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Summary record of the 3294th meeting

Topic:
Protection of persons in the event of disasters

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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

protection of the human rights of victims of disasters. In addition, in an internal memorandum issued by the Office of the Legal Adviser of the United States Department of State on 19 October 2010, the Legal Adviser affirmed that a State incurred obligations to respect Covenant rights – in other words, was itself obligated not to violate those rights through its own actions or the actions of its agents – in those circumstances where it exercised authority or effective control over the person or context at issue.³⁶ The European Court of Human Rights, meanwhile, interpreting the territorial scope of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), had consistently held, as in *Loizidou v. Turkey*, that a State party to the Convention had a positive obligation to ensure human rights thereunder whenever it had *de facto* control over a territory, even if it did not have sovereignty over that territory. It therefore made sense to affirm in draft article 4 (a) that “affected State” meant “the State in the territory or otherwise under the jurisdiction or control of which persons, property or the environment are affected by a disaster”.

4. With regard to draft article 5, he agreed with the proposal by Mr. Caffisch and Mr. Murphy to refer to human dignity in the preamble, since that principle was a yardstick for the protection of human rights and not a legal obligation in and of itself.

5. Like Mr. Murphy, he considered the term “no harm” in draft article 7 to be ambiguous. The term “independence” should be understood as the need to respect the territorial sovereignty, integrity and independence of affected States. However, in the light of draft articles 13 and 14, one might wonder how to respect the “independence” of an affected State that was unable or unwilling to protect its citizens.

6. He agreed with Mr. Park that draft articles 13 and 14 were not sufficiently clear and failed to provide definitive answers regarding affected States that did not have a functioning Government. In the past, certain affected States had deliberately avoided or even prevented disaster relief in regions inhabited by enemies of the central Government or by persecuted populations. The Commission should therefore consider how best to balance, on the one hand, the rights of affected States that were unable or unwilling to protect their citizens and, on the other, the strong desire of States not to include the concept of responsibility to protect in the draft articles.

7. Lastly, he highlighted the importance of draft articles 10 and 11, since the reduction of risk and prevention had more merit than disaster relief, and said that, like other Commission members, he supported the deletion of draft article 21, which was superfluous given the all-encompassing nature of draft article 20.

8. Mr. HMOUD noted that the issue of whether to specify which rules were progressive development and which were codification of customary law had sparked a debate within the Commission that concerned not only the topic

in question but also the overall approach to the various topics on the agenda, and said that no uniform rule could be applied in that regard. If the Commission believed that there was a need to highlight that a certain rule or principle was progressive development rather than codification, it would do so. Given that the draft articles were meant to strengthen the protection of persons during disasters and to create appropriate legal tools for responding and providing relief, and taking into account the balance between a State’s prerogatives and individuals’ rights that the articles strived to achieve, references to the nature of the rules proposed could prove counterproductive. If the draft articles took the form of a convention, the rules that they contained would become binding as treaty obligations. If they took the form of guidelines or of a declaration, however, those rules which were *lex ferenda* could become binding if they induced a general practice in the context of disaster prevention, response and relief. Several provisions of the draft articles were clearly innovative or based on practice, which was mixed in that field. It should be stressed that the Special Rapporteur and the Commission had ensured that the necessary balance was struck between the sovereign rights of States and individual rights without undermining the effectiveness of the draft articles in strengthening the protection of persons.

9. Turning to the rights of the affected State, he noted that, in many disaster situations, the lack of a proper response had resulted in the deaths of hundreds of thousands of people and in the suffering of many more. Those losses could have been mitigated if measures of relief, cooperation and coordination with assisting actors had been taken in a timely and appropriate manner. In many cases, assistance had not been provided or had been delayed because the authorities in the affected State had not been in a position to act or had failed to respond to offers of assistance from external actors, and had thus been unable to protect the persons in their territory effectively from the effects of the disaster. It was that imbalance between what were perceived as the rights of the affected State, on the one hand, and the rights of the people in its territory, on the other, that contributed to aggravating the situation and the effects of the disaster. The draft articles aimed to address that situation by introducing or reaffirming certain core principles, including the duties of the State, by virtue of its sovereignty, to ensure the protection of persons and the provision of relief and assistance on its territory, to cooperate, to respect human dignity, to protect the human rights of the individuals affected and not to abuse its right to withhold consent for assistance. Those principles had to work in tandem in order to achieve the goals of the draft articles, which were to strengthen and maximize protection in the event of a disaster. They provided the necessary guarantees for the proper application of the protection regime under the draft articles.

10. While Commission members, States in the Sixth Committee and other actors had debated the appropriateness of a rights-based approach, he did not see how a legal instrument intended to provide the necessary protection during disasters could achieve that objective without being based on the concepts of the rights and obligations of States and the fundamental rights of the persons affected. It should be noted that the draft articles were the *lex generalis* and so did not limit the application, in

³⁶ Office of the Legal Adviser, United States Department of State, “Memorandum opinion on the geographic scope of the International Covenant on Civil and Political Rights”, p. 4.

a given situation, of the special rules contained in other instruments, including the rules governing the specific needs and the *modus operandi* to be adopted in a disaster area. Another aspect of the issue concerned the role of actors who were not the subjects – at least not the traditional subjects – of international law, such as individuals and NGOs involved in providing relief who fell within the definition of “other assisting actors”. The draft articles provided, in some cases, for certain rights and duties for those actors that went beyond the rules applicable to them in international law, but did not set out the specific consequences that flowed from those rights and duties, the implementation of which would thus be governed by national laws. Under international law, however, the non-performance of those duties or a violation of the rights of assisting non-State actors by one or more States could trigger the application of the regime concerning the responsibility of the States involved.

11. As a last general point, he recalled that the Commission had decided not to include the concept of responsibility to protect in the draft articles, which had proved to be the right approach in the light of the comments and observations made by States over the years. There was no denying, nonetheless, that the goals of the responsibility to protect, which was not yet a doctrine of international law, underpinned some of the provisions of the draft articles without giving rise to rights or obligations, as Mr. Forteau had said. That approach was appropriate as the concept of responsibility to protect had emerged in a different context and aimed to put a stop to the most serious crimes of concern to the international community as a whole. It should be stressed that the draft articles did not trigger obligations *erga omnes*: the non-performance by an affected State of the obligations set forth in the draft articles would lead to the normal consequences of a breach of an obligation under international law. If the draft articles became a convention, the negotiating parties could include provisions regarding the specific consequences of a violation of certain obligations.

12. Turning to draft article 1, he said that it was apparent from the discussions in the Sixth Committee and from the comments received that the Commission had been right to include the three phases of disaster in the scope of the draft articles. Leaving out the pre-disaster phase would have undermined the goal of the protection regime contained in the draft articles, especially since, in many cases, disasters were simply the final manifestation of a chain of events, and preparedness and prevention were integral to any effective response to a disaster and its effects.

13. Regarding the definition of the term “disaster” in draft article 3, he understood why it should be addressed in a separate draft article, but considered that it should be specified that the definition was for the purposes of the draft articles, as it was technical in nature and its application to other instruments might not necessarily be appropriate. From reading the draft article and the new formulation of draft article 21 on the relationship with international humanitarian law, armed conflicts and other internal disturbances and violent acts did not appear to be excluded from the definitions. The Commission would have to consider that point carefully in order to avoid any unintended consequences, even though it was stated

in draft article 20 that the draft articles were without prejudice to other applicable rules of international law. He agreed with Mr. Murphy that the reference to large-scale economic damage would extend the scope of the draft articles beyond what had initially been intended. If the Commission decided to keep the reference, it should make clear in the commentary that the damage in question was not the sort caused by a recession or by similar events.

14. The definition of affected State in draft article 4 (a) suggested that more than one State could be considered as affected. In fact, any State in whose territory an affected person was present would be considered an affected State, so tens of States could be affected by a disaster that had occurred in the territory of just one. The issue would have to be dealt with in the draft articles, and not in the commentaries, in order to ensure that the definition applied only to those States in whose territory the disaster and its effects occurred. He did not see the need to include the phrase “at its request or with its consent” in the definitions of “assisting State” or of “other assisting actor”. The protection regime under the draft articles set out the conditions for its application and for requesting, accepting and providing assistance. Leaving the phrase as it was might create legal problems, for example if a State withdrew its consent arbitrarily: what would be the legal position of the assisting State or of other assisting actors considering that they would no longer fall within the definition given in draft article 4?

15. On the issue of military assets and the assertion that they should be used only where there was no comparable civilian alternative to meet a critical humanitarian need, he wished to point out that, in many States, civil defence personnel were part of the armed forces. Allowing the use of military assets only as a last resort would, in many cases, limit the ability of assisting States to provide assistance. The fact that such assets fell under the command of assisting States and therefore that there was a conflict with the prerogatives of the affected State in directing and controlling relief and assistance under draft article 12, was not a genuine problem. After all, the draft articles were *lex generalis*, and often States entered into agreements regulating the relationship between the military assets of the assisting State and those of the affected State prior to the deployment of assets. As a result, the Commission should perhaps refrain from adding a provision concerning the use of military assets to draft article 4 (e).

16. With regard to the issue of whether to devote a provision of the draft articles to the principle of human dignity, on which there had been an extensive debate during the first reading, it should be stated in the body of the text that respect for, and the protection of, the inherent dignity of the human person by States and by other assisting actors was a guiding principle that should serve as the basis for the implementation of protection regimes during disasters. The principle created obligations for States and for intergovernmental organizations, but not for assisting non-State actors.

17. The entitlement of persons affected by a disaster to respect for, and the protection of, their human rights was an important point that should be made in the draft

articles to encourage the adoption of positive measures in that regard. That did not prevent the application as *lex specialis* of the human rights regime under human rights treaties, including the implementation of rules relating to derogable and non-derogable rights.

18. As to the principles of humanitarian response under draft article 7, he agreed that the principle of non-discrimination was an element of impartiality and welcomed the clarification provided in the draft article. The addition of the principle of independence might lead to certain legal problems in relation to assisting actors, whether they were States, international organizations or other actors. At the same time, he did not see how the principle of no harm would add to the protection regime under the draft articles.

19. The duty to cooperate, which was key to achieving the goal of protection during disasters, was a fundamental obligation under the draft articles. The content of the duty was interpreted in the light of the other provisions of the draft articles, including draft article 9 on forms of cooperation, and other rules of international law. He noted that the duty to cooperate was more limited under the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations³⁷ than under the draft articles, which also imposed such a duty on assisting non-State actors. Nevertheless, he was not in favour of referring to the United Nations Special Coordinator for Emergency Relief, since his or her role could change, as previously noted.

20. Draft article 11 should take into account, or be read in the light of, the fact that many States did not have the capacity to reduce the risk of disasters. It should thus be clear that the duty was a differentiated duty based on every State's capacity to undertake the necessary and appropriate measures to prevent, mitigate and prepare for disasters.

21. Draft article 12 on the role of the affected State was one of the pillars of the draft articles, as it established that the State, by virtue of its sovereignty, had the duty to ensure protection and to provide relief, and that it had the primary role in the direction, control, coordination and supervision of that relief and assistance. It guaranteed the rights of the affected State, stemming from its sovereignty, *vis-à-vis* other actors. At the same time, it should be noted that any violation of a duty of the affected State triggered the same consequences as an internationally wrongful act. The draft articles did not specify the consequences of such a violation, which would thus need to be defined in the future if the draft articles took the form of a convention.

22. On the duty of the affected State to seek external assistance, he did not consider it appropriate to leave it to the affected State to determine whether a disaster exceeded its response capacity. That might have the effect of suspending the application of a key aspect of the draft articles, which aimed to provide effective and adequate protection during disasters. That was especially true when

the State was unable or unwilling to seek external assistance or when it did not have an effective Government.

23. On the consent of the affected State to external assistance under draft article 14, he welcomed the proposed amendment to prohibit the arbitrary withdrawal of consent, which did not mean that the affected State lost the right to control its territory and the relief operations carried out there. The prohibition on withholding consent during an emergency was, at the very least, an emerging norm, which could be found in, for example, Security Council resolution 2165 (2014) of 14 July 2014 on the humanitarian situation in the Syrian Arab Republic.

24. In the same vein, draft article 15, on the conditions for the provision of external assistance, did not provide the affected State with a blanket right to decide those conditions, as the draft articles established that assisting actors had certain rights *vis-à-vis* the affected State.

25. With regard to offers of external assistance, he was in favour of deleting the word "right", which would have created practical and legal problems, including in relation to subjects of international law.

26. Regarding the duty of the affected State to take appropriate measures to ensure the protection of relief personnel under draft article 18, it should be stressed that no undue burden should be placed on the affected State and that such protection should depend on the capacity of that State, especially when relief was provided in areas where no State authority existed. The words "within the capacity of the affected State" or a similar expression should therefore be added to convey the idea clearly.

27. The relationship between the draft articles and international humanitarian law should be studied carefully by the Commission and by the Drafting Committee. The change proposed by the Special Rapporteur had the effect of applying the provisions of international humanitarian law and those of the draft articles concurrently when they were not in conflict. If they were in conflict, international humanitarian law would prevail. Mr. Murphy had explained in detail why the proposed language (a "without prejudice" clause) might create problems in relation to the rights and obligations of parties to an armed conflict. At the same time, it was important for the draft articles to fill any gaps in international humanitarian law with regard to disasters during conflict situations (assuming that the conflict itself would not be included in the definition of the term "disaster") and not to infringe the rules of international humanitarian law or the rights and obligations thereunder.

28. Regarding the form that the draft articles should take, there were strong reasons to support the Special Rapporteur's proposal for them to take the form of a convention, as the draft articles not only set out rights and obligations but also facilitated the operationalization of disaster relief. The Commission should at least look into Mr. Nolte's proposal for the draft articles to become a framework convention, which would offer the necessary flexibility and enable other actors to negotiate separate agreements while respecting the principles of the convention.

³⁷ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

29. Mr. FORTEAU said that, in the French version, the principle of independence was not mentioned in draft article 7 as it appeared in paragraph 141 of the eighth report of the Special Rapporteur nor in the annex.

30. Mr. WISNUMURTI said that, in general, many of the changes proposed by the Special Rapporteur improved the text of the draft articles. Regarding draft article 3, it was important to retain the adjective “economic” as it covered disasters that caused economic damage, like the huge tsunami in Aceh, Indonesia in 2004, which had had severe consequences for the economy of the region and its surroundings. He agreed with Mr. Forteau and Sir Michael, among others, that draft articles 3 and 4 should be combined, as it did not seem logical to separate the definition of the term “disaster” from the other definitions.

31. As to draft article 6, it was important to keep the text adopted on first reading. The proposed wording – “fulfillment of their human rights” – would not reflect the reality on the ground, since certain rights might be impeded, limited or suspended in disaster situations. He also agreed with Sir Michael that the expression “fulfillment of their human rights” was rather odd.

32. Concerning draft article 7, he had doubts about the need to add the words “no harm” and “independence”, which would overburden the text unnecessarily. He was not sure that he understood what the no harm principle covered or that the addition of the principle of independence was useful, given that the principle of impartiality was already mentioned. He was not even convinced of the need to refer to the principle of neutrality, which had been adopted on first reading. As indicated in paragraph 128 of the eighth report, a number of Governments had expressed doubts over whether the principle was relevant, as it was closely connected to situations of armed conflict, which fell outside the scope of the draft articles. The Drafting Committee should thus reconsider the issue.

33. Turning to draft article 11, he agreed with the Special Rapporteur’s recommendation, but believed that the phrase “the creation of new risk and reduce existing risk” in paragraph 1 should be clarified in the commentary.

34. It was clear from the comments received that a significant number of States had expressed reservations about the wording of draft article 13. The imposition of a duty to seek external assistance had no basis in international law and would undermine the legitimate and sovereign right of the affected State to judge for itself whether it needed external assistance. According to the current wording, any actor (a State or an international organization) could judge for itself whether a disaster exceeded the response capacity of the affected State, which would trigger the obligation of that State to seek external assistance. Another undesirable consequence was that State responsibility could be invoked against an affected State accused of non-compliance with its obligation to seek external assistance, a situation that would be unacceptable. One of the solutions proposed by some Commission members, including Mr. Murphy, was to use an exhortatory formulation such as “should seek”. He recalled that he had, on several occasions, expressed his own strong reservations about the current wording of draft article 13.

The new wording proposed by the Special Rapporteur was not ideal because the word “duty” was retained, but it was satisfactory since it took into account the observations of the Governments concerned and reflected the efforts made to find a compromise. It therefore deserved to be considered favourably by the Drafting Committee.

35. With regard to draft article 14, it would be helpful to include the concept of “good faith” in paragraph 3, as proposed by the Special Rapporteur. The affected State had to deal with various offers of assistance, which, in accordance with draft article 13, could be made by “other potential assisting actors”, which could be any actor or NGO. It was thus important to give the affected State the necessary discretion and to provide it with criteria for making a decision about an offer of assistance.

36. Turning to draft article 16, he said that he was in favour of the Special Rapporteur’s proposal to simplify the text and to replace “have the right” with “may”. He would also prefer to replace “may address an offer of assistance” with “may offer assistance”, as proposed by Mr. Murphy.

37. Subject to the adoption of the draft articles on second reading, he agreed with the Special Rapporteur that the final draft articles should be submitted to the General Assembly with a recommendation in favour of the conclusion of an international convention. For the time being, he supported the referral of all the draft articles to the Drafting Committee.

38. Mr. KOLODKIN said that he wished to congratulate the Chairperson and all the members of the Bureau on their election and to thank the Special Rapporteur for the considerable amount of work that he had put into drafting his eighth report on the protection of persons in the event of disasters.

39. Although the time for substantive discussions had passed, he wished to make some observations that might influence the wording of the draft articles. First of all, it was essential, for the purposes of preparing the draft articles, to decide how to reflect the balance between, on the one hand, the principles of sovereignty, of the defence of human rights and of cooperation and, on the other, the rights and obligations of States in terms of the protection of persons in the event of disasters.

40. At the heart of the draft articles lay the duty of the affected State to ensure the protection of persons in its territory. To perform that duty, which itself flowed from the three aforementioned principles, the State in question had to be in a position to seek assistance when it did not have the capacity to cope with a disaster. The relevant provision of the draft articles, along with some other related provisions, clearly echoed the notion of the “responsibility to protect”. Nevertheless, that obligation went hand in hand with the assurance that, in accordance with the principle of sovereignty, assistance could be provided only with the consent of the State concerned, which was not required to accept if it did not see fit to do so.

41. In that connection, it was strange that, with regard to the principle of cooperation, only the obligations of the

affected State were laid down. The obligations of other States *vis-à-vis* that State were hardly mentioned in the draft articles or appeared in any case to have been given no importance. In draft article 16, “States, the United Nations and other potential assisting actors” were not subject to anything like the same requirements as affected States in draft articles 12 and 13, to the extent that it was questionable whether there was a need to retain draft article 16.

42. None of the nine multilateral agreements or 30 or so bilateral agreements to which the Russian Federation was a party and that dealt to a greater or lesser extent with the protection of persons in the event of disasters required States parties to seek assistance. They did, however, oblige States parties to offer assistance as appropriate, provided that the affected State had requested them to do so and that it was unable to cope with the disaster by using its own resources. States parties were, at the very least, required to consider requests for assistance and to communicate their decisions to the affected States. The scope of the affected State’s duties under those agreements widened once other States began to provide it with assistance. The affected State then had more obligations than other States. The balance between the rights and obligations of the affected State and those of other States was thus not the same in those agreements as in the draft articles.

43. While, in his fourth report,³⁸ the Special Rapporteur had spoken in favour of the duty to seek assistance, he had not cited any international agreements establishing such an obligation to substantiate his argument and had referred only to non-binding instruments. The Commission could of course decide to impose such an obligation, on condition that it specified that it was promoting the progressive development of international law rather than its codification. Similarly, by way of progressive development, it could impose obligations on the States from which assistance was requested by the affected State, including the duty to consider and respond to requests for assistance, because, ultimately, why not create new obligations for all the States concerned? To that end, it could base itself on the principles of cooperation and good faith. In any event, it had to explain clearly to States that such a duty did not exist in international law but that, for various reasons, it considered it important to incorporate it in the draft articles. It would also be necessary to define more precisely what constituted a source of obligations. Some issues lent themselves to the progressive development of international law, but others did not, and a case-by-case analysis of the different issues addressed by the Commission was therefore needed. In the field of the protection of persons in the event of disasters, nothing prevented the Commission from contributing to the progressive development of international law, but it had to be realistic. The provisions that would be proposed to States had to take into account the real needs of the international community or they would remain a dead letter.

44. With regard to the scope of the draft articles *ratione temporis*, the Commission indicated in the commentary to draft article 4 adopted on first reading that it was taking the approach of considering “the consequence of the event as a key element for purposes of establishing the

threshold for the application of the draft articles”.³⁹ If that was the case, how could the scope of the draft articles be extended to the pre-disaster risk-reduction phase? And, in any event, was it really useful to include that phase within the scope of the draft articles?

45. Draft articles 10 and 11 did not fit into the general structure of the draft articles. Under draft article 10, for example, the duty to cooperate enshrined in draft article 8 extended to the taking of measures intended to reduce the risk of disasters. However, the forms of cooperation contemplated in draft articles 8 and 9 did not lend themselves to the cooperation provided for in draft article 10. The general obligation of each State to take the measures referred to in draft article 11, paragraph 2, seemed unrealistic, even if it was an obligation of conduct, given the highly diverse nature of the disasters for which risk reduction would be appropriate. It was thus for States to assume such a duty if they had the resources to do so.

46. With regard to the general structure and wording of the draft articles, he was in favour of combining draft articles 3 and 4. In any event, the phrase “for the purposes of the present draft articles” should be added to the definition of the term “disaster”. As to draft article 4 (a), the definition of “affected State” gave the impression that a State could be affected even if a disaster had not had a major impact on its population, as it was enough for persons, property or the environment in its territory or under its jurisdiction or control to be affected in one way or another, but was that criterion sufficient to justify the application of the draft articles to the State concerned?

47. Regarding the proposal to draw a distinction between civilian and military personnel and resources, he wished to stress that the relevant bilateral agreements reached by the Russian Federation provided for both civilian and military assistance, and for the use, in the latter case, of military equipment. In no case was priority given to civilian assistance. The States parties to those agreements assumed that, in the event of a disaster, one should use the military or civilian means that would produce the best results in a given situation, subject, of course, to the consent of the receiving State. There was therefore no need to favour civilian personnel or equipment in the draft articles.

48. With regard to draft article 5, the Special Rapporteur had rightly proposed specifying that all assisting actors should respect the dignity of the human person. There remained, however, a point that needed clarifying: did the duty to protect the dignity of the human person entail the adoption of specific measures? And was it an obligation under international law, particularly for NGOs and individuals providing assistance? The proposal to move draft article 5 to the preamble should also be considered.

49. In the commentary to draft article 6 adopted on first reading, it was stated that “the provision contemplates an affected State’s right of derogation where recognized under existing international human rights law”.⁴⁰ He was

³⁸ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/643.

³⁹ *Yearbook ... 2014*, vol. II (Part Two), p. 66 (para. (6) of the commentary to draft article 4, subpara. (a)).

⁴⁰ *Ibid.*, p. 70 (para. (3) of the commentary to draft article 6).

not sure, however, that such a principle could be identified in draft article 6, as it was currently worded. It would therefore be useful to add the words “in accordance with international law” at the end of the text. While he did not support the Special Rapporteur’s proposed rewording for the reasons already set out, he considered that it would be advisable to explore the possibility of moving draft article 6 to the preamble.

50. As to the proposed rewording of draft article 7, it would be useful, as other Commission members had pointed out, to know what the principles of independence and no harm meant in that context. Moreover, neither the title of the draft article adopted on first reading (“Humanitarian principles”⁴¹) nor the title proposed by the Special Rapporteur (“Principles of humanitarian response”) was related to humanitarian law. If the draft article concerned external assistance, it would make sense to include the principle of neutrality. The draft article as adopted on first reading, however, did not appear to concern only the assistance given to the affected State, because it also dealt with the conduct of that State. It was difficult to see how the principle of neutrality was applicable to the affected State’s response. If draft article 7 was applied to a disaster caused by a terrorist attack, would the State be required to remain neutral with regard to the terrorists? It was important to recall, in that respect, that humanity and neutrality were not synonyms.

51. Draft article 8 provided that States had a duty to cooperate among themselves, but to what extent was that duty applicable to other assisting actors? Conversely, to what extent were international organizations obliged to cooperate with States? International organizations had their own rules governing their conduct. Consequently, could an organization that was in a position to provide disaster relief assistance and that was required to cooperate with its member States be considered to have a duty to cooperate with other States, too? It might be appropriate to supplement the draft article by indicating that the duty to cooperate also stemmed from applicable national and international law.

52. Turning to draft article 16, it should be noted that, in accordance with its rules of procedure, an international organization might also have a duty to offer assistance that was owed, above all, to its member States. Draft article 20 perhaps helped remedy the shortcomings of draft article 16 in that regard. In any event, it would be wrong to place States and international organizations on the same footing in draft article 16. In addition, one might wonder whether it was appropriate to establish a general rule applicable to international organizations.

53. The first sentence of draft article 19 imposed a very strict and unrealistic obligation to consult with respect to the termination of external assistance. The Special Rapporteur’s proposal would improve the draft article but would not address that fundamental flaw.

54. The Special Rapporteur’s proposed rewording of draft article 21 added nothing to what was contained in draft article 20 and might even render the former superfluous.

Moreover, it should be noted that, in paragraph 366 of his eighth report, the Special Rapporteur listed a very large number of States that supported the exclusion of situations of armed conflict from the scope of application of the draft articles. It was rare for so many States to hold the same opinion on a humanitarian law issue, an opinion that was shared by the ICRC, as noted in paragraph 377 of the eighth report. Other States were of a different view, but it was clear from the report that there were not as many of them. The proposed rewording of draft article 21 did not reflect the view of most States. It was therefore reasonable to question the usefulness of seeking their opinion if that was not then taken into account.

55. He recommended the referral of the draft articles to the Drafting Committee. It was essential, however, that the Committee knew what was expected of it: was it being asked to formulate draft articles that were intended to become a convention, or to produce a draft declaration or a draft of a different nature? If it was deemed appropriate to establish draft articles, “shall” should not be used systematically in place of “should”, as both words coexisted harmoniously in many international instruments. Above all, the Commission should make clear to States that the aim of the draft articles was to contribute to the progressive development of law.

56. Mr. CANDIOTI said that he wished to draw attention to two points. First, with regard to the wording of draft article 16, he noted that, in the Spanish version, it was difficult to grasp the meaning because an important element was missing, namely the adjective *potenciales*. The mistake would no doubt be corrected. In any event, he agreed with Mr. Kolodkin that draft article 16 was flawed as it gave the impression that States and international organizations were free to choose whether or not to offer assistance to affected States. Second, as noted by the Special Rapporteur, the duty to cooperate provided for in draft article 8 was insufficient. It was important that States and organizations at the very least be required to consider any requests for assistance made to them.

57. Mr. SABOIA said that the Special Rapporteur’s eighth report on the protection of persons in the event of disasters contained all the elements necessary for the successful completion of the second reading of the draft articles. He wished, in particular, to congratulate the Special Rapporteur on having presented in his eighth report a careful analysis of the comments and suggestions made by States and by international organizations during the course of the elaboration of the draft articles.

58. Regarding the form of the outcome of the Commission’s work, it should be recalled that it would be for States to decide whether they wished to adopt a legally binding instrument on the basis of the text submitted by the Commission or to choose an instrument of a different nature. He was in favour of drafting a binding instrument. As stated by the Special Rapporteur in paragraph 413 of his eighth report, a recommendation in favour of the conclusion of an international convention would be fully in line with the practice of the Commission. Moreover, important organizations with extensive experience of disaster situations, such as the IFRC and the World Food Programme, had expressed support in that regard.

⁴¹ *Ibid.* (draft article 7).

59. As to the debate on whether it should be mentioned expressly that certain provisions represented either progressive development or codification of international law, he shared the view expressed by Mr. Candiotti, Mr. McRae and Mr. Nolte, among others. The Commission's mandate was to promote the progressive development of international law and its codification. In most of its work, the Commission had avoided drawing a sharp distinction between the two aspects and, as Mr. McRae had pointed out, it was often difficult to differentiate them in practice.

60. Most of the changes proposed by the Special Rapporteur as a result of his analysis of the comments made by States and by international organizations preserved or enhanced the balance between respect for the sovereign rights of the affected State, on the one hand, and respect for individual rights and for international law, on the other. While, for some, the draft articles were not sufficiently operational, it should be recalled that their purpose was not to duplicate the large number of instruments governing operational aspects of the protection of persons in the event of disasters, but to establish a broad legal framework and thereby fill a gap.

61. With regard to draft article 3, some Commission members had argued that the addition of the adjective "economic" could lead to an excessively broad interpretation of the definition of "disaster", which might then be applied to, for example, the effects of falling prices of exports. However, the adjective "economic" was linked to the word "damage" and to the expression "large-scale" and referred to the large-scale destruction of economic infrastructure resulting from a disaster, as had happened in Haiti. The Drafting Committee should take care to reword the draft article in a manner that responded to the concerns expressed in that regard.

62. As to draft article 4 on the use of terms, the Special Rapporteur proposed, taking into account the Oslo Guidelines,⁴² to rephrase the provision related to military assets. The reasons cited to justify that approach should not lead to undue restrictions being placed on the employment of military assets, which were often vital in bringing prompt and adequate assistance to victims of disasters, as Mr. Kolodkin had rightly noted. Moreover, it was stated in paragraph 76 of the eighth report that military personnel remained under the full command of the assisting State, which might conflict with the rights of the affected State. The matter should be further clarified.

63. Turning to draft article 5, Mr. Saboia said that the inherent dignity of the human person, which served as the basis for the evolution of human rights, should not be incorporated in the preamble, as it was a concept that deserved to be addressed in a separate draft article.

64. Concerning draft article 6 on human rights, he supported the insertion of the word "protection". The word "fulfillment" had been criticized by some; perhaps the word "enjoyment" was more in line with standard human rights terminology. As to draft article 7, he agreed with

some of the earlier speakers that there was little reason to insert the words "no harm" and "independence".

65. As emphasized by the Special Rapporteur in paragraph 158 of his eighth report, the duty to cooperate was an important principle of international law embodied in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. Draft article 8 on the duty to cooperate was central to the topic, and the expression "as appropriate" added an element of flexibility to the fulfillment of the obligation.

66. Lastly, regarding the relationship of the draft articles with international humanitarian law and the reformulation of draft article 21 by the Special Rapporteur as a "without prejudice" clause, that solution adequately incorporated the majority opinion expressed during the debate held in the Sixth Committee, namely that, while it should be recognized that international humanitarian law took precedence as *lex specialis* during armed conflicts, the draft articles could prove useful in disaster situations occurring in time of armed conflict.

67. The draft preamble proposed by the Special Rapporteur should be submitted to the Drafting Committee together with the draft articles.

68. Mr. HASSOUNA said that the timeliness of the topic under consideration was demonstrated by the suffering caused all over the world by natural disasters such as floods, earthquakes and tsunamis, and that there was therefore an urgent need to regulate the international community's response to those dramatic situations. The Commission's work, guided and inspired by the Special Rapporteur, was important in that regard, and the draft articles filled a legal lacuna by elucidating the basic principles that underpinned the rights and duties of States and other actors in the event of disasters. They would provide a legal framework for the conclusion of regional and bilateral agreements and for drafting the operational guidelines governing the work of non-State actors, in particular the IFRC.

69. The draft articles under consideration had been developed by the Commission between 2008 and 2014, when they had been adopted on first reading. The Commission was currently carrying out the second reading of the draft articles, at a time when it had entered the final year of the current quinquennium. In that context, he wished to thank the Special Rapporteur for his excellent eighth report, in which he summarized all the work on the topic by going over the comments and observations of all relevant actors in relation to each issue and draft article, and studied each proposal and agreement before presenting his own recommendations, in which he showed understanding, objectivity and flexibility. His only aim was to end up with wording that was accurate, legally sound and likely to attract wide support. It would be appropriate, however, to explain briefly in the commentaries the reasons why he had not accepted the main proposals of relevant actors.

70. The report under consideration reflected the Commission's overall approach to dealing with the topic,

⁴² United Nations, OCHA, Oslo Guidelines: Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, Revision 1.1, November 2007.

which consisted in striking the right balance between the need to protect the persons affected by disasters and the need to respect the principles of State sovereignty and non-interference. In order to achieve that goal, humanitarian assistance had, at all times, to remain neutral and impartial, and be based on solidarity and cooperation among all relevant actors. In spite of the constructive approach adopted by the Commission, many member States of AALCO had expressed concern, at their recent annual assembly, that the draft articles did not sufficiently preserve the sovereignty of the affected States and its consent to external assistance. He had reassured them that the sovereignty and consent of the affected State were explicitly referred to in draft article 4 on the use of terms, draft article 12 on the role of the affected State, draft article 14 on the consent of the affected State to external assistance and draft article 15 on the conditions on the provision of external assistance. He had expressed his hope that those clarifications would dispel their concerns, and had stressed that the support of member States of the Organization for the draft articles adopted by the Commission was essential to their approval by the General Assembly of the United Nations.

71. Regarding the Special Rapporteur's eighth report and his recommendations concerning the draft articles, he supported the proposal to indicate in the introduction or in the commentaries that the draft articles represented both progressive development and codification of international law, as that would be in accordance with the Commission's mandate and recent practice. The appropriateness of mentioning that a given rule represented progressive development should be left to the discretion of the Special Rapporteur, who was the best placed to determine whether it was useful and necessary.

72. He welcomed the fact that the draft articles did not include the concept of "responsibility to protect", in line with the position taken by the Secretary-General of the United Nations, who, in his 2009 report on implementing the responsibility to protect, indicated that "[t]he responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility".⁴³ The Commission had subsequently endorsed that position.

73. It should be made clear in the commentary that draft articles 1 and 2 were applicable to all phases of disasters.

74. Draft articles 3 and 4 could be combined as they both related to the terms used, although keeping the definition of "disaster" in a separate draft article could be justified, as it was the subject of the draft articles as a whole. He welcomed the inclusion of the word "displacement" in the definition contained in draft article 3, since it addressed the sad plight of displaced persons in disaster situations. As to the adjective "economic", it would be unreasonable if it referred only to a recession

or to a temporary economic crisis, but since the damage was qualified as "large-scale", it referred to the total economic collapse of the affected State, which was often combined with another calamity and could thus well be described as a disaster.

75. Concerning draft article 4 (e) on "relief personnel", the proposition that "military assets shall be used only where there is no comparable civilian alternative" warranted further explanation in the commentary, bearing in mind that military assistance (as opposed to intervention) had often proved in practice to be more expeditious and effective in disaster situations. The word "shall" should thus be replaced with "should".

76. Draft article 5 related to human dignity, which was an important principle that provided the ultimate foundation for human rights law. It was referred to in the Charter of the United Nations, in all universal human rights instruments, in most regional human rights instruments and in the constitutions of various countries. The draft article should therefore be retained prior to draft article 6 on human rights. With regard to draft article 6, he would prefer to return to the original wording, in which reference was made only to respect for human rights, rather than to respect, protection and fulfillment.

77. Concerning draft article 7 on the principles of humanitarian response, the reference to the principles of no harm and independence was ambiguous and should be clarified. While he welcomed the reference to the needs of the most vulnerable people, clarifications in the commentary as to their legal identity would facilitate the provision of assistance.

78. Draft article 8 related to the duty of States to cooperate among themselves, with the United Nations and with other assisting actors. Since cooperation was by definition of a voluntary nature, the verb "shall" should be replaced with "should", and the title of the draft article should simply read "Cooperation in the event of disaster". Moreover, special mention should be made in the draft article or in its commentary to the role of regional organizations, whether intergovernmental or non-governmental, in providing assistance in disaster situations. Practical experience demonstrated that regional assisting actors could often provide the most rapid and effective assistance in such situations.

79. Concerning the reduction of the risk of disasters provided for in draft article 11, he would prefer to replace the words "shall reduce" in paragraph 1 with "should reduce" or "shall aim at reducing".

80. On the duty of the affected State to seek external assistance, which was the subject of draft article 13, a determination as to whether a disaster exceeded an affected State's response capacity should not be made by the State itself; he therefore supported adding the word "manifestly" before "exceeds" to define the threshold for triggering the duty.

81. In draft article 14 on the consent of the affected State to external assistance, the notion of "good faith" seemed unnecessary. Besides, the idea that consent

⁴³ "Implementing the responsibility to protect", report of the Secretary-General (A/63/677), para. 10 (b).

should not be withheld or withdrawn “arbitrarily” required elaboration and clarification in the commentary to the draft article, since it was a key element in the provision of external assistance.

82. As to the termination of external assistance, which was dealt with in draft article 19, the requirements for such termination should be more clearly defined in the commentary to ensure the transparency and legal clarity of the process.

83. Draft article 20, on the relationship to special or other rules of international law, and draft article 21, on the relationship to international humanitarian law, should be simplified and combined in a single draft article that provided: “The present draft articles are without prejudice to other rules of international law.” The nature and specificity of those rules could be mentioned in the commentary.

84. He agreed with the Special Rapporteur that the draft articles needed to be supplemented by a preamble that provided the conceptual framework. The Special Rapporteur’s proposed text was generally acceptable, with two observations. In the fourth paragraph, on the importance of strengthening international cooperation, reference could be made to the parties to that cooperation, for example assisting actors or the affected State. In the fifth paragraph, when reaffirming the primary role of the affected State, reference could also be made to the State’s duty to cooperate with assisting States and other actors, so as to preserve the balance of the draft articles.

85. The issue of the final form of the draft articles seemed to be controversial, since different opinions had been expressed on the matter by States and by the Commission members. Some had stated that they would prefer non-binding guidelines, a guide to practice or a set of recommendations, but he considered that an international convention would provide the momentum needed to develop new disaster relief assistance instruments at the regional level and relief legislation at the national level. Consequently, he agreed with the Special Rapporteur’s proposal that the Commission recommend to the General Assembly the conclusion of an international convention on the basis of the draft articles. All the recommendations in the Special Rapporteur’s eighth report should thus be referred to the Drafting Committee in order for the draft articles to be finalized as soon as possible and for the Special Rapporteur to complete the commentaries. Once the draft articles had been adopted on second reading, they would represent a major achievement of the current quinquennium.

86. Ms. JACOBSSON said that she wished to state from the outset that, with respect to the final form of the Commission’s work on the topic of the protection of persons in the event of disasters, she was in favour of a draft convention. The need for a universal framework convention on the topic had become more and more apparent in view of the natural disasters that the world had faced in recent years and of the administrative and structural difficulties that had sometimes slowed response times. In fact, it would be regrettable if the Commission did not make use of its mandate to codify and progressively develop international law in an area where the need was so obvious.

87. Having said that, the Special Rapporteur’s excellent eighth report and the draft articles that he proposed warranted some comments. It was worth underlining the excellent manner in which the Special Rapporteur had managed, as in his previous reports, to focus on the protection of the individual while maintaining the basic presumption that the affected State had the primary role in the direction, control, coordination and supervision of disaster relief and assistance in its territory. In that context, it was worth reiterating that no balance could ever be struck between sovereignty and human rights, which existed irrespective of whether the sovereignty of a State was infringed. Reciprocity was not required. The fact that a State could derogate from its human rights obligations did not mean that those rights ceased to exist. In addition, as pointed out by other Commission members, State sovereignty entailed a duty to honour human rights obligations.

88. There was no reason to revisit matters on which the Commission had reached agreement after lengthy discussions, for example the sensitive and controversial issue of the “responsibility to protect”. The protection of persons in the event of disasters did not depend on a label; it should rest on concrete and functional articles on how States and international organizations had to and could act so as to ensure that victims of disasters were protected and assisted with full respect for their dignity and rights.

89. She welcomed any formulation that aimed to strengthen preventive measures and to underscore the importance of regional and bilateral agreements on assistance in the event of disasters. Such agreements were most often concluded before a disaster had taken place and often addressed all phases of disasters, including prevention. In addition, they often provided for cooperative measures, such as common training and exercises, which did not serve only a practical purpose: they also contributed significantly to diminishing tension among countries. In the region from which she hailed, several bilateral and regional agreements had been reached containing a general article on border crossing and an article on cases when assistance was provided by military personnel, State ships and aircraft or military vehicles. In such situations, special permission was required to enter the territory. In that connection, regarding the treatment of military assets in the report under consideration, although humanitarian assistance was primarily a civilian matter, it was important not to set up obstacles that might unnecessarily delay disaster assistance. In the end, it was the receiving State that decided whether to accept assistance. In addition, it was sometimes difficult to distinguish between military and civilian assets. Coastguards, for example, could be characterized as civilian or military depending on the internal organization of the assisting State.

90. The issue of gender seemed to have been forgotten in the report under consideration. In his seventh report,⁴⁴ the Special Rapporteur had mentioned the Hyogo Framework for Action 2005–2015⁴⁵ and the need to take that issue into

⁴⁴ *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/668 and Add.1.

⁴⁵ Report of the World Conference on Disaster Reduction, held in Kobe, Hyogo, Japan, 18–22 January 2005 (A/CONF.206/6 and Corr.1), chap. 1, resolution 2: “Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters”.

account. She remained convinced that the issue of gender should be elucidated in the draft articles and in the commentaries, for the simple reason that it would make assistance much more effective. A gender-sensitive approach, like other elements, such as the need to take into account cultural diversity, was essential to ensuring that responses were effective, in terms of speed, adequacy and cost.

91. The issue of gender was increasingly mainstreamed when humanitarian assistance was discussed, and the OCHA had made an important contribution at the global level. The issue was, however, somewhat ignored in disaster situations, as had been noted during the thirty-first International Conference of the Red Cross and Red Crescent in 2011. For example, after having experienced how emergency operations in Haiti and Pakistan affected women, girls, men and boys differently, the Norwegian Red Cross had decided to take account of the issue more systematically. The importance of the issue was also underlined in the Sendai Framework for Disaster Risk Reduction (2015–2030)⁴⁶ and in resolution 6 on strengthening legal frameworks for disaster response, risk reduction and first aid, adopted in December 2015 at the thirty-second International Conference of the Red Cross and Red Crescent.⁴⁷

92. Regarding draft articles 1 and 2, she supported the Special Rapporteur's recommendation to retain the wording adopted by the Commission on first reading. She was of the view that draft articles 3 and 4 should be merged. She could not see the merit in adopting a definition of "disaster" for purposes other than those of the draft articles. By introducing two categories of definitions – one that was clearly restricted to the purposes of the draft articles and one that attempted to go further – there was a risk of causing some confusion. In addition, such a general definition might run counter to the definitions of "disaster" in other instruments, including bilateral and regional agreements.

93. The Special Rapporteur had proposed two modifications to draft article 3. She supported the insertion of the word "displacement", primarily for the reason put forward by the International Organization for Migration, namely that it would give greater visibility to the issue of human mobility, but not the proposal to insert the adjective "economic", since she could not find convincing arguments in favour of such an addition, which might cause uncertainty.

94. The definition of "affected State" in draft article 4 (a) merited further consideration if it was to be interpreted as it had been by some Commission members, such as Mr. Hmoud and Mr. Murphy, namely as meaning that a State was affected if one of its citizens was present in the territory where the disaster had taken place. It would be worrying if the Commission were to expand the concept of "affected State" beyond what could be considered reasonable. In addition, the concept had to be kept separate from that of "national interest". There was a dangerous tendency to expand the concept of "national interest" that the Commission should not fuel. It was

therefore important that the meaning of "affected State" be explained properly in the commentaries. The current definition drew on the IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance,⁴⁸ as explained in the commentaries adopted on first reading in 2014. It was an appropriate starting point, although more detailed commentaries might be warranted.

95. For reasons that she had already explained, she believed that the proposed addition to draft article 4 (e), namely that "military assets shall be used only where there is no comparable civilian alternative", should be deleted. However, she supported the inclusion of an explicit reference to "telecommunications equipment" in draft article 4 (f).

96. She was of the firm opinion that human dignity, which was the subject of draft article 5, should be dealt with in a separate draft article. As explained in the commentaries adopted on first reading, "[t]he principle of human dignity undergirds international human rights instruments and has been interpreted as providing the ultimate foundation of human rights law".⁴⁹ It would be wrong to place the obligation of States and other assisting actors to respect and protect the inherent dignity of the human person in the preamble when that obligation was set out in the articles of human rights instruments, for example article 10 of the International Covenant on Civil and Political Rights. She also supported the Special Rapporteur's proposal to use the expression "other assisting actors".

97. She supported the revised version of draft article 6. As to draft article 7, on humanitarian response principles, and draft article 21, on the relationship with international humanitarian law, the Special Rapporteur proposed mentioning two additional principles in draft article 7, namely those of no harm and independence. However, in a draft convention, only principles with clear implications should be mentioned, and she was not convinced that referring to the principles of no harm and independence would help in assessing their legal implications. It would be better to emphasize the importance of the two principles in the commentaries. For a similar reason, she remained sceptical about referring to the principle of neutrality. Admittedly, the principle was laid down in many "soft law" instruments on disaster response. As one of the core principles of the ICRC, it was of course crucially important to its work, but she could not understand why it was mentioned in the draft articles under consideration. She would not, however, be opposed to retaining the reference if the distinction between neutrality and impartiality was properly explained in the commentary.

98. While it was correct to say, as Ecuador had done, that humanitarian action should avoid worsening disparities and discrimination among the affected population, it was also correct to note that international humanitarian law occasionally supported "discrimination", in the

⁴⁶ General Assembly resolution 69/283 of 3 June 2015, annex II.

⁴⁷ IFRC, document 32IC/15/R6.

⁴⁸ IFRC, Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, Geneva, 2008.

⁴⁹ *Yearbook ... 2014*, vol. II (Part Two), p. 68 (para. (2) of the commentary to draft article 5).

sense that it prioritized certain groups, such as women and children. That had led some Commission members to conclude that the principles laid down in the draft convention might conflict with the principles of international humanitarian law, despite the fact that the draft convention was not, generally speaking, applicable in times of armed conflict. That showed the inextricable link between draft articles 7 and 21. If the Commission were to retain the wording of draft article 21 adopted on first reading, which provided that the draft articles “do not apply to situations to which the rules of international humanitarian law are applicable”,⁵⁰ there would be less of a problem. The wording made it clear that there was a hierarchy of norms that helped protect vulnerable persons in the event of disasters and during armed conflicts. If, however, the Commission were to reformulate draft article 21 as proposed by the Special Rapporteur, a problem might arise unless it explained in detail in the commentaries what was meant by “without prejudice to”.

99. With regard to draft article 8, on the duty to cooperate, she was not convinced that it was necessary to refer specifically to the United Nations Special Coordinator for Emergency Relief, whose post was far too closely connected to the present administrative structure of the United Nations. The specific role of the Coordinator could be explained in the commentaries.

100. Lastly, concerning draft article 12, on the role of the affected State, she supported the Special Rapporteur’s recommendation not to modify the text as adopted on first reading. The wording was the result of long and thorough discussions, and any modification might prompt requests for other consequential modifications. The draft article on the role of the affected State was one of the most important, if not the most important, in that it set out the premises for the draft articles as a whole.

101. In conclusion, she supported the referral of all the draft articles to the Drafting Committee.

102. Mr. ŠTURMA said that the proposed draft articles as a whole set out suitable and balanced principles that could guide the provision of assistance to affected States by relevant actors. They struck an appropriate balance between the principles of sovereignty and non-intervention, on the one hand, and humanitarian principles and human rights, on the other. As to their legal nature, they represented both codification and progressive development of international law, which could be mentioned in a general commentary to the draft articles, as had been proposed by some members at a previous meeting, but he would not press the matter.

103. As to the final form of the draft articles, he supported the Special Rapporteur’s proposal for the Commission to recommend to the General Assembly the adoption of an international convention. Since the convention would, by the nature of its provisions, necessarily be a framework convention, there was no cause for concern if the General Assembly opted instead for a declaration, because, in either case, framework rules and principles would be adopted. While the adoption of the draft articles in the form of a

binding treaty would be preferable, a declaration might bring certain advantages, as it would be adopted more quickly and would apply to all Member States.

104. He agreed with most of the draft articles and would therefore make just a few comments on the changes proposed by the Special Rapporteur and on related problems. Several members had proposed merging draft articles 3 and 4 into a single draft article on the use of terms. There was nothing to prevent such a step, since it was the content of the draft articles that was most important. The definition of “disaster” in draft article 3 was key to understanding the distinction between the protection of persons in the event of disasters and the concept of responsibility to protect, a point that had been raised by Mr. Forteau and Mr. Nolte. The two sets of rules were clearly based on the basic obligation of States to protect, by virtue of their sovereignty, persons in their territory or under their jurisdiction or control. They differed, however, in terms of the nature of the risks associated with them and, to a large extent, in terms of the nature and means of the responses provided in each case.

105. Several elements had been added to the definition of “disaster” and, while there had been no particular objection to the inclusion of the word “displacement” among Commission members, Mr. Murphy and Mr. Nolte had questioned the addition of the adjective “economic”. The decision could be reversed, but, coming from a country that had experienced two large-scale floods over the past 15 years, he wished to recall that disasters also often resulted in direct and indirect damage, which was precisely what the words “material” and “economic” aimed to encapsulate. He therefore proposed to keep the adjective “economic” and to add, after the words “events resulting”, the phrase “through their physical consequences”, which were taken from the 2001 draft articles on the prevention of transboundary harm from hazardous activities.⁵¹ That solution had the double benefit of recalling the distinction between the topic of the protection of persons in the event of disasters and the concept of responsibility to protect, and of excluding from the definition of disaster and economic damage human-caused economic troubles and disruptions, such as debt or financial crises.

106. As to the wording of draft article 4, the term “other assisting actor” was a good shorthand for actors other than assisting States. Nevertheless, it might be useful, in some operative draft articles, to distinguish among States, the United Nations (and possibly some other intergovernmental organizations) and other actors. That was particularly the case in draft article 8 on the duty to cooperate, where the distinction was desirable, as had been emphasized by Mr. Murphy and Mr. Nolte.

107. Concerning draft article 4 (e), he agreed that the phrase “military assets shall be used only where there is no comparable civilian alternative to meet a critical humanitarian need” should be removed for both formal

⁵⁰ *Ibid.*, vol. II (Part Two), p. 62.

⁵¹ The draft articles on prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm and the commentaries thereto adopted by the Commission at its fifty-third session are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98. See also General Assembly resolution 62/68 of 6 December 2007, annex.

and substantive reasons: for formal reasons, because such a rule should be placed not in a draft article on the use of terms, but in draft article 16 or 17; for substantive reasons, because the language was too restrictive, particularly when compared to the Oslo Guidelines. The organization of relief personnel and equipment differed among States, and it was not uncommon for it to fall under the responsibility of the military, including when relief was provided for civilian or humanitarian purposes. If the above-mentioned phrase were to be retained, the word “shall” should be replaced with “should”.

108. Turning to the key draft articles, while he supported the inclusion of draft article 6, the word “fulfillment” gave rise to significant difficulties. Without downplaying the role of the positive obligations of States or that of economic and social rights (the right to food, for example), he wished to recall that disasters were a typical example of *force majeure* or of exceptional circumstances, in other words, of situations when the capacity of States to fulfil all human rights was limited. As acknowledged by the Special Rapporteur in the commentary to the draft article, the reference to human rights in the draft article was to the whole of international human rights law, including its treatment of derogable and non-derogable rights. However, that distinction, which was crucial for civil and political rights, was not included in all treaties, in particular those on economic and social rights. Moreover, in the event of disasters, the implementation of those rights was affected, even without a formal derogation.

109. With regard to draft article 7, which was of the utmost importance, he supported the words “the most vulnerable”, which were an improvement on the original version, but was unsure why the Special Rapporteur had added the principle of “no harm”, which seemed rather problematic, to the principles of humanitarian response. Clearly, the response to a disaster should never cause any additional harm to the victims. However, in the very exceptional circumstances (*force majeure*) created by disasters, it was not always possible to provide an effective response and assistance without causing harm. Thus, the measures adopted by assisting States or by other assisting actors in order to save human lives might cause damage to private or public property. Did it follow that States could be held internationally responsible for such damage?

110. The same problem arose in relation to draft article 11, which provided for the adoption by States of preventive measures to reduce the risk of disasters. Should the lack of prevention, or its inadequacy, be considered a breach by the affected State of its obligations, which might render it internationally responsible? If so, a new rule would be created. In order to avoid further debate on the progressive development of international law, “shall reduce” could be replaced with “should reduce” in the first paragraph of the draft article.

111. He supported the new wording of draft articles 12, 13 and 14, the content of which was the result of a delicate balance between the sovereignty of the affected State and its obligations. Lastly, the wording of draft article 21 as modified by the Special Rapporteur posed an interesting legal problem. Mr. Caffisch was right to say that, if the Commission just wanted to have two “without prejudice” clauses,

the best solution would be to combine draft articles 20 and 21. However, if it wished to draw attention to the fact that some complex emergency situations could result from both a disaster and an international or non-international armed conflict, it should include in the draft articles another provision on the relevant *lex specialis*, namely international humanitarian law. Thus, the draft articles would apply only when the existing rules of international humanitarian law did not. In conclusion, he supported the referral of all the proposed draft articles to the Drafting Committee.

112. Mr. HUANG said that the draft articles adopted by the Commission on first reading at its sixty-sixth session had generally been welcomed by States in the Sixth Committee, which demonstrated the quality of the work carried out up to that point. Criticisms had also been voiced, however, which showed that significant improvements would need to be made to the draft articles on second reading. As work on the topic proceeded, the Commission should thus ensure that it took due note of not only the views expressed orally during the debates in the Sixth Committee but also the comments and observations submitted in writing by Governments and by international organizations and entities.

113. While he supported the referral to the Drafting Committee of the preamble and of the text of the draft articles on the protection of persons in the event of disasters as proposed in the eighth report, he wished to focus on certain issues that might arise during the second reading. Regarding the distinction between the progressive development of international law and its codification, which had been the subject of some very interesting exchanges, he noted that a considerable number of members had stated that many provisions of the draft articles were not substantiated by either treaty law or practice and they had therefore proposed to specify, in the commentaries to each of the draft articles, whether the rules that they contained constituted codification of international law or its progressive development. Other members had dismissed that proposal on the grounds that it made little sense and might even imply that a hierarchy had been established among the various proposed rules. In their view, it would be preferable to indicate in the preamble, and not in the commentaries, that the draft articles constituted both progressive development of international law and its codification. Lastly, other members had rejected both proposals and had stated that the issue simply should not be discussed. In his opinion, the issue at hand was not so much whether a particular provision was progressive development of international law or its codification as it was ensuring that there was no imbalance between the two. In general, however, it was clear that the proposed draft articles constituted progressive development of international law rather than its codification and that, moreover, their content was not at all substantiated by any settled State practice. That was true of draft article 13, which provided that, when a disaster exceeded an affected State’s national response capacity, it had the duty to seek assistance from among other States. The same was also true of draft article 14, paragraph 2, in which it was stated that consent to external assistance could not be withheld arbitrarily. It should also be noted that, in the commentaries to those draft articles, reference was made above all to “soft law”, but almost no mention was made of binding international

instruments or of rules of customary international law. The Commission should take care not to go too far or too fast with regard to the development of international law, which, it was worth recalling, should be progressive and in line with existing law.

114. It should also be borne in mind that, during its consideration of the draft articles on first reading, the Commission had decided not to refer to the concept of responsibility to protect. Given that its choice had been approved by States in the Sixth Committee, it would be inappropriate to reopen the debate on the matter. It was clear that the concept of responsibility to protect had been specified as part of work related to serious criminal activities that had nothing to do with the topic under consideration. Lastly, concerning the definition of the rights and obligations of States with regard to the protection of persons in the event of disasters, great care should be taken during the second reading to ensure that the draft articles struck a satisfactory balance between the sovereignty of States and the principle of non-interference in their internal affairs, particularly as, during the debate in the Sixth Committee, several States had indicated that such a balance had not been achieved. Indeed, while the draft articles adopted on first reading contained a number of provisions related to the duties of affected States or of assisting States and other assisting actors, very little was said about their rights. In draft article 12, paragraph 1, for example, it was established that the affected State, by virtue of its sovereignty, had the duty to ensure the protection of persons and the provision of disaster relief and assistance on its territory. However, that kind of duty did not imply an obligation to accept an offer of external assistance. The affected State should not be required to seek assistance, nor should it be obliged not to reject an offer of assistance from a third State. The links between the affected State and the assisting State should be viewed in the context of cooperation. The Commission should therefore specify that, while the affected State could seek assistance when a disaster clearly exceeded its national response capacity, it was under no binding obligation to do so.

115. He considered the new definition of the term “disaster” to be overly broad in that it encompassed both natural and industrial disasters and might even cover armed conflicts. It would be advisable to avoid such an approach, which might lead to a number of overlaps with the rules of international humanitarian law and to conflicts of norms. Lastly, with respect to the final form of the draft articles, the Special Rapporteur’s proposal to adopt them in the form of an international convention was not suitable, especially bearing in mind that most of their provisions were not substantiated either by international treaties or by customary international law or international practice. It would therefore be more worthwhile to present the draft articles in the form of a non-binding instrument.

116. The CHAIRPERSON, noting the late hour, suggested that the Commission pursue its consideration of the eighth report on the protection of persons in the event of disasters at the next meeting.

The meeting rose at 1.05 p.m.

3295th MEETING

Tuesday, 10 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Cafilisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, 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. Tladi, 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. The CHAIRPERSON invited the members of the Commission to continue their consideration of the eighth report on the protection of persons in the event of disasters (A/CN.4/697).
2. Mr. PETRIČ said he agreed with the Special Rapporteur that it would be inadvisable to incorporate in the draft articles any proposed amendments which would alter the delicate balance between the paramount principles of the sovereign equality of States and non-interference, on the one hand, and the equally vital protection of individuals affected by a disaster, on the other. An international instrument protecting human beings in the event of disasters was needed but, in order to be accepted, it would have to respect the two above-mentioned principles of contemporary international law. Without that balance, which had been established after lengthy, in-depth discussions in the Commission, the whole project would fail. Although States’ comments were vital for the Commission’s work, they sometimes reflected the specific interests of a given State and should be treated with care. Thus, the original text of the draft articles should be changed only when there was good reason to do so. With regard to the relationship between codification and progressive development, he fully subscribed to the comments made by Mr. McRae at the end of the 3293rd meeting.
3. As there were already several non-binding instruments on the topic under consideration, he was in favour of the draft articles ultimately taking the form of a binding instrument. Even if they did not become a convention in the near future, as an instrument drafted by the International Law Commission they would have an impact on legal thinking and would provide an international legal framework for the protection of persons in the event of disasters. He was therefore in favour of referring all the draft articles to the Drafting Committee.
4. The fifth paragraph of the preamble was somewhat unbalanced in that it referred to the principles of