

Document:-
A/CN.4/3295

Summary record of the 3295th meeting

Topic:
Protection of persons in the event of disasters

Extract from the Yearbook of the International Law Commission:-
2016, vol. I

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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

sovereignty and non-interference, but said nothing about the rights and needs of victims of disasters, which should be mentioned in either that paragraph or a separate preambular paragraph. With regard to draft articles 1, 2, 6, 9, 12, 15, 17, 18 and 19, he considered that either the versions adopted on first reading⁵² or the new versions proposed by the Special Rapporteur in his eighth report were acceptable. Draft articles 3 and 4 should not be merged, because the definition of what constituted a disaster was so crucial that it deserved a separate article. He agreed that draft article 3 should include a reference to displacement, which was a consequence of many disasters. He was, however, uncertain whether a reference to economic damage should be included in the draft articles, even though it could have grave consequences for many people. The Drafting Committee might wish to give some thought to that matter.

5. In draft article 4 (e), he had some reservations with regard to the restriction placed on the use of military assets, because many countries had military units that were specially trained and equipped to respond speedily to disasters. In a large-scale disaster, the crucial role which they could play should not be hampered by lengthy discussions as to whether civilian disaster relief was available. He agreed with the introduction of a reference to “telecommunications equipment” in draft article 4 (f).

6. Although he could accept the use of the new formula “other assisting actors” in draft article 5, since it implied that everyone involved in assistance had to respect the inherent dignity of the human person, the differentiation of the various actors in the previous version had merit. It would therefore be wise to scrutinize the altered wording in the Drafting Committee. Bearing in mind that several modern constitutions and a number of international instruments deemed human dignity to be a separate basic human right underpinning all others, he agreed with the decision to devote a separate article to it, especially as human dignity was so often forgotten or ignored when disasters occurred.

7. In draft article 7, the addition of the principles of “no harm” and “independence” required clarification, because harm was often an unavoidable consequence of disaster response and it was unclear whose independence was meant in that context. If it were that of the affected State, he wondered whether it was not already covered by the reference to the principles of sovereignty and non-interference. Too many conflicting principles might undermine efficient disaster relief.

8. He questioned the advisability of including a specific reference to the United Nations Special Coordinator for Emergency Relief in draft article 8, since that position might no longer exist by the time the instrument entered into force. Moreover, that draft article was simply reconfirming a very basic principle, the duty to cooperate, which, in the opinion of some writers, belonged to the realm of *jus cogens*. As draft articles 10 and 11 both dealt with disaster risk reduction, they could be combined.

9. He preferred the version of draft article 13 as adopted on first reading, because a State might be slow to determine that a disaster exceeded its national response capacity, or

it might be too proud to do so. As a result, the response might come too late for the victims. On the other hand, he agreed with the recasting of the final phrase of that draft article, as proposed by the Special Rapporteur. In draft article 14, he was not in favour of introducing the notion of “good faith”, since it was unclear who would ascertain whether the offer of assistance had been made in good or bad faith. The draft articles already gave an affected State ample discretion to choose the most appropriate form of assistance and to refuse any offer it considered unhelpful or dangerous. In draft article 16, he failed to understand the logic behind weakening the language from “have the right to offer assistance” to “may address an offer of assistance”. In that connection, he supported the view that the draft articles should refer to the obligation of a State or international organization to respond either negatively or affirmatively to a request for assistance. As far as draft articles 20 and 21 were concerned, deliberations in the Drafting Committee would offer an opportunity to establish a proper functional relationship between the draft articles and international humanitarian law.

10. Mr. VÁZQUEZ-BERMÚDEZ, referring to the discussion surrounding the advisability of making express reference in the commentary to the question of whether a specific draft article, or the draft articles as a whole, comprised the codification or progressive development of international law, said it should be recalled that, in accordance with its statute, the Commission had been tasked with assisting the General Assembly in both functions. In presenting draft articles that encompassed codification and progressive development, the Commission was therefore simply fulfilling its mandate. Elements of progressive development were inherent in any process of codification and vice versa. In practice, the Commission had proceeded on the basis of a composite idea of codification and progressive development, as stated in its report on the work of its forty-eighth session.⁵³ Its general practice had been not to draw a distinction between the two processes with respect to specific draft articles and it had only occasionally stated in the introductory commentary to draft articles adopted on second reading that they reflected both codification and progressive development. The fact that some Commission members might have identified elements of progressive development in a given proposal was not lost, however, since their comments were recorded in the summary records of debates in plenary meetings and, if necessary, in the reports of the Drafting Committee, or in the commentary to the draft articles adopted on first reading. He agreed with Mr. McRae that the Commission should not include such references in the final text adopted on second reading, since they would diminish the value of the final product. Moreover, it would be very difficult to determine which aspects of a given draft article were *lex lata*, *lex in statu nascendi* or *lex ferenda*. The most sensible solution might be to reflect the wording used in paragraph (1) of the general commentary to the draft articles on the responsibility of States for internationally wrongful acts.⁵⁴

⁵³ *Yearbook ... 1996*, vol. II (Part Two).

⁵⁴ The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

⁵² *Yearbook ... 2014*, vol. II (Part Two), pp. 61 *et seq.*, paras. 55–56.

11. It should be remembered that the Commission had decided at the outset of its work on the topic under consideration not to employ the concept of responsibility to protect, since, among other reasons, the Heads of State and Government of the States Members of the United Nations had decided in the 2005 World Summit Outcome document⁵⁵ that this concept was applicable solely in respect of the most serious international crimes of genocide, war crimes, ethnic cleansing and crimes against humanity. Any subsequent developments in that field would have to be reflected in practice and *opinio juris*.

12. The Commission's rights/duty approach was appropriate, since the central purpose of the draft articles was to protect persons in the event of disasters by recognizing the rights of individuals, the rights and duties of the affected State and the duties of the international community, while maintaining a balance between those rights and duties. Since the draft articles and the commentaries thereto would therefore make a substantial contribution to the codification and progressive development of a sphere of international law which was of increasing importance and interest, the Commission should recommend to the General Assembly that the draft articles adopted on second reading form the basis for the negotiation of an international convention, whether in an *ad hoc* committee established on the recommendation of the Sixth Committee or a diplomatic conference. Such an outcome would be all the more welcome given that there was no general and legally binding instrument with universal scope on that important subject, and it might prompt the formulation of more detailed regional or bilateral agreements or relevant national laws.

13. As suggested by the International Organization for Migration, the commentary to draft article 1 should recall that States had the obligation to protect all persons present in their territory, irrespective not only of nationality but also of legal status. The commentary to draft article 2 should explain that the concept of effective disaster response included the timely provision of relief, since the prompt action of specialized relief teams in the first hours or days following a disaster could save many lives. In draft article 3, a reference to displacement should be included in the definition of disaster, as it was something that should be borne in mind by States when providing a response that took account of victims' essential needs. A disaster always caused enormous economic damage to individuals and States in terms of loss of homes and other assets, as well as loss of livelihood when tourism and trade were hit. For that reason, as proposed by the Special Rapporteur, it would be wise to include the economic effects of calamitous events in the definition of disaster. It had already been stated in the commentary to that article adopted on first reading that the scope of the definition did not cover serious events such as political and economic crises, which might also undermine the functioning of society.⁵⁶ That clarification should be retained and even possibly expanded so that it was clear that the draft articles would not apply, for example, in the event of a collapse of the stock market. The commentary should also

state that not all the results of a calamitous event or series of events contained in the definition needed to be present in order for the definition to be applicable. Furthermore, there was no need to keep the definition of disaster separate from the terms defined in draft article 4.

14. In draft article 4 (a), the definition of "affected State" should be clarified so as not inadvertently to include States whose nationals were affected by a disaster in the territory of another State. He also agreed with the suggestion of the IFRC that subparagraph (d), which defined "external assistance", should include the words "financial support" after the reference to goods, in order to cover situations where external debt was cancelled or swapped, or non-reimbursable or reimbursable financial resources were provided, with a view to supporting the affected State's efforts to meet the essential needs of the stricken population. The last part of that subparagraph should read "for disaster relief and recovery or disaster risk reduction assistance" so as to cover the phase following the immediate response to a disaster. With regard to the Special Rapporteur's suggestion in paragraph 90 of his eighth report that the references to disaster risk reduction be deleted from subparagraphs (d), (e) and (f), "given the main focus of the draft as a whole, as explained under draft article 2", it should be noted that, in fact, draft article 2 implicitly covered disaster prevention, which was achieved through the provision of assistance in disaster risk reduction. Moreover, the United Nations Office for Disaster Risk Reduction had argued that the references to "disaster risk reduction" in draft article 4, subparagraphs (d), (e) and (f), should be deleted on the grounds that those subparagraphs were more relevant to the provision of relief than applicable for the purpose of disaster risk reduction, and not because the focus of the draft articles as a whole was limited to disaster relief. That Office had also stated that disaster risk management included measures to prevent or forestall conditions making for a disaster, which therefore came within the scope of the draft articles and had indeed formed the subject of draft articles 10 and 11. With regard to subparagraph (e), he was not in favour of restricting the definition of relief personnel in line with the Oslo Guidelines,⁵⁷ which called for military assets to be used only when there was no comparable civilian alternative, as that would unnecessarily constrain the provision of external assistance. The commentary could perhaps state that it was preferable to use civilian rather than military personnel.

15. Draft article 5 on human dignity was a key provision that should be kept as a separate article in its current location in the operative part of the document. Draft article 6, as proposed by the Special Rapporteur in his eighth report, was extremely important in that it covered the obligations not only to refrain from violating human rights in the event of disasters, but also to protect persons from such violations, as well as positive action to facilitate the fulfillment of their human rights. It should be made clear in the commentaries that international human rights law, including rules concerning the revocability or irrevocability of human rights, applied in full in that context.

⁵⁵ General Assembly resolution 60/1 of 16 September 2005.

⁵⁶ See *Yearbook ... 2014*, vol. II (Part Two), pp. 64–65 (para. (1) of the commentary to draft article 3).

⁵⁷ United Nations, OCHA, Oslo Guidelines: Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, Revision 1.1, November 2007.

16. He supported the Special Rapporteur's proposal to add the words "in particular" after "impartiality" in draft article 7, in order to clarify that non-discrimination derived from the principle of impartiality. While he understood the logic behind the suggestion by some States to include the "no harm" and "independence" principles, their scope in the context of disasters was unclear. Only the references to the three principles on which there was broad consensus among States and other actors in the field of humanitarian assistance should be retained.

17. The duty to cooperate set out in draft article 8 was of utmost importance, but was considerably weakened by the inclusion of "as appropriate"; the words "according to their capacity" would be more suitable in the light of the purpose of the draft articles, namely to facilitate an adequate and effective response to disasters that met the essential needs of the persons concerned, with full respect for their rights. When a disaster on the scale described in draft article 3 occurred, if the affected State could not meet the essential needs of the persons concerned because the disaster exceeded its response capacity or for any other reason, the consequences for the victims would be catastrophic and were likely to have a major impact on their human rights. In that context, it seemed clear that the international community had a duty to contribute to the respect, protection and fulfillment of the victims' human rights through cooperation and solidarity.

18. In draft article 9 on forms of cooperation, a reference to "financial support" and "recovery assistance" should be added at the end of the sentence, in line with the suggestion by Romania and the IFRC. In draft article 11, for which many States, as well as the IFRC, had expressed support, it was important to retain the reference to disaster risk reduction as a duty so as to provide clear normative content in relation to disaster prevention, mitigation and preparedness. The first paragraph should be maintained as adopted on first reading. The reference to preventing the creation of new risk and reducing existing risk could be addressed in the commentary so as not to make the text unwieldy and to avoid problems of interpretation. Although the list in paragraph 2 was only indicative, two key measures should be added: planning and reduction of vulnerability, which would cover earthquake-resistant construction, for example.

19. As several members had noted, draft article 12 was a key pillar of the project. In order to ensure that the title more adequately reflected the content, the word "role" could be replaced with "duty", given that the first paragraph expressly mentioned the duty of the affected State to ensure the protection of persons and provision of disaster relief and assistance on its territory. With regard to draft article 13, the duty of the affected State to seek external assistance, to the extent that a disaster exceeded its national response capacity, was a consequence of the principle set out in draft article 12. The formulation adopted on first reading should be maintained, as it involved a more objective determination of whether national response capacity had been exceeded; if such a determination were left exclusively to the affected State, the provision would be unlikely to have any practical application. The duty of the affected State to seek external assistance must create a corresponding obligation for the international community

to provide relief and assistance when a disaster exceeded the affected State's national response capacity. In that context, he agreed with the comments made by Mr. Forteau, Mr. Kolodkin and others.

20. In draft article 14, paragraph 3, it was not necessary to state that offers of assistance should be "good faith", since such a requirement would be difficult to apply in practice and implied that the affected State would need to verify that each offer of assistance had been made in good faith, which did not seem appropriate in disaster situations. In any event, the words "whenever possible" already provided sufficient flexibility in terms of the response to be given by the affected State regarding an offer. Draft article 15, as proposed by the Special Rapporteur in his eighth report, adequately provided for the right of the affected State to identify priorities in the type of disaster assistance it required. He supported the Special Rapporteur's recommendation that draft article 16 should not refer to a right to offer assistance to the affected State. The new formulation maintained the intended effect by ensuring that an offer of assistance would not be interpreted as an unfriendly act.

21. As for the relationship between the draft articles and international humanitarian law, he was of the view that, in complex emergency situations, international humanitarian law should be regarded as *lex specialis* and the draft articles should be used to fill any gaps that might exist in that field of law. It would be useful to include a preamble as a conceptual framework for the draft articles as a whole, based on the draft proposed by the Special Rapporteur. It might be worth including a reference to solidarity in the preamble, alongside the reference to cooperation.

22. Ms. ESCOBAR HERNÁNDEZ said that she agreed with the Special Rapporteur that the "rights-based approach" should be maintained; the final draft reflected an appropriate balance between the protection of individuals and recognition of their rights, on the one hand, and recognition and preservation of the sovereignty of the affected State, on the other, and she did not see any reason to change course at that late stage. Regarding the final outcome of the Commission's work, she now believed that the adoption of a convention would be the best way of regulating the complex questions raised by the topic. She therefore supported the Special Rapporteur's proposal that the Commission recommend to the General Assembly the adoption of a convention on the basis of its final draft articles on the topic.

23. With regard to the debate on codification and progressive development, she agreed with other members that it was not always easy to distinguish between the two activities. Obviously, qualifying a project as codification or progressive development should not have positive or negative connotations *per se*, at least in theory, but it was clear from the discussions in the Commission that making such a distinction could be interpreted as a warning that provisions described as an exercise in progressive development lacked certainty and reliability. The fact that the Commission was sometimes divided on whether a particular proposal was the result of codification or progressive development only added to the difficulties. She was therefore in full agreement with the balanced views

expressed by Mr. McRae on the matter. The newly constituted Commission beginning work in 2017 should perhaps discuss the issue in detail in the context of its debate on working methods.

24. With regard to the draft articles themselves, she agreed with other Commission members that draft articles 3 and 4 should be merged. Although the concept of “disaster” was obviously key to the project, its definition did not need to be kept separate from the other definitions. In order to highlight its importance, perhaps it could simply be placed in first position in draft article 4. She did not support the Special Rapporteur’s proposal to include in draft article 4 (e) the phrase “military assets shall be used only where there is no comparable civilian alternative to meet a critical humanitarian need”, as its prescriptive nature was not in keeping with a definition and it did not take account of the diversity of State practice in coordinating disaster response mechanisms. For example, the Emergency Military Unit established in 2006 to provide disaster relief throughout Spain, and the military mountain units involved in search and rescue operations, provided valuable services. However, assistance from military units that carried or used weapons was a different matter, and should be excluded or restricted to only the most exceptional cases. The Special Rapporteur’s intention in proposing the amendment could be better addressed in the commentaries.

25. Concerning draft article 5, she believed that the prescriptive nature of the provision would be lost if it were moved to the preamble. In any case, the draft preamble already included respect for human dignity and human rights as objectives of the draft articles. Although it was true that some human rights instruments included human dignity only in their preambles as the source of human rights, without expressing a general obligation to protect the inherent dignity of the human person, they later defined how human dignity would be respected by listing the rights recognized and guaranteed thereunder. Since the Commission’s draft articles were not a human rights instrument, the concept of dignity was the element underpinning the entire protection regime and should therefore be kept in the body of the draft articles. Mr. Forteau’s proposal to refer to “rights under international human rights law” in draft article 6 should be considered, and a reference to refugee law might also be added, in line with the concerns expressed by the International Organization for Migration. Given the close relationship between draft articles 5 and 6, the two could perhaps be merged, following the precedent established in article 13 of the draft articles on the expulsion of aliens.⁵⁸ She proposed deleting the newly introduced reference to “no harm” in draft article 7, since it was unclear and did not appear to add value.

26. She had reservations about the newly formulated draft article 13, as proposed by the Special Rapporteur, since it seemed to promote unilateralism in determining whether a disaster exceeded the national response capacity of an affected State. Although it was clear that the role of the affected State was essential, the possibility of taking objective elements into consideration when making such determinations should be left open. If the Commission

were to opt for the new formulation, a modifier, such as the word “manifestly”, as suggested by Mr. Forteau, would have to be added.

27. The expressions “good faith offer” and “in a timely manner” in draft article 14, paragraph 3, as proposed by the Special Rapporteur, did not add any value and in fact introduced unnecessary elements of subjectivity and conditionality that could lead to unintended interpretations. For example, the suggestion that some offers of assistance might not be made in good faith seemed to send a general message of distrust. She would therefore support reverting to the original draft, as adopted on first reading. She did not understand the logic of the Special Rapporteur’s proposal to split draft article 15 into two separate paragraphs and would prefer to retain the formulation adopted on first reading, although she would not oppose the amendment if the Special Rapporteur deemed it advisable. However, in that case, an explanation would have to be provided in the commentary.

28. Draft article 16, as adopted on first reading, had been the result of a hard-won compromise to reflect the different positions of Commission members, particularly with regard to the difference in the way in which offers of humanitarian assistance by States and international organizations, and such offers by other actors, should be treated. The general and ambiguous formulation of the new version upset that balance and it should therefore be reviewed, particularly as it now had no prescriptive meaning. In her opinion, the new version proposed by the Special Rapporteur could be deleted, unless the expression “without it being construed as an unfriendly act or a form of interference in internal affairs” (*sin que ello pueda entenderse como una actitud inamistosa ni como una forma de intervención en asuntos internos*) were to be added to give it some normative significance. Her preference was to retain draft article 16 as adopted on first reading. With regard to the concept of a duty to offer assistance, she agreed that it was the natural counterpart to the duty to seek external assistance and that it might therefore be appropriate to introduce a reference to it in the final draft, although that might be difficult to do at that late stage.

29. The phrase “in the exercise of their right to terminate external assistance at any time” in draft article 19 did not add value. It should therefore be deleted and addressed instead in the commentaries. The right to terminate assistance was implicit in other draft articles, particularly because it was stipulated that the provision of assistance required the consent of the affected State, which implied, *a contrario sensu*, the right to terminate said assistance, and also because States and other actors were not obliged to provide assistance but had the right to offer it, which implied that they could withdraw their offers. The reference to the “right to terminate external assistance at any time” could also lead to difficulties in interpreting the relationship between draft article 19 and draft article 14, paragraph 2, according to which “[c]onsent to external assistance shall not be withheld or withdrawn arbitrarily”. The specific reference in draft article 20 to “regional and bilateral treaties” was unnecessary since such treaties were included in the reference to “special or other rules of international law otherwise applicable in the event of disasters”. She supported the Special Rapporteur’s use of a

⁵⁸ *Yearbook ... 2014*, vol. II (Part Two), p. 36 (draft article 13).

“without prejudice” clause in draft article 21 to acknowledge that a disaster could also occur in the context of an armed conflict, though she would prefer draft articles 20 and 21 to be merged. However, she would not object to an express reference to “international humanitarian law” in that merged article. In conclusion, she supported referring all of the draft articles to the Drafting Committee.

30. Mr. LARABA said that he fully endorsed the Special Rapporteur’s recommendation in paragraph 28 of his eighth report that no changes be made to the text of the draft articles that might upset the delicate balance achieved between the principles of sovereignty and non-intervention on the one hand and the protection of individuals affected by a disaster on the other. That balance had been given a generally favourable reception by States, as demonstrated both by their reactions in the Sixth Committee and by the comments and observations that they had submitted to the Commission. However, the constant quest for compromise had at times led to the draft articles being formulated in a manner that was ambiguous or even contradictory. Certain provisions, for example draft article 16, which had already given rise to intense debates, would therefore need to be revisited. As some members had already mentioned, further thought should also be given to the importance currently accorded to certain documentary sources that were largely programmatic in nature, such as the Sendai Framework for Disaster Risk Reduction 2015–2030.⁵⁹ The idea, expressed in paragraph 26 of the eighth report, that there existed a strong alignment and complementarity between the draft articles and the Framework was open to dispute, since the function and the nature of the two texts were not the same.

31. As to the draft texts themselves, he was of the view that draft articles 3 and 4 could be merged. However, in the light of concerns that had been raised regarding draft article 3, some thought should be given to clarifying the meaning of the phrase “thereby seriously disrupting the functioning of society” and of the concept of economic damage.

32. The question had been raised as to whether draft articles 5 and 6 should be merged. He had no strong position on the matter and could go along with the Special Rapporteur’s recommendation that draft article 5 be retained as a separate, autonomous provision. However, the commentary to that draft article gave rise to some doubt as to its autonomous nature and perhaps justified its merger with draft article 6, inasmuch as it indicated that the precise formulation of the principle of the inherent dignity of the human person adopted by the Commission was drawn from the preamble of the International Covenant on Economic, Social and Cultural Rights and article 10 of the International Covenant on Civil and Political Rights,⁶⁰ thereby emphasizing the close link between human dignity and human rights. It would be useful for the matter to be given further consideration in the Drafting Committee.

33. With regard to draft article 7, he had reservations about the change in the title recommended by the Special

Rapporteur because of the historically loaded connotations of the proposed new wording, particularly in French.

34. Concerning draft article 12, he agreed that its title, “Role of the affected State”, corresponded only to the second paragraph. Furthermore, the word “role” was not a legal term. He therefore proposed changing the title to read “General or guiding principles governing the conduct of the affected State” (*Principes généraux ou directeurs régissant la conduite de l’Etat touché*).

35. As to draft article 16, it was important that it be seen in the context of the draft articles that preceded it, in particular draft articles 8 and 10, which established the duty of States to cooperate; draft article 13, which addressed the duty of the affected State to seek external assistance; and draft article 14, on the consent of the affected State to external assistance. Against that background, the wording of draft article 16 appeared rather laconic and failed to convey fully the duty to cooperate, as set out in particular in draft article 8. An effort should therefore be made to review draft article 16 with the aim of achieving a better balance in that regard. He endorsed the proposal to delete draft article 21.

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

37. Mr. KAMTO said that he was in favour of merging draft articles 3 and 4. From a legal perspective, defining the term “disaster” in a draft article on definitions in no way detracted from the scope and the force that the Commission wished to attribute to that definition. On the contrary, to define the word “disaster” separately from the other terms used in the draft articles would raise questions about the Commission’s intentions in so doing. In any event, it should be borne in mind that any definition of the term “disaster” formulated in the text was made for the express purpose of the present draft articles. He agreed that the word “economic” should be included in the definition of disaster, since very few disasters, whatever their cause, did not result in economic damage of some kind.

38. Regarding draft article 4 (*e*), while he understood the viewpoint of colleagues who had rightly pointed out that military assets were commonly tasked with disaster relief operations, the risk of abuse could not be ruled out. He therefore proposed that the second part of subparagraph (*e*) be replaced with the following: “military assets may be used in agreement with the affected State” (*les ressources militaires peuvent être utilisées en accord avec l’Etat touché*).

39. Draft article 5 should remain where it was. Apart from the fact that human dignity was enshrined in various international legal instruments as a normative provision, it was not set forth in the draft article as a right but as an inherent value of human beings. Draft article 5 constituted the fundamental provision of the entire set of draft articles; moving it to the preamble or incorporating it into another draft article would have the effect of undermining the intended purpose of the project.

40. Given that some members had expressed reservations concerning the use of the expression “no harm” in

⁵⁹ General Assembly resolution 69/283 of 3 June 2015, annex II.

⁶⁰ See *Yearbook ... 2014*, vol. II (Part Two), p. 69 (para. (4) of the commentary to draft article 5).

draft article 7, the Special Rapporteur should perhaps do more to explain what was meant by that term in the current context, if he remained convinced of its usefulness.

41. He agreed with the Special Rapporteur and other members who were in favour of retaining draft article 8, since the duty to cooperate existed in international law. Furthermore, in the current context, it would be impossible to achieve the aim of the draft articles if cooperation constituted only an option that was available to States, rather than an obligation.

42. The formulation of draft article 13 posed a real legal problem. It was not possible to create a sort of objective obligation for the affected State the fulfillment of which was not subject to the fulfillment by another State of its own obligation under the draft articles. What would happen if the requested State or international organization failed to respond to the request or responded inadequately? In its current formulation, the obligation of the affected State to seek assistance would become, in the framework of a future convention, an obligation *erga omnes partes*, which, if not met, could lead to the responsibility of the affected State being invoked by any other State party to the convention, while the invoking State was bound by no obligation whatsoever. If the Commission wished to establish such an obligation, it should make it part of a system of collective obligations under which the affected State would be obligated to seek assistance from one or several States that, in turn, would be bound to respond to such a request. Alternatively, the seeking of assistance should be formulated either as an option available to the affected State – not an obligation – or in hortatory terms.

43. Lastly, he shared the view of other members who were in favour of merging draft articles 20 and 21. If the Commission wished to reassure those who were concerned about preserving the integrity of international humanitarian law, it could insert a comma after the word “disasters” at the end of draft article 20, add the phrase “including the rules of international humanitarian law” and delete draft article 21.

44. In conclusion, while he was in favour of referring all the draft articles and the draft preamble to the Drafting Committee, he hoped that the Special Rapporteur would take account of his concerns regarding draft article 13.

45. The Commission should, under no circumstances, go back on its wise decision to exclude the concept of the responsibility to protect, as formulated in the 2005 World Summit Outcome document, from the scope of the project. The topic under consideration was in no way linked to, for example, situations of internal conflict where there might be a risk of genocide, crimes against humanity, ethnic cleansing or war crimes; it was essentially related to unpredictable and overwhelming natural disasters. In the context of the present topic, “responsibility” basically meant the responsibility to provide assistance.

46. The thorny issue of whether or not to indicate that certain draft texts represented progressive development had not been resolved despite the many debates on the matter over the years. Until 2010, it had generally been the Commission’s practice not to emphasize the distinction

between the two dimensions, especially as far as individual provisions were concerned; more recently, however, some newer members had sought to reverse that trend. It was therefore important that the Commission in its future composition adopt a clear policy on the matter.

47. Since 2011, the Commission had appeared reluctant to envisage the drafting of a convention, preferring instead to draft guidelines, guiding principles or conclusions – in other words, non-binding instruments. While there was nothing wrong *per se* with producing a variety of outputs, the Commission, by giving the impression that it had abandoned the tradition of preparing draft articles, had opened itself to criticism and risked undermining its work at a time when it was under attack on a number of fronts. He therefore wished to reiterate his proposal that the Commission mark its seventieth anniversary by organizing a colloquium – open to, among others, representatives of States, members of international courts and academics – with a view to taking stock of its past work and exploring new opportunities.

48. Mr. KITTICHAISAREE said that his understanding was not that the Commission had excluded human-caused disasters from the definition of “disaster”, but rather that it had decided that the concept of responsibility to protect was not applicable in its work on the present topic.

49. Mr. KAMTO said that he had intended simply to emphasize that the concept of responsibility to protect did not come under the scope of the draft articles.

50. Mr. NOLTE said that he welcomed the proposal for the Commission to hold a colloquium on the occasion of its seventieth anniversary. On the issue of the progressive development of international law and its codification, it was possible to find relevant examples of the Commission’s practice of identifying certain draft articles as deriving from either progressive development or codification. One such example was the specific reference to “progressive development” in paragraph (12) of the commentary to article 48 of the draft articles on the responsibility of States for internationally wrongful acts.⁶¹ That said, the fact that the Commission had sometimes found it useful to highlight certain draft articles in that way did not mean that doing so was beneficial in all its work. He proposed that the Commission continue discussing the issue either during the current quinquennium or at the beginning of the next one.

51. The CHAIRPERSON said that the proposal for a colloquium to be held on the occasion of the Commission’s seventieth anniversary should be retained for future discussion.

52. Mr. VALENCIA-OSPINA (Special Rapporteur) said that it would be interesting to verify whether the language of paragraph (12) of the commentary to article 48 of the aforementioned draft articles on the responsibility of States for internationally wrongful acts included the words “shall” or “should”.

53. Mr. NOLTE said that article 48 of the draft articles on the responsibility of States for internationally wrongful

⁶¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 127.

acts was formulated in terms of entitlement and therefore referred to rights and obligations. In that regard, there had been a lively debate on whether States had the right to invoke the responsibility of other States – a very controversial issue in terms of *lex lata*.

54. Mr. FORTEAU, referring to the Commission's 1966 draft articles on the law of treaties,⁶² said that the commentary to draft article 50, relating to *jus cogens*, highlighted the Commission's contribution to the codification rather than the progressive development of international law.⁶³ However, in paragraph (6) of the commentary to draft article 62, on the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty, the Commission had noted that the establishment of the procedural provisions of that draft article "would be a valuable step forward",⁶⁴ thereby placing it more in the context of the progressive development of international law. Draft article 62 had been formulated as an obligation and used the word "shall" rather than "should".⁶⁵

55. Mr. NOLTE said that the example of the draft articles on the law of treaties supported the view that, during its elaboration of the draft articles on the responsibility of States for internationally wrongful acts, the Commission had weighed carefully its decision to indicate that certain draft articles, relating to sensitive subjects, were an exercise in the progressive development of international law or its codification.

56. Mr. VALENCIA-OSPINA (Special Rapporteur) said it was helpful to note that, in the examples provided by Mr. Nolte and Mr. Forteau, the draft articles had been elaborated in terms of rights and duties and the identification of a particular provision as an exercise in the codification of international law or its progressive development thus had no direct consequences for the formulation of the provision in question using "shall" or "should", especially if the intention was to recommend that the draft articles should become a convention.

57. Mr. HMOUD, noting that no action had been taken by the Sixth Committee on the draft articles on the responsibility of States for internationally wrongful acts since the General Assembly had taken note of them over a decade earlier, said that the Commission should endeavour to promote its work in a manner that was conducive to the adoption of draft texts by the Sixth Committee. Such considerations were especially relevant in the present case: given that many of the draft articles reflected both codification and progressive development, it was advisable not to attempt in the commentaries to distinguish between those two processes.

58. Mr. ŠTURMA said that, overall, there were relatively few cases in which the Commission had decided to highlight particular draft articles as being tied to either

the progressive development of international law or its codification; therefore, such cases should not be considered to be the Commission's general practice. He would not oppose inserting a reference to the progressive development of international law on an exceptional basis; however, it should not become a general practice, lest it undermine the Commission's work.

59. Mr. SINGH said that he supported the Special Rapporteur's proposal for the Commission to adopt a recommendation to the General Assembly in favour of an international convention, to be concluded on the basis of its final draft articles on the protection of persons in the event of disasters. Such a position was in line with the Commission's practice and was also supported by a number of organizations with expertise in the matter. It must be borne in mind, however, that it was the prerogative of Member States to make a decision on the final form of the Commission's work.

60. On the question of whether to identify certain provisions as an exercise in progressive development, he shared the view expressed by some members that the Commission had generally preferred to avoid making a clear distinction between the two aspects of its mandate, and that, moreover, it was often difficult to make such a distinction in practice.

61. He supported the Special Rapporteur's general approach, as set out in paragraph 28 of his eighth report, to maintain the delicate balance achieved throughout the draft articles between the paramount principles of sovereignty and non-intervention, and the no-less-vital protection of the individuals affected by a disaster. In that regard, the concerns of some States members of AALCO should also be borne in mind. He continued to support the Commission's decision not to include the concept of the responsibility to protect in the draft articles – a decision that had also been borne out by States' comments on the draft articles in the years since the Commission had begun its consideration of the topic.

62. He was in favour of combining draft articles 3 and 4, as it seemed inappropriate to isolate the definition of one term, "disaster", from the others. If the definition were to remain separate, the text would need to make it clear that this definition, like the others, was for the purposes of the draft articles.

63. He had reservations about the addition, in draft article 4 (e), of the phrase "military assets shall be used only where there is no comparable civilian alternative to meet a critical humanitarian need". Such a phrase could unduly restrict the provision of prompt and adequate assistance to victims of disasters, since in many countries, including his own, it was the military that was best equipped and trained to respond in the early stages of a disaster, when action had the potential to save many lives.

64. There was little reason, in draft article 7, to insert the words "no harm" or the word "independence". He continued to have doubts about the principle of neutrality already included in the text as adopted on first reading. The relevance of that principle had also been questioned by a number of Governments on the basis that it was more

⁶² The draft articles on the law of treaties adopted by the Commission at its eighteenth session (1966) with commentaries thereto are reproduced in *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 177 *et seq.*

⁶³ *Ibid.*, pp. 247–249.

⁶⁴ *Ibid.*, p. 263.

⁶⁵ *Ibid.*, pp. 261–262.

closely connected to situations of armed conflict. Furthermore, States had clearly expressed reservations regarding draft article 13 on the grounds that imposing a duty on the affected State to seek external assistance would undermine the legitimate right of that State, by virtue of its sovereignty, to assess its own need for such assistance. The suggested alternative involving the use of hortatory terms, such as the words “should seek”, would be preferable. In draft article 8, he supported deleting the reference to the United Nations Special Coordinator for Emergency Relief.

65. Regarding draft article 11, it was important to note that most States did not have the capacity to reduce the risk of disasters. Therefore, the duty set out in the draft article referred to each State’s capacity to undertake the necessary and appropriate measures to prevent, and mitigate the risk of damage from, disasters.

66. Mr. CANDIOTI welcomed the Special Rapporteur’s introduction of a draft preamble, which set out the general context in which the draft articles had been elaborated, and provided for a better understanding of the objectives of those draft articles. He supported the proposal that the outcome of the Commission’s work on the topic form the basis of a binding text, such as a convention. In that connection, he was concerned that several members had proposed replacing the word “shall” with “should”, since a standard-setting text necessarily referred to rights and obligations and therefore implied the use of the word “shall”, rather than the word “should”.

67. The debate about whether the Commission should indicate that certain draft articles related to the progressive development or codification of international law had been rich and interesting, and he had nothing to add to what had already been said by Mr. McRae and Mr. Kamto. He also supported the comments made by Mr. Kolodkin regarding the possible amendment of draft article 16, and its relationship to draft article 8, with a view to achieving an even better balance of interests and principles throughout the draft articles.

68. In draft article 12, which was focused on the competence, function and obligations of affected States, the Special Rapporteur might wish to replace the word “role” with a more technical expression, but any mention of the word “responsibility” should be avoided, not least to avoid confusion similar to that which had arisen in relation to references to the “responsibility to protect”.

69. In draft article 4 (e), he proposed reformulating the phrase referring to “military assets” to make it less prescriptive and thus more appropriate in the context of “use of terms”. It should be made clear that the military assets in question referred to “relief” assets only, as opposed to those that might be necessary to restore public order following a disaster.

70. Draft article 3 might be amended to clarify that the draft articles as a whole were applicable to both natural and human-caused disasters. He supported the reformulation of draft article 16. Draft articles 20 and 21 could be combined to form a general draft article. He supported the referral of the draft preamble together with the draft articles to the Drafting Committee.

71. The CHAIRPERSON said that he concurred with the proposal to refer the draft preamble and the draft articles, in their entirety, to the Drafting Committee. The Commission should make a recommendation to the General Assembly in favour of the conclusion of an international convention. With regard to draft article 3, although Mr. Murphy had raised a pertinent question regarding economic damage, it was important to recognize the undeniable connection between disasters and the economic losses deriving therefrom. Draft article 3 would therefore be much enhanced if it reflected that relationship; failing that, he would be comfortable retaining the wording adopted by the Commission on first reading. He would not be opposed to merging draft article 3 with draft article 4. In that connection, he was confident that the Drafting Committee would find language to streamline draft article 4 (a). Regarding the discussion on the concept of jurisdiction, it was crucial to convey clearly that the affected State was the State in the territory or otherwise under the jurisdiction or control of which a disaster had occurred, and that the disaster that had taken place in that territory had affected persons, property or the environment. Even though the use of precise legal terms was important, the Commission should bear in mind that, once adopted, the legal instrument based on the draft articles would be widely used by those more acquainted with disasters than with international law. Therefore, clarity should remain its primary goal.

72. He was strongly in favour of retaining draft article 5; as for draft article 6, he suggested reverting to the wording adopted on first reading.

73. Draft article 8 was one of the most important provisions resulting from the Commission’s work. He disagreed with those who did not support the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations⁶⁶ as a basis for the draft article. Where disasters occurred and the rights and dignity of the persons affected were at stake, there was a need and, in fact, a duty for States to cooperate. If the Commission recognized the universality of rights and defended the rights-based approach set out in draft article 6, it should not ignore a collective duty to cooperate on the part of the international community when disasters struck. He would therefore argue strongly in favour of retaining the draft article as currently drafted, with the exception of the reference to the United Nations Special Coordinator for Emergency Relief, the deletion of which he supported.

74. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of protection of persons in the event of disasters was composed of Mr. Forteau, Mr. Hmoud, Mr. Huang, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. McRae, Mr. Murphy, Mr. Nolte, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Mr. Valencia-Ospina (Special Rapporteur) and Mr. Park, *ex officio*.

The meeting rose at 1.15 p.m.

⁶⁶ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.