

Document:-  
**A/CN.4/3332**

**Summary record of the 3332nd meeting**

Topic:  
**Draft report of the International Law Commission on the work of its sixty-eighth session**

Extract from the Yearbook of the International Law Commission:-  
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50. He agreed that, in draft article 7, genocide, crimes against humanity, war crimes, torture and enforced disappearances should be listed among the crimes to which immunity did not apply, since they were crimes of concern to the international community as a whole. He concurred with Mr. Kittichaisaree and Mr. Murase that aggression should also be included, because it involved a violation of *jus cogens* norms. Because an act of aggression, by a State, and the crime of aggression, by an individual, were two separate matters, the draft articles should contain a without prejudice clause in order not to undermine the authority of United Nations organs. He was also in favour of including the crime of apartheid, since it was a violation of a peremptory norm of international law.

51. In conclusion, he recommended sending draft article 7 to the Drafting Committee.

52. Mr. McRAE said that he wished to congratulate the Special Rapporteur on her well-researched fifth report, which constituted a commendable effort to bridge differences of opinion within the Commission on the question of exceptions to immunity. She had suggested a thoughtful approach to the scope of offences to which exceptions to immunity would apply and to the persons who enjoyed immunity without exception, namely those who had immunity *ratione personae*. In doing so, she had said quite frankly that what she proposed was not existing international law, but that she was identifying a trend and inviting the Commission to play a role in continuing that trend. She was not suggesting that the Commission subscribe to the view of those who considered that, since State practice amounting to customary international law did not endorse exceptions to immunity, neither should the Commission.

53. The Special Rapporteur recognized that granting or denying immunity to foreign State officials charged with serious international crimes could have an impact on States' ability to conduct international affairs without harassment. The questions which he asked himself in that connection were whether exceptions to immunity could have implications for the drive to avoid impunity, whether there was any evidence that the relatively few cases where foreign officials had been charged with serious offences had actually impeded the conduct of international affairs and what kind of procedural guarantees would make exceptions to immunity more plausible when foreign State officials were being prosecuted.

54. He wondered whether the future Commission would use only what States had agreed to as a touchstone for its work. Would it see its primary role as that of identifying *lex lata* or would it regard the progressive development of international law as *lex ferenda* as an integral part of its role and not separate from and less important than codification? Would it embrace the developing trend identified by the Special Rapporteur or would it seek to halt it? He would watch with interest to see on which side of history the new Commission would want to be.

55. Mr. PETRIČ said that he fully agreed with Mr. McRae that the Commission should display more vision. The position that only the troika could enjoy immunity from foreign criminal jurisdiction had been based

on what had been deemed to be international practice in the form of a decision adopted many years earlier by the International Court of Justice with many dissenting opinions, but it ignored the reality of the modern world where ministers of defence or of finance could have more functions than the Minister for Foreign Affairs.

56. Mr. KITTICHAISAREE asked the Special Rapporteur if she intended to submit a sixth report in 2017.

57. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in 2017, she intended to submit a sixth report on procedural aspects and procedural guarantees of the rights of State officials subject to foreign criminal jurisdiction, for it might be advantageous for the Commission to consider those questions in parallel with the exceptions and limitations to the immunity of State officials from such jurisdiction.

*The meeting rose at 11.40 a.m.*

### 3332nd MEETING

*Tuesday, 2 August 2016, at 10 a.m.*

*Chairperson:* Mr. Pedro COMISSÁRIO AFONSO

*Present:* Mr. Caffisch, 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. 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.

#### **Draft report of the International Law Commission on the work of its sixty-eighth session**

CHAPTER IV. *Protection of persons in the event of disasters (A/CN.4/L.882 and Add.1)*

1. The CHAIRPERSON invited the members of the Commission to adopt the part of chapter IV of the draft report contained in document A/CN.4/L.882, paragraph by paragraph.

2. Mr. TLADI said that, in order for his silence not to be interpreted as a sign of approval, he wished to make clear that he would not participate in the adoption of the chapter of the Commission's report devoted to the protection of persons in the event of disasters because he strongly disagreed with the general direction in which the Commission had decided to take its work on the topic, in particular with regard to the rights and duties of States, a direction that he felt was inconsistent with existing international law.

3. Mr. MURPHY said that, like Mr. Tladi, he believed that several provisions of the draft related to rights, obligations and duties were not sufficiently substantiated by treaty or State practice. It was regrettable that the Commission had not been able to specify, in the

commentaries, the aspects of the topic with regard to which it was engaging in progressive development, but he hoped that the discussion would enable improvements to be made to those commentaries.

4. Mr. SABOIA said that several members of the Commission, including Mr. McRae, had indicated during the discussions that it was very difficult, if not impossible, to determine which provisions represented progressive development and which represented codification. The work on the topic of the protection of persons in the event of disasters was the most important of the current quinquennium, and, if the Commission now tried to draw such a distinction, it might compromise the successful completion of that work. In any event, it would ultimately be States that decided the status of the text adopted by the Commission when they came to examine the outcome of the work on the topic.

#### A. Introduction

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

*Section A was adopted.*

#### B. Consideration of the topic at the present session

Paragraphs 4 to 6

*Paragraphs 4 to 6 were adopted.*

Paragraph 7

5. The CHAIRPERSON said that paragraph 7 would be duly completed once the Commission had adopted the commentaries to the draft articles.

Paragraph 8

*Paragraph 8 was adopted.*

#### C. Recommendation of the Commission

Paragraph 9

#### D. Tribute to the Special Rapporteur

Paragraph 10

6. The CHAIRPERSON suggested leaving sections C and D in abeyance and returning to them once the whole of chapter IV had been considered.

*It was so decided.*

#### E. Text of the draft articles on the protection of persons in the event of disasters

##### 1. TEXT OF THE DRAFT ARTICLES

Paragraph 11

7. Mr. FORTEAU said that, as he had already pointed out to the Special Rapporteur, it seemed that, in the French version, the text of the draft articles reproduced in paragraph 11 did not match the final version as contained in document A/CN.4/L.882/Add.1. He would inform the secretariat of the changes to be made to the French text,

and recommended that the consistency of the English and Spanish versions with the final text also be checked.

*Paragraph 11 was adopted on the understanding that the text of the draft articles would be brought into line with the final version of the draft adopted by the Commission.*

8. The CHAIRPERSON invited the members of the Commission to adopt the part of chapter IV of the draft report contained in document A/CN.4/L.882/Add.1, paragraph by paragraph.

##### 2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO

*Commentary to the draft preamble*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

9. Mr. MURPHY, noting that the third preambular paragraph, to which paragraph (4) referred, did not contain the word "obligation", proposed deleting the words "the obligation for" after the verb "reiterates" and recasting the end of the sentence to read: "and reiterates that the rights of those persons must be respected ...".

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

Paragraph (6)

10. Sir Michael WOOD proposed that, in the second sentence, the words "and the primary role of the affected State", which derived from the last preambular paragraph, be added after "The reference to sovereignty".

*Paragraph (6), as amended, was adopted.*

*The commentary to the draft preamble, as amended, was adopted.*

*Commentary to draft article 1 (Scope)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

11. Mr. MURPHY said that the structure of the first sentence was ambiguous, and proposed that it should be clarified by inserting the words "and the rights and obligations of" before "third States".

*Paragraph (2), as amended, was adopted.*

Paragraphs (3) and (4)

*Paragraphs (3) and (4) were adopted.*

Paragraph (5)

12. Sir Michael WOOD said that the expression "in the arena of the disaster" in the first sentence was not very

clear and should be replaced with the phrase “in the area directly affected by the disaster”.

13. Mr. HMOUD said that reference was not being made only to the activities conducted in the directly affected area but, more broadly, to the activities conducted in the territory where the disaster occurred. Sir Michael’s proposal should be modified accordingly.

*It was so decided.*

14. Mr. MURPHY said that, in the fourth sentence, the words “of those of”, which appeared after “within the territorial boundaries of a single State, or”, should be replaced with “within”. The start of the fifth sentence could also be redrafted to read: “States have obligations, in accordance with international law, with respect to the persons present in their territory ...”.

15. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, far from improving the text, the proposal made it unclear. Since the subject of the draft was precisely the protection of persons in the event of disasters, he did not see why it was necessary to delete the reference to the duty of States to protect.

16. Mr. NOLTE, supporting the Special Rapporteur, said that he saw no need to reword the sentence, in which the Commission simply reiterated the basic duty of States, imposed on them by human rights instruments and customary international law, to protect the persons in their territory or under their jurisdiction.

17. Mr. PETRIČ, Ms. JACOBSSON and Mr. HMOUD supported Mr. Nolte.

18. Mr. MURPHY said that, on the contrary, the sentence as currently worded laid down a general obligation of States that was not backed up by any treaty and went far beyond the obligation to respect and protect the rights of persons under human rights instruments. The reformulation that he had proposed was therefore justified and should be accepted.

19. Mr. KITTICHAISAREE proposed that, to address Mr. Murphy’s concern, the words “In the event of disasters” be added at the beginning of the sentence, with the rest left unchanged.

20. Mr. NOLTE said that the duty set out in the sentence disputed by Mr. Murphy could not be interpreted as requiring States to protect individuals in all circumstances from all conceivable danger or harm and that it referred implicitly to the protection of human rights. The inclusion of the words “the human rights of” before “all persons present in their territory”, though unnecessary, could be a way of satisfying Mr. Murphy.

21. Mr. MURPHY said that it was not mentioned anywhere else in the draft articles or in the commentaries that States had a general obligation to protect all persons present in their territory or in a territory under their jurisdiction or control, and that it was therefore important to contextualize the statement in paragraph (5). The proposals made by Mr. Kittichaisaree and Mr. Nolte sought to achieve that and thus struck him as acceptable.

22. Sir Michael WOOD, noting that both Mr. Nolte and the Special Rapporteur had used the word “duty” rather than “obligation” in their respective statements, proposed replacing the latter with the former in the sentence in question.

23. Mr. VALENCIA-OSPINA (Special Rapporteur) said that there were separate articles devoted to human dignity and human rights, and that there was thus no reason to address those issues in the paragraph in question, the sole purpose of which was to recall that disasters knew no borders and, consequently, to reaffirm that States had an obligation to protect all persons present in their territory or in a territory under their jurisdiction or control. Throughout its work, the Commission had strived to avoid giving the impression that it was drafting a new human rights instrument. If it limited the obligation to protect the protection of human rights alone, as advocated by Mr. Murphy, it would be going against its original intention and introducing a restriction contrary to article 5 of the draft, which provided that persons affected by disasters were entitled not only to the protection of their human rights but also to respect for those rights. As to Mr. Kittichaisaree’s proposal to insert the words “In the event of disasters” at the beginning of the fifth sentence, he himself remained convinced that the addition was unnecessary and that States were under a general obligation to protect the persons present in their territory or in a territory under their jurisdiction or control, but he would defer to the decision of the Commission in that regard. He supported Sir Michael’s proposal to replace the word “obligation” with “duty”.

24. Mr. NOLTE reiterated his view that the duty to protect was a basic duty of the State and that the wording proposed in paragraph (5) should not be controversial. While he saw no great harm in referring to the protection of the human rights of persons rather than to the protection of persons themselves, it was his understanding that any change to that effect was opposed by the Special Rapporteur, whose assessment he respected.

25. Mr. MURPHY said that there was no basis for stating that States had a general obligation – or even a general duty – to protect individuals, and that such a statement could give rise to abusive interpretations. However, since Mr. Nolte had withdrawn his proposal and he himself appeared to be the only member defending that point of view, he would leave it for the Chairperson to close the debate as he saw fit.

26. The CHAIRPERSON said that he wished to thank the members who had participated in the discussion for their efforts to arrive at a consensus. The fifth sentence of paragraph (5) would be redrafted to read: “In the event of disasters, States have the duty to protect all persons present in their territory ...”. The amendment to the first sentence proposed by Mr. Hmoud and the minor editorial change in the fourth sentence of the English version proposed by Mr. Murphy would also be introduced in the text.

*Paragraph (5), as amended, was adopted.*

*The commentary to draft article 1, as amended, was adopted.*

*Commentary to article 2 (Purpose)*

## Paragraph (1)

27. Sir Michael WOOD proposed the deletion of paragraph (1), which seemed superfluous.

*It was so decided.*

## Paragraph (2)

28. Sir Michael WOOD said that, to take account of the deletion of paragraph (1), the words “The provision” at the start of the first sentence of paragraph (2) should be replaced with “Draft article 2” and all the paragraphs should be renumbered.

*Paragraph (2), as amended, was adopted.*

## Paragraph (3)

29. Sir Michael WOOD, noting that draft article 15 was not the only one that dealt with the issue of what made a response “adequate” or “effective”, proposed that the sixth sentence be modified to state that the issue was the subject of other provisions of the draft articles, including draft article 15.

*Paragraph (3), as amended, was adopted.*

## Paragraph (4)

*Paragraph (4) was adopted.*

## Paragraph (5)

30. Sir Michael WOOD said that several draft articles other than those mentioned in the last sentence of the paragraph also addressed the issue of the obligations of States. He therefore proposed to amend the sentence to indicate that those obligations were considered in other draft articles or, simply, to delete the sentence altogether.

31. Mr. VALENCIA-OSPINA (Special Rapporteur) said that it would be preferable to retain the sentence, but to recast it in more general terms to state that other provisions of the draft articles were specifically devoted to the issue of the obligations of States.

*Paragraph (5), as amended, was adopted.*

## Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

## Paragraph (8)

32. Mr. FORTEAU said that he was surprised to read, in the second sentence, that the term “persons concerned” had been inserted “so as to further qualify the scope of the draft articles”, given that, according to the commentary to draft article 1, that scope was vast. The word “further” should thus be removed.

33. Mr. MURPHY, noting that the fifth sentence did not introduce a contrast to what went before, proposed replacing the word “instead” with “indeed”.

*Paragraph (8), as amended, was adopted.*

## Paragraph (9)

34. Sir Michael WOOD said that he was not sure what was meant by the expression “active connotation” in the first sentence. He also wished to know what justification there was for the inclusion, in that sentence, of the word “fully”, which did not appear in draft article 5, especially as it was in quotation marks.

35. Mr. VALENCIA-OSPINA (Special Rapporteur) said that those words were, indeed, not the most felicitous, and proposed their deletion.

36. Mr. KITTICHAISAREE, noting that “formula” and “connotation” were not legal terms, proposed amending the first sentence to read: “The proviso ‘with full respect for their rights’ aims to ensure that the rights in question are respected and protected ...”.

37. Sir Michael WOOD said that the phrase “with full respect for their rights” was more than a proviso; it was an important element of draft article 2. Consequently, he proposed rewording the start of Mr. Kittichaisaree’s proposal to read: “The reference to ‘full respect for their rights’ ...”.

*Mr. Kittichaisaree’s proposal, as amended by Sir Michael Wood, was accepted.*

*Paragraph (9), as amended, was adopted.*

*The commentary to draft article 2, as amended, was adopted.*

*Commentary to article 3 (Use of terms)*

## Paragraph (1)

*Paragraph (1) was adopted.*

## Paragraph (2)

38. Sir Michael WOOD proposed inserting the word “serious” before “disruption” in the last sentence.

39. Mr. FORTEAU proposed to clarify that it was the disruption of the “functioning” of society, not the disruption of society itself.

*Paragraph (2), as amended, was adopted.*

## Paragraph (3)

*Paragraph (3) was adopted.*

## Paragraph (4)

*Paragraph (4) was adopted, subject to minor drafting changes in the English version.*

## Paragraph (5)

40. Sir Michael WOOD said that it was unwise, in the penultimate sentence, to cite “the widespread loss of life” as an example of an event that did not seriously disrupt the functioning of society. It would be preferable to refer, instead, to “large-scale material damage”.

*Paragraph (5), as amended, was adopted.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

Paragraph (8)

41. Mr. HMOUD proposed that, in the first sentence, the word “forced” be replaced with “mass”, because the expression “forced displacement” did not have the same meaning as “mass displacement”.

42. Mr. VALENCIA-OSPINA (Special Rapporteur) proposed simply to delete the word “forced”, without replacing it with “mass”, to avoid duplication with the term “on a wide scale” at the end of the sentence.

*It was so decided.*

43. Mr. FORTEAU asked what was meant by the term “social capital” in the third sentence, because, in French, *capital social* denoted the capital invested in a company.

44. Mr. VALENCIA-OSPINA (Special Rapporteur) said that it referred to the rights and benefits that people enjoyed as part of a group, and of which they were deprived in the event of mass displacement.

45. Mr. NOLTE said that, in his opinion, the expression “social capital” covered not only the relationship of solidarity among members of a community but also their economic relations, which was why he believed that it should be kept in the draft.

46. Mr. PETRIČ said that, for people who had lived under a communist regime, the expression instantly called to mind Marxist theories, which was clearly not the Special Rapporteur’s intention.

47. Mr. VÁZQUEZ-BERMÚDEZ said that, in the light of those remarks, the term “social fabric” should be used instead.

*It was so decided.*

*Paragraph (8), as amended, was adopted, subject to minor drafting changes.*

Paragraph (9)

*Paragraph (9) was adopted.*

Paragraph (10)

48. Mr. NOLTE said that the last sentence was too long and should be divided into two, with a full stop after the words “such disruption” and the word “so” replaced with “This means” at the start of the new sentence.

49. Sir Michael WOOD said that he did not quite understand the second sentence, which was also very long. If the Commission were to retain it, however, he would prefer to replace the past participle “anticipated” with “indicated”. Moreover, the third sentence was worded too strongly. A situation of armed conflict was very much a disaster, although it was not considered as such “for the purposes of the draft articles”, a point that should be made clear by inserting that expression at the end of the sentence.

50. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, admittedly, the wording of the third sentence did not convey very felicitously the idea that certain events that might lead to a disruption of the functioning of society were not covered by the draft articles, and he was in favour of the addition proposed by Sir Michael. While the second sentence of the paragraph was indeed very long, it contained criteria – namely the purpose of the draft articles and the existence of other applicable rules of international law – for determining whether an event was or was not covered by the draft articles. That said, there was nothing to prevent the word “anticipated” from being replaced with a more appropriate term.

*Paragraph (10), as amended by Mr. Nolte and Sir Michael Wood, was adopted.*

Paragraphs (11) to (13)

*Paragraphs (11) to (13) were adopted.*

Paragraph (14)

51. Sir Michael WOOD said that he doubted the usefulness of the paragraph as a whole, but in particular the third and fourth sentences, in which it was explained, in order to cover the scenario in draft article 10, paragraph 1, that subparagraph (b) of draft article 3 referred to both the territory of the State affected by a disaster and the territory under its jurisdiction or control. However, those two categories of territory were mentioned in the text of draft article 10 itself.

52. Mr. VALENCIA-OSPINA (Special Rapporteur) said that it was, in his view, essential to specify in the commentary that the Commission was addressing not only territory in the traditional sense of the term but also any territory over which the State exercised jurisdiction or control. That clarification was all the more relevant because, in the context of another topic under discussion at the current session, the Commission had decided to mention only the State’s jurisdiction, not its control. The Commission’s choices were justified in both cases, but that should be explained, as the Commission did in the third and fourth sentences of the paragraph, which would therefore leave a void if the decision were made to delete them. The same applied to the reference to the source of inspiration for the phrase “in whose territory, or in territory under whose jurisdiction or control”. That said, it was true that the term “scenario” was perhaps not the best for conveying the idea that he wished to express.

53. Mr. NOLTE said that, to reconcile Sir Michael’s point with the Special Rapporteur’s intention, which he deemed equally valid, the third and fourth sentences of the paragraph should be merged and recast to read: “Accordingly, the scenario in draft article 10, paragraph 1, in which an affected State has the duty to ensure protection, is not only covered by the reference to ‘territory’ but also includes scenarios where a State may exercise *de jure* jurisdiction ...”.

54. Sir Michael WOOD said that, although the proposal would improve the wording of the paragraph, it was still obscure, and the use of the term “scenario” to refer to draft article 10, paragraph 1, was odd, to say the least. In his view, the best solution would be to remove the third and fourth sentences.

55. Mr. MURPHY said that he, too, would prefer to delete the third sentence, because his impression was that the Special Rapporteur wished to address both the State's territory itself and any territory under its jurisdiction or *de facto* control. The confusion noted initially by Sir Michael was probably due to the reference to draft article 10, paragraph 1. The deletion was all the more desirable since, far from being limited to draft article 10, references to territory were made in several other draft articles, including draft article 16.

56. Mr. MURASE said that the fourth sentence of the paragraph should be retained as the long discussions that the Commission had held some years previously on the subject of the *de jure* jurisdiction and *de facto* control of the State should be reflected in the commentary.

57. Mr. KITTICHAISAREE said that he agreed that the simplest solution would be to delete the third sentence.

58. Mr. FORTEAU said that the difficulty with that sentence stemmed from the fact that it had been adopted on first reading at a time when draft article 10 dealt merely with sovereignty, without specifying in which kind of territory its provisions applied. Since every possibility was now covered in draft article 10, the third sentence had lost its relevance. The confusion to which it gave rise was therefore attributable to the redrafting that had taken place between the first and second readings.

59. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the wording of the commentary in question, like that of many others, was derived from the draft commentaries adopted on first reading. It was true that, as a reference to territory under the State's jurisdiction or control had been added throughout the draft articles, there was no longer any need to single out draft article 10. The third sentence could thus be removed and the fourth modified so that it dealt with "other scenarios" and followed on from the second sentence: "In most cases that would accord with control exercised ..., which does not necessarily exclude other scenarios, where ...". The term "scenarios" could also be replaced with "hypotheses", "possibilities" or any other term that expressed the same idea, and the rest of the paragraph could be left as it stood.

60. Sir Michael WOOD said that previous comments, particularly those of Mr. Forteau, had enabled him to grasp the source of the problem, and he was grateful to the speakers in question for that clarification. He supported the Special Rapporteur's proposal and considered the term "scenario" to be appropriate, given the context.

61. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, if the Commission decided to delete the third sentence, the paragraph would read: "The key feature in disaster response or disaster risk reduction is State control. In most cases that would accord with control exercised by the State upon whose territory the disaster occurs. However, this does not necessarily exclude other scenarios, where a State may exercise *de jure* jurisdiction ...".

*Paragraph (14), as amended, was adopted.*

Paragraphs (15) to (18)

*Paragraphs (15) to (18) were adopted.*

Paragraph (19)

62. Mr. MURPHY proposed to redraft the start of the last sentence to read: "This reference is without prejudice to the differing legal status of these actors ...".

*Paragraph (19), as amended, was adopted.*

Paragraph (20)

63. Mr. MURPHY said that, in the first line, the reference should be to draft article 7, not 17.

64. Mr. VALENCIA-OSPINA (Special Rapporteur) said that it was a misprint and that the reference should indeed be to 7 rather than 17.

65. Mr. NOLTE proposed the deletion of the word "primarily".

*Paragraph (20), as amended, was adopted.*

Paragraph (21)

66. Sir Michael WOOD said that, in the first sentence, the quotation marks should end after the word "actors".

*Paragraph (21), as amended, was adopted.*

Paragraphs (22) and (23)

*Paragraphs (22) and (23) were adopted.*

Paragraph (24)

67. Sir Michael WOOD said that, in the first sentence, the phrase "which draws inspiration from the commentary to draft article 14" should be removed, since that commentary was of no relevance. Besides, it would be strange for the Commission to draw inspiration from a commentary when drafting a provision.

*Paragraph (24), as amended, was adopted.*

Paragraphs (25) and (26)

*Paragraphs (25) and (26) were adopted.*

Paragraph (27)

68. Mr. NOLTE said that, in the fourth sentence, the words "are to" should be replaced with "should", because the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief ("Oslo Guidelines")<sup>489</sup> did not impose obligations. It was his understanding that the Special Rapporteur accepted that amendment.

69. Mr. MURPHY said that the sentence did not belong in the commentary to a definition, as it did not clarify that definition at all. Consequently, it should be either deleted or moved to the commentary to another draft article. If the Commission decided to retain it, the wording of the Oslo Guidelines should be used and the start of the sentence redrafted to read: "In accordance with the Oslo Guidelines, foreign military or civil defence assets should be requested only ...".

<sup>489</sup> United Nations, OCHA, Oslo Guidelines: Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, Revision 1.1, November 2007.

70. Sir Michael WOOD said that he also believed that the sentence was out of place in the commentary in question. He therefore proposed to delete it and to add a footnote reference to the Oslo Guidelines. If the Commission chose to retain it, his proposal would be to replace the words “In accordance with” with “According to”.

71. Mr. NOLTE, supported by Mr. SABOIA, said that the sentence should be retained in the commentary to draft article 8 or to draft article 11. The Special Rapporteur could perhaps reflect on the matter.

72. Mr. PETRIČ said that he agreed with the comments made by Mr. Nolte and Mr. Murphy.

73. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the members of the Commission would recall that, in his eighth report (A/CN.4/697), he had recommended conforming to the wording of the Oslo Guidelines on that point in the text of the definition itself, in response to a very concrete proposal by a State or an international organization concerning the text adopted on first reading. There had been a debate on the issue in plenary, during which Mr. Murphy had made the same – justified – observation, but the Drafting Committee had decided to include that reference not in the text of draft article 3 but in the commentary to a draft article. As to which one, several proposals had been made in the Drafting Committee, but none had concerned draft articles 8 or 11. He himself had recommended putting that reference in the commentary to the latter draft article, but had not been supported, which was why it appeared in the commentary under consideration. He still believed that it should be inserted in the commentary to the draft article that laid down the duty of the affected State to seek external assistance, namely draft article 11, especially if the Commission accepted Mr. Murphy’s proposal, which he supported.

74. Mr. FORTEAU said that, as he recalled, the Drafting Committee had agreed that the issue should be dealt with in the commentary to draft article 15, not to draft article 11. Perhaps the Chairperson of the Drafting Committee remembered?

75. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that, if his memory served him right – after all, the Drafting Committee had worked on nine topics – the Committee had been of the view that the reference to the Oslo Guidelines would be better placed in the commentary to draft article 15.

76. The CHAIRPERSON said he took it that the Commission wished to move the fourth sentence of paragraph (27) of the commentary to draft article 3, as amended by Mr. Murphy and Mr. Nolte, to the commentary to draft article 11 or to draft article 15, and to leave it to the Special Rapporteur to decide which one in consultation with any interested members.

*Paragraph (27), as amended, was adopted.*

Paragraph (28)

77. Mr. WAKO said that the words “which enjoy” should be replaced with “who have”.

*Paragraph (28), as amended, was adopted.*

Paragraph (29)

78. Mr. MURPHY, in reference to the second sentence of paragraph (29), said that the Commission had decided not to retain the expression “acting on behalf of” in order to avoid any implication about responsibility, not in order to avoid the applicability of the rules on attribution with regard to either the affected State or the assisting State. A more neutral formulation would thus be preferable, and his proposal would be to replace the words “the applicability of” with “any implication with respect to”. The end of that sentence, which was rather long, suggested that it was the affected State that was responsible under international law, which was not always true. He therefore proposed that, after the word “organizations”, the sentence be redrafted to read: “given the primary role of the affected State in accordance with draft article 10, paragraph 2.” The Commission would thereby avoid giving a view on responsibility one way or the other.

79. Mr. NOLTE said that he understood Mr. Murphy’s intention, but wondered whether his proposal went too far, because it might give the impression that the sending State was no longer responsible for its personnel. Naturally, the rules on responsibility remained applicable, and that should be made clear, but he shared Mr. Murphy’s concern that the phrase “so as to avoid the applicability of the rules of international law on the attribution of conduct to States or international organizations” might be misunderstood. The Commission should not imply that it believed that the rules applied, but it should not appear to exclude their application, either, as States that continued to direct and control their personnel should not be able to shirk their responsibility.

80. Mr. FORTEAU said that Mr. Murphy’s proposal was along the right lines and that Mr. Nolte’s concerns were legitimate. He therefore proposed to recast the first part of the second sentence of paragraph (29) to read: “The Commission decided against making a reference to ‘acting on behalf of’ so as to avoid adopting any position on the practical application of the rules of international law on the attribution”. At the end of that sentence, it would be better to follow the wording of article 10, paragraph 2, which covered not only the direction and control of assistance but also its coordination and supervision, particularly since the applicability of the rules on attribution could differ depending on whether one was dealing with, for example, the control of relief activities or just their supervision. The four terms used in article 10, paragraph 2, namely direction, control, coordination and supervision, should be reflected.

81. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he agreed with Mr. Forteau, but that, for the sake of conciseness, rather than mentioning the four terms in question, it would suffice to accept Mr. Murphy’s proposal and to refer to the role of the affected State “in accordance with draft article 10, paragraph 2”. The issue of responsibility was very delicate not only legally but also politically, and he was thus in favour of Mr. Murphy’s proposal, which avoided giving the impression that the Commission was taking a position in that regard.

82. The CHAIRPERSON said he took it that the Special Rapporteur, Mr. Murphy and Mr. Forteau would consult

one another with a view to finalizing the text of the second sentence of paragraph (29).

*It was so decided.*

Paragraph (30)

*Paragraph (30) was adopted.*

Paragraph (31)

83. Mr. NOLTE said that, when reading the definition of the term “equipment and goods”, he had been surprised to note that software was not mentioned. He therefore proposed inserting the words “physical and electronic” before “tools” in the first sentence of paragraph (31).

*Paragraph (31), as amended, as adopted.*

*The meeting rose at 1 p.m.*

### 3333rd MEETING

*Wednesday, 3 August 2016, at 10 a.m.*

*Chairperson: Mr. Pedro COMISSÁRIO AFONSO*

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, 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.

#### **Draft report of the International Law Commission on the work of its sixty-eighth session (continued)**

##### **CHAPTER IV. Protection of persons in the event of disasters (continued) (A/CN.4/L.882 and Add.1)**

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.882/Add.1, specifically paragraph (29) of the commentary to draft article 3 (f), which had been left in abeyance.

##### **E. Text of the draft articles on the protection of persons in the event of disasters (continued)**

##### **2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (continued)**

*Commentary to draft article 3 (Use of terms) (concluded)*

Paragraph (29) (concluded)

2. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he had redrafted the second sentence on the basis of written proposals made by Mr. Forteau and Mr. Murphy. The resultant wording read: “The Commission decided against making a reference to ‘acting on behalf of’ in

order not to prejudge any question of the application of the rules of international law on the attribution of conduct to States or international organizations, given the primary role of the affected State, as provided for in draft article 10, paragraph 2.” The intention in redrafting the sentence had been to avoid using the word “applicability”.

3. Mr. FORTEAU suggested replacing “of the application of” by “related to the application of”.

*It was so decided.*

4. Sir Michael WOOD said that the wording after “international organizations” was unnecessary and perhaps somewhat questionable; it should simply be deleted.

5. Mr. PARK said that either the final part of the sentence should be deleted as suggested by Sir Michael or the words “and draft article 15, paragraph 1 (a)” should be inserted at the end of the sentence, since that subparagraph referred to privileges and immunities.

6. Mr. SABOIA supported the proposal to delete the final part of the sentence.

7. Mr. MURPHY said that he would be prepared to accept either the proposal read out by the Special Rapporteur or the one just made by Sir Michael.

8. Mr. McRAE requested an explanation of the reasoning behind the proposal to replace “applicability” with “application”. The latter term assumed that international law applied, whereas the former made no such assumption.

9. Mr. SABOIA said that he agreed with those comments on the term “applicability” and endorsed the proposal by the Special Rapporteur, as amended by Mr. Forteau.

10. Mr. VALENCIA-OSPINA (Special Rapporteur) said that in draft article 10, paragraph 2, the role of the affected State was characterized by four prerogatives, of which only two, direction and control, were part of the rules of international law on the attribution of conduct to States, as described in article 8 of the articles on the responsibility of States for internationally wrongful acts.<sup>490</sup> He would, however, be prepared to agree to the omission of the final part of the sentence, after “international organizations”, as had been proposed by Sir Michael.

11. Sir Michael WOOD said that in the light of the discussion, he was prepared to go along with the text as put forward by the Special Rapporteur and amended by Mr. Forteau.

*Paragraph (29) was adopted as proposed by the Special Rapporteur and as amended by Mr. Forteau.*

*The commentary to draft article 3, as a whole, as amended, was adopted.*

<sup>490</sup> 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.