict the definition of "affected State", as proposed by Mr. Murphy. The latter's concern that, under the current broad definition, every State that had a national located in a disaster zone would constitute an affected State was perhaps based on a misunderstanding regarding the concept of jurisdiction, as used in the current draft. That concept was not identical to the general jurisdiction of States to prescribe, but referred rather to the specific concept of jurisdiction as it had been developed by various human rights courts and bodies, as well as by the International Court of Justice, in the context of the responsibility of States for human rights violations. It would be sufficient to make that clear in the commentaries.

46. He agreed that the new reference to "military assets" in draft article 4 (*e*) should be reconsidered, both because it was formulated as a substantive rule in an article on definitions and because it might unnecessarily restrict recourse to important forms of assistance. If a cautioning reference to the military was considered necessary, it should perhaps refer not to "assets" but to "arms".

47. Draft article 5 should remain where it was. Human dignity was not merely an overarching principle or source of inspiration: it also represented the very core of human rights and was central to the current topic. International and national courts had demonstrated on various occasions that human dignity, while admittedly a rather general and indeterminate concept, was not inherently too vague and uncertain to operationalize. The article was therefore appropriately placed at the beginning of the substantive provisions and just before the draft article on human rights. A reference to its function could, however, perhaps be included.

48. He would prefer to keep the original text of draft article 6, as adopted on first reading,[34] since the expression "fulfillment of their human rights", in the amended text recommended by the Special Rapporteur, seemed somewhat inappropriate in the current context.

49. Concerning draft article 7, he shared the doubts of those members who had questioned whether the inclusion of a "no harm" principle or the word "independence" would be helpful. It was not clear what those concepts meant in the context of the topic in question.

50. Draft article 8 should not lose the element of "duty", which was clearly recognized as a legal duty in its inter-State dimension and was not purely voluntary in that dimension. A distinction should perhaps be made between States and international organizations, for whom such a duty existed, and "other assisting actors", for whom its existence was less clear. He was not convinced of the advisability of replacing the expressions "other competent intergovernmental organizations" and "relevant non-governmental organizations" with "other assisting actors", in various draft articles. The Commission made a distinction between intergovernmental organizations and other actors in other contexts, and with good reason: that distinction might, for example, be legally relevant in the context of the duty to cooperate.

51. With regard to draft article 12, he was not in favour of replacing the word "role" as proposed by Mr. Forteau, since, although the term did not have a specific legal content, it served the important purpose in the current context of describing the main functions of the State.

52. The Special Rapporteur's proposal to turn draft article 13 into a self-judging provision went too far in taking certain concerns of States into account. The proposal to insert the word "manifestly" went in the right direction and should accommodate the concerns of those States that had expressed scepticism about whether a duty of the affected State existed. The questions raised by some States regarding the potential consequences of a breach of such a duty had also drawn attention to the important practical issue of whether the application of the rules of State responsibility would be helpful in that context. On a more general level, the intense debates that had resulted in draft articles 13 and 14 should not be reopened unless there were convincing reasons to do so. Like previous speakers, he saw no need to emphasize that offers of assistance must be made in good faith, since that would introduce an inappropriate element of distrust into the set of draft articles.

53. In conclusion, he was in favour of referring the draft articles to the Drafting Committee.

54. Mr. McRAE said that he wished to congratulate the Special Rapporteur on his eighth report, in which he had sought to take into account the responses from Governments and other stakeholders following the first reading of the draft articles.[35] Although he himself had not been involved in the Commission's finalization of the first reading, he had taken part in the earlier stages and fully remembered the delicacy of achieving a balance between State sovereignty and claims to a right to intervene in the event of a disaster. Like others, he would be reluctant for the Commission to go back and upset those balances, which were reflected in, for example, draft articles 13, 14 and 16.

55. Although he had doubts about some of the amendments proposed by the Special Rapporteur, such as the inclusion of the adjective "economic" in the definition of "disaster" in draft article 3, the addition of the words "no harm" and "independence" in draft article 7 and the inclusion of a "without prejudice" clause in draft article 21, those were matters that could be dealt with in the Drafting Committee.

56. With regard to the question of whether to make any reference to progressive development in the final report on the topic, the Commission had never had a consistent practice in the way in which it treated or distinguished between codification and progressive development. Having quickly abandoned the separate procedures set out in its statute for dealing with the two elements, it had, for a time, simply noted that the draft articles it was proposing dealt with both codification and progressive development, taking the view that it was not possible to draw a distinction between them. More recently, there had been an occasional tendency to identify individual provisions as progressive development. However, both approaches were inadequate in terms of dealing with the question of the status of draft provisions and, ultimately, quite misleading.

57. The mandate of the Commission was the "progressive development of international law and its codification". Consequently, the statement that a particular set of draft articles was a combination of codification and progressive development was saying nothing more than that the Commission had carried out its mandate. However, a statement that some provisions represented existing law while others represented progressive development suggested that there was a hierarchy among the articles proposed and that some draft articles could be relied upon, but others could not. That was made more explicit if the

[34] See *Yearbook … 2014*, vol. II (Part Two), p. 70.

[35] *Ibid*., pp. 61 *et seq.*, paras. 55–56.

reference to progressive development was a label attached to a particular draft article like a warning sign. Moreover, the Commission often did not reach a unanimous decision on what was customary international law and what was not, and thus when it identified a provision as coming within the category of progressive development it was not stating that the Commission had reached a conclusion on that matter; rather, the label was a compromise between different views. While it was acceptable at first reading to include in the commentaries an indication of such divided opinion in the Commission on certain points, the practice had been to remove such notations at the second reading, so that the outcome reflected the views of the Commission as a whole. Attaching a "progressive development" label to one set of draft articles also raised a question about other draft articles where there was no such label. In addition to the fact that other draft articles not labelled as such also clearly involved progressive development in some cases, such a label carried the implication that the draft articles were of less value than they would otherwise have been if no such qualifier had been attached. It was not for the Commission to diminish the value of its work in advance by providing a warning that it did not regard what it had proposed as being in accordance with the existing law. Instead, the Commission's role was to produce an outcome that States could then decide how to use.

58. Regarding the final form of the work on the topic, while the Special Rapporteur had proposed that the Commission continue with the objective of providing draft articles and recommending that they should be incorporated into a convention, some States had taken the view that the Commission should instead be producing guidelines, principles or conclusions. The discussion highlighted the fact that the Commission had never adopted a uniform view on what the differing ways of describing the outcome of its work actually meant. The preparation of draft articles with a recommendation that the General Assembly convene a conference with a view to drafting a convention was perhaps the clearest outcome that it could propose. But what if the Commission prepared draft articles but did not recommend that they be incorporated into a convention? Did it matter whether they were called draft articles, draft principles, draft guidelines or draft conclusions? Those were questions that required further reflection, and, in the next quinquennium, the Commission might like to give thought to setting up a working group to consider such questions with a view to introducing some uniformity into the Commission's practice. As to the current draft articles, it seemed appropriate to continue with the project in the form of draft articles that could be turned into a framework convention, as proposed by the Special Rapporteur. The Commission could subsequently decide, after it had adopted the draft articles on second reading, whether actually to recommend that the General Assembly convene a conference with a view to drafting a convention.

59. In conclusion, he recommended that all of the draft articles, as proposed by the Special Rapporteur, be sent to the Drafting Committee.

The meeting rose at 1.10 p.m.

3294th MEETING

Friday, 6 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, 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.

Protection of persons in the event of disasters (*continued*) (A/CN.4/696 and Add.1, A/CN.4/697, A/CN.4/L.871)

[Agenda item 2]

Eighth report of the Special Rapporteur (*continued*)

1. Mr. KITTICHAISAREE said that he would begin with some general comments. Noting that the purpose of the draft articles was to find the most appropriate balance between the rights and interests of States, individuals and the international community, he recalled that the movement of persons to unaffected States was one of the main consequences of disasters and that it was for that reason, among others, that States had a vested interest in the prevention of disasters and the protection of victims. Regarding the concept of the responsibility to protect, the reactions of States in the Sixth Committee had been unequivocal: it was not applicable to the situations covered by the draft articles. Lastly, he agreed with Commission members who had noted that several provisions of the draft articles reflected progressive development rather than the codification of international law, a point that should be made clear in the commentary.

2. Turning to draft article 3, he agreed with the comments made by some members about the inclusion of the adjective "economic" in the definition of the term "disaster". As the adjective was vague and ambiguous in the context of the draft articles, an explanation for its use was needed.

3. Like many other members, he considered that draft articles 3 and 4 should be combined. In relation to draft article 4 (*a*), he agreed with Mr. Nolte that the definition of "affected State" was appropriate. As the International Court of Justice stated in paragraph 109 of its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions." The International Covenant on Civil and Political Rights contained provisions that were of direct relevance to, *inter alia*, the