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Summary record of the 3334th meeting

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

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Paragraph (3)

85. Mr. FORTEAU, supported by Mr. NOLTE, proposed the deletion of the final sentence, which was confusing.

86. Mr. MURPHY said that, contrary to what was stated in the first sentence of paragraph (3), draft article 10, paragraph 1, did not recognize that the State's duty to ensure protection stemmed from its sovereignty. He proposed recasting the first sentence to read: "The duty held by an affected State to ensure the protection of persons and the provision of disaster relief assistance in its territory, as recognized in paragraph 1, stems from its sovereignty."

87. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he had no objection to the amendments proposed by Mr. Forteau and Mr. Murphy.

Paragraph (3), as amended, was adopted.

Paragraph (4)

88. Mr. FORTEAU proposed the insertion, in the first sentence, of the words "among others" [*en particulier*] next to the words "Judge Álvarez": the conception of a bond between sovereign rights and concomitant duties upon a State had not been expressed by Judge Álvarez alone.

Paragraph (4), as amended, was adopted.

Paragraph (5)

89. Mr. MURPHY, supported by Mr. PETRIČ, said that, in the final sentence, the words "given its use as a term of art elsewhere within and beyond the Commission's work" might be viewed as characterizing the term "responsibility" in a way that was not helpful; he therefore proposed their deletion.

90. Mr. NOLTE, echoing Mr. Murphy's concern, suggested that the final sentence simply be deleted. In the first sentence, he proposed the deletion of the words "which benefits from the principle of non-intervention", as affected States did not benefit from that principle with respect to every territory that was covered under draft article 10.

91. Ms. JACOBSSON agreed with Mr. Nolte's proposal to delete the final sentence, since it simply explained a term that the Commission had chosen not to use.

92. Mr. KITTICHAISAREE said that he endorsed Mr. Nolte's proposal concerning the first sentence. As to the second and third sentences, he proposed merging them into one, to read: "The Commission determined that the term 'duty' was more appropriate than that of 'responsibility', which has been used with different meanings within and beyond the Commission's work."

93. Mr. McRAE said that he did not agree with the deletion of the entire phrase "given its use as a term of art elsewhere within and beyond the Commission's work" and suggested instead that it be replaced by "given its use elsewhere". The sentence then explained why the use of the term "responsibility" could give rise to confusion.

94. Mr. KAMTO said that he could accept the proposals by Mr. McRae and Mr. Murphy but did not agree with Mr. Kittichaisaree's proposal. The second and third sentences were both needed in order to explain what meaning the Commission gave to the term "duty" in draft article 10, given that it was used to refer to an obligation in other draft articles of the text. In many provisions of the project, the words "duty" and "obligation" had both been translated into French using the word *obligation*, thereby failing to reflect the distinction made between the two terms in English.

95. Mr. SABOIA said that the amendments proposed by Mr. Kittichaisaree and Mr. McRae were an attempt to convey a subtle message: the notion of responsibility was implicit in the use of the term "duty" in draft article 10. Mr. McRae's proposal perhaps best reflected the very cautious approach the Commission wished to take.

96. Mr. MURASE endorsed Mr. McRae's proposal and further proposed to place a footnote after the word "elsewhere" to refer to principle 21 of the Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration"),⁴⁹¹ which provided that States had the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States. He recalled that the translation of the word "responsibility" as *devoir* in the French version of the Stockholm Declaration had elicited a lengthy debate in the Commission on the distinction between the terms "duty" and "responsibility" and which of the two was the most appropriate for use in draft article 10.

97. Mr. FORTEAU said he supported the amendment proposed by Mr. Kittichaisaree.

98. The CHAIRPERSON suggested that paragraph (5) be left in abeyance until the next meeting.

It was so decided.

The meeting rose at 1.10 p.m.

3334th MEETING

Wednesday, 3 August 2016, at 3 p.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Cafilisch, 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.

⁴⁹¹ *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

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 continue with the adoption of the part of chapter IV of the report contained in document A/CN.4/L.882/Add.1, paragraph by paragraph, starting with paragraph (4) of the commentary to draft article 9, and paragraph (5) of the commentary to draft article 10, which had been left in abeyance at the previous meeting. The secretariat had prepared a new version of those texts, taking account of the proposals made by the members (document without a symbol distributed in the meeting room, in English only).

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 9 (Reduction of the risk of disasters) (*concluded*)

Paragraph (4) (*concluded*)

2. The CHAIRPERSON, summarizing the amendments put forward at the previous meeting, said that it had been proposed to delete the first sentence, to replace the words “States’ obligation” with “the obligations undertaken by States” in the second sentence, to revise the third sentence to read: “Protection entails a positive obligation on States to take the necessary and appropriate measures to prevent harm from impending disasters”, and to add the word “inspiration” after the word “draws” in the final sentence.

Paragraph (4), as amended, was adopted.

The commentary to draft article 9, as amended, was adopted.

Commentary to draft article 10 (Role of the affected State) (*concluded*)

Paragraph (5) (*concluded*)

3. The CHAIRPERSON said that it had been proposed to delete the words “which benefits from the principle of non-intervention” in the first sentence and to merge the second and third sentences to read: “The Commission determined that the term ‘duty’ was more appropriate than that of ‘responsibility’, which could give rise to confusion given its use elsewhere.”

4. Mr. FORTEAU said that he supported the new formulation, but proposed replacing the word “elsewhere” with “in other contexts”.

The proposal was adopted.

5. Mr. MURASE recalled that the controversy surrounding the use of “duty” or “responsibility” stemmed from principle 21 of the Declaration of the United Nations Conference on the Human Environment (“Stockholm Declaration”)⁴⁹² and proposed that, in order to make it

⁴⁹² *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

clear that the word “responsibility” in that context did not equate to a “responsibility to protect”, a footnote should be added with a reference to the Declaration.

6. Mr. PETRIČ said that, in that sentence, the term “responsibility” was not problematic, as it was clear that it did not refer to the responsibility to protect. In the English version, the word “confusion” should be replaced with something else, and he would leave it to the English-speaking members of the Commission to come up with a more appropriate solution.

7. Mr. WAKO said that he did not see why the Commission had to choose between the terms “duty” and “responsibility”, since according to a dictionary definition they were almost synonymous. The former had a broader meaning than the latter, which it encompassed, and that could perhaps be mentioned in the sentence to justify the Commission’s preference for that term.

8. Sir Michael WOOD proposed replacing the word “determined” with “considered” in the English version and replacing “give rise to confusion” with “be misunderstood”. While he understood why Mr. Murase had proposed inserting a footnote referring to principle 21 of the Stockholm Declaration, the content of that principle was not the reason for the Commission’s decision to use the term “duty”.

9. Mr. ŠTURMA and Mr. FORTEAU said that they would be in favour of deleting the last sentence. If the Commission decided to retain it, however, the sentence should be amended in line with Sir Michael Wood’s proposal.

10. Mr. NOLTE said that he did not recall the Commission having mentioned the Stockholm Declaration in that context. In his view, Sir Michael Wood’s proposal would suffice and need not be accompanied by a footnote.

11. The CHAIRPERSON said he took it that the majority of Commission members were in favour of keeping the last sentence, subject to the amendments proposed by Mr. Forteau and Sir Michael Wood. If he heard no objection, he would take it that the members wished to adopt paragraph (5), as a whole, as amended.

Paragraph (5), as amended, was adopted.

Paragraph (6)

12. Mr. FORTEAU proposed inserting the word “too” before “restrictive” in the final sentence, in order to make a clearer logical link between that sentence and the previous one.

13. Mr. PARK proposed amending the end of the final sentence to read: “... States that preferred to take a more limited role in disaster response coordination because, for example, they faced a situation of limited resources”.

14. Sir Michael WOOD said that, in the penultimate sentence, it would be preferable to replace the words “margin of appreciation”, which was a term of art in the field of human rights, with the word “flexibility”.

15. Mr. NOLTE said that, while he supported Sir Michael's proposal, he believed that the word "some" should be added before "flexibility".

Paragraph (6), as amended, was adopted.

Paragraph (7)

16. Sir Michael WOOD proposed replacing "the Government of a State" with "the State" in the first sentence, as it was possible that it could be another body that was best placed to determine the gravity of an emergency situation and not the Government.

Paragraph (7), as amended, was adopted.

Paragraph (8)

17. Sir Michael WOOD said that, in his view, the second sentence should be made more assertive by deleting the introductory phrase "The Commission considered that" and replacing the word "construction" with "language" in the English version. The sentence would thus read: "The Tampere Convention formula is gaining general currency in the field of disaster relief assistance and represents more contemporary language." In the third sentence, the word "final" should be deleted.

18. Mr. PETRIČ, referring to the second sentence of the English version, proposed replacing the word "currency", whose meaning might be unclear to non-native English speakers, with the word "acceptance".

The proposals were adopted.

19. Sir Michael WOOD proposed deleting the last part of the third sentence, starting with the words "in accordance with international law". Those words limited the control exercised by the State, whereas the State might have many other grounds on which it wished to control the manner in which relief operations were carried out and which were not limited to the need to verify their compliance with international law.

20. Mr. VALENCIA-OSPINA (Special Rapporteur) said that if those words were deleted, the next sentence would no longer make sense, as the word "thus" referred back to them. He would therefore be in favour of retaining that part of the sentence.

21. Mr. SABOIA said that the reference to international law should be maintained, as the manner in which a State exercised its right to control activities carried out by an assisting actor and, in general, all activities in its territory, must be in accordance with international law.

22. Mr. MURPHY said that the previous speakers' comments showed the ambiguity of the third sentence: it was not clear whether the phrase "in accordance with international law" referred to the way in which the State exercised control over relief operations or to the manner in which such operations were to be carried out. In order to remove that ambiguity, he proposed amending the sentence to read: "The formula reflects the position that a State exercises control over the manner in which relief operations are carried out, which shall be done in

accordance with international law, including the present draft articles."

The proposal was adopted.

23. After a discussion on the amendments to be made to the last sentence, taking account of Mr. Murphy's proposal, in which Mr. KITTICHAISAREE, Mr. SABOIA, Mr. HMOUD, Mr. VALENCIA-OSPINA (Special Rapporteur) and Mr. WAKO took part, Mr. FORTEAU proposed amending the beginning of the sentence to read: "Such control exercised over them by an affected State cannot amount to undue interference ...".

The proposal was adopted.

24. The CHAIRPERSON asked the secretariat to prepare a draft, taking account of all the proposed amendments that had been accepted, and to circulate it to the Commission members.

The new version of paragraph (8) of the commentary to draft article 10, prepared by the secretariat taking account of the proposed amendments, was distributed to the members (document without a symbol distributed in the meeting room, in English only).

25. Mr. MURPHY said that the revised draft of paragraph (8) read well, but in the last sentence of the English version, the word "cannot" should be replaced with "shall not" and "legitimate" with "lawful".

26. Mr. NOLTE said that replacing "cannot" with "shall not" would change the meaning of the sentence, making it more prescriptive. Since the commentaries were not intended to set out legal rules, it would be preferable to preserve "cannot". Nor was he in favour of replacing "legitimate" with "lawful", as the situations covered were those in which an assisting actor indicated that a particular course of action was the most appropriate, not simply that its activities were lawful. If the proposed substitution were made, the Commission would be suggesting that, once the affected State concluded that the activities carried out were inappropriate, the control it had exercised could never be classed as undue interference.

27. Sir Michael WOOD proposed deleting "a" before "more" in the second sentence of the English version and said that he would prefer to replace "cannot" with "does not" in the last sentence, as that would make it clearer but avoid making it overly prescriptive.

28. Mr. MURPHY said that both "shall not" and "cannot" were extremely prescriptive. Since what the Commission was, in fact, trying to say was that States should not engage in undue interference, it would be preferable to express it as such and use "should not". The reason he considered the word "lawful" more appropriate was that, as was recalled in the preceding sentence, relief operations should be in accordance with international law. The use of that word would not deprive the affected State of its margin of appreciation, since nothing prevented it from interfering in lawful activities if, for some reason, they did not seem appropriate in a particular situation. He would therefore be in favour of using "should not" and maintained his proposal concerning "lawful", as "legitimate" seemed overly vague and unclear.

29. Mr. KITTICHAISAREE said that he supported Mr. Murphy's proposal concerning "should not" but would rather replace "legitimate" with "such" or "the aforesaid".

30. Mr. NOLTE said that, in his view, using "should not" would completely change the meaning of the sentence, which was intended to protect the affected State that was exercising control in accordance with international law against accusations of undue interference in the activities of assisting actors. No such accusations could be made, because the affected State's actions were justified. He therefore supported the proposal made by Sir Michael. With regard to the word "legitimate", while unlawful activities were also illegitimate, the affected State could nonetheless argue that it was exercising control in accordance with international law in order to respond to the claims of certain actors or to the pressure they might bring to bear on the grounds that their activities were legitimate.

31. Mr. McRAE said that he agreed with Mr. Nolte and Sir Michael that "does not" was the correct formulation. It could not be said that an act that complied with international law "should not" amount to undue interference, since that would suggest that it could, which would be strange. A similar problem would arise with the use of "shall not". It would therefore be best to make the sentence simply descriptive.

32. Mr. PARK said that he agreed that using "should not" would completely change the meaning of the sentence and would therefore prefer to keep "cannot".

33. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, in order to take account of the different views expressed and to avoid making the sentence overly prescriptive, he would propose amending it to read: "Such control by an affected State is not to be regarded as undue interference ...". In that way, the emphasis would be placed on the assessment that would be made of the exercise of such control.

34. Mr. MURPHY said that he supported the Special Rapporteur's very good proposal. Since the emphasis was not on the fact that the control exercised by the State was not regarded as due interference, the word "legitimate" could be deleted, so that the sentence would read: "Such control by an affected State is not to be regarded as undue interference with the activities of an assisting actor."

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

The commentary to draft article 10, as amended, was adopted.

Commentary to draft article 11 (Duty of the affected State to seek external assistance)

Paragraph (1)

35. Mr. PARK said that article 11 was an essential part of the entire set of draft articles, as was paragraph (1) of

the commentary to draft article 11, which gave a general overview of the content of the provision. However, in the penultimate sentence, there was no reference to the disagreement between certain members of the Commission concerning the idea expressed in the article, although in his view such a reference was essential. Whereas the version of the commentary adopted on first reading had indicated that "[t]he existence of the duty to seek assistance as set out in draft article 13 [10] was supported by a majority of the members of the Commission, but opposed by others, since in the view of those members, international law as it currently stands does not recognize such a duty",⁴⁹³ the new version suggested that there had been unanimity in the Commission on the matter and also made reference to customary international law. He therefore considered that it would be more appropriate to reinstate the previous version.

36. Mr. KAMTO, responding to Mr. Park, said that it was standard practice not to mention differences of opinion within the Commission when a text was considered on second reading, as they had already been reflected during its consideration on first reading. Although it had been clearly stated in the Drafting Committee that the term "duty" should be translated in French by *devoir* rather than *obligation*, that had not been done, and the oversight should be corrected. Furthermore, in the fifth sentence, it was wrongly stated that the draft article affirmed the central position of obligations owed by any State towards persons within its borders. In fact, the draft article focused less on the obligations owed by States to such persons than on the obligation of States to seek assistance. The sentence should therefore read: "The draft article affirms the [fundamental] obligation of the affected State to do its utmost to provide assistance to persons within its borders", as it went without saying that the reason the State sought external assistance was in order to provide assistance. Similarly, in the penultimate sentence, since it was not cooperation itself but rather seeking such cooperation that was appropriate and required, the word "seeking" should be added before "such cooperation", which in fact could be replaced with "such assistance".

37. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he supported the proposals made by Mr. Kamto, subject to their translation into English. He was astonished by the comments of Mr. Park, who was going to be presenting the Commission's work to the Sixth Committee in his capacity as Rapporteur.

38. Mr. NOLTE, responding to Mr. Park, said that the sentence he had quoted was from a version of the draft article that had not included the word "manifestly", so the duty mentioned therein had been formulated more broadly. Since the scope of the duty had been reduced in an attempt to persuade the members of the Commission who had been doubtful about the customary nature of the duty, it was not necessary to revisit the choice that had been made as the result of a compromise.

39. Mr. SABOIA said that he agreed with Mr. Kamto and the Special Rapporteur about the nature of the second

⁴⁹³ *Yearbook ... 2014*, vol. II (Part Two), p. 80 (para. (1) of the commentary to draft article 13 [10]).

reading, as well as with Mr. Nolte's response. In his view, the paragraph in question described the progression from the duty to protect from an internal point of view to the stage where the disaster had taken on such proportions that international assistance was necessary. He agreed with the Special Rapporteur's decision with respect to Mr. Kamto's proposals.

40. Sir Michael WOOD said that, in general, paragraph (1) was lengthy and repetitive, and his preference would be to limit it to the first two sentences. Taking into account Mr. Kamto's proposal with regard to the penultimate sentence, the English version would read: "The Commission considers that where an affected State's national capacity is manifestly exceeded, seeking assistance is both appropriate and required." Since that formulation did not mention any legal obligation, it would perhaps be acceptable to Mr. Park. The last sentence of the paragraph should be deleted, as it was reproduced at the beginning of paragraph (4). As for the rest, he did not consider it particularly helpful to place the duty to seek assistance in the context of other articles, namely 7 and 10, in order to justify it somehow, and he therefore believed that those references should be deleted. The same applied to the fifth sentence, which was problematic. However, if the Commission did decide to keep it, in the English version the words "within its borders" would have to be replaced with "within such territory" in order to ensure consistency with the previous sentence.

The proposal by Sir Michael Wood concerning the deletion of the last sentence of the paragraph was adopted.

41. Mr. TLADI, referring to the problem raised by Mr. Park, said that, while it was true that divergences of opinion among Commission members concerning substantive issues were not brought up when a text was being considered on second reading, that did not mean that they had been resolved.

42. Mr. PARK said that he had expressed his views as a member of the Commission and not in his capacity as Rapporteur. Although he was aware of the distinction between consideration of a text on first as opposed to second reading, he had nonetheless considered it necessary to give his opinion.

43. Mr. MURPHY said that he would like to know Mr. Kamto's position concerning the comment by Sir Michael to the effect that the use of the expression "within its borders" in the fifth sentence seemed to limit the scope of the obligation to the territory of the State, whereas the affected State had been defined as a State that was the victim of a disaster not just within its borders but also in territory under its jurisdiction or control. In other words, if the Commission amended the fifth sentence as proposed by Mr. Kamto, it would also have to change the end of the sentence and specify the scope of the concept of territory.

44. Mr. KAMTO said that his comments had been on a different point and he did not have a defined position in that regard.

45. Mr. MURPHY proposed replacing the words "within its borders" with "within its territory" and adding

"or territory under its jurisdiction or control" in the English version of the fifth sentence.

The proposal was adopted.

Paragraph (1) was adopted with the amendments put forward by Mr. Kamto, Mr. Murphy and Sir Michael Wood.

Paragraph (2)

46. Mr. FORTEAU, supported by Mr. HMOUD and Mr. WISNUMURTI, said that the phrase "regardless of the opinion it may hold on the matter" at the end of the second sentence was incompatible with paragraph (8) of the commentary, in which it was recalled that the State's assessment must be carried out in good faith, something which imposed certain limitations but also provided for some flexibility. As there was no point in going into detail on those matters at the current stage, it would be preferable to delete that part of the sentence.

47. Mr. NOLTE said that, in order to simplify the third sentence, the words "are considered to overwhelm" should be replaced with "overwhelm". Regarding Mr. Forteau's proposal, while it was true that the phrase "regardless of the opinion it may hold on the matter" was very strong language, the point being made was important. Perhaps that clause could be replaced with "a standard which is to be determined objectively" so as to indicate that it was not a purely subjective assessment.

48. Mr. MURPHY said that he agreed with Mr. Nolte's proposal concerning the third sentence. While he also supported Mr. Forteau's proposal, if the second sentence were to be shortened as proposed, it would simply be repeating the first sentence without adding anything, and it should therefore be deleted.

49. Mr. FORTEAU said that he supported that proposal.

50. Sir Michael WOOD said that, in addition, he would be in favour of deleting the last sentence, as it merely stated the obvious.

51. Mr. KITTICHAISAREE said that he supported that proposal but that by inverting the second and third sentences, the logical sequence of the paragraph would be restored.

52. Mr. MURPHY said that he remained convinced that the second and third sentences were redundant and that, if the Commission decided to retain the second and transpose it as proposed by Mr. Kittichaisaree, the word "obligation" would have to be replaced with "duty". In addition, the expression "manifestly cannot cope by itself with the disaster" seemed to express a slightly different idea from "the national response capacity of an affected State is manifestly exceeded", the latter being preferable.

53. Mr. SABOIA said that he generally agreed with the proposals that had been made, but would welcome clarification of Mr. Nolte's proposal on the objective determination of a standard by which an affected State could be considered not to be able to cope by itself with the disaster.

54. Mr. PETRIČ said that the only sentence that was really problematic was the third, which simply stated the obvious. That sentence should therefore also be deleted, which would mean that little of the original paragraph would remain.

55. Mr. FORTEAU proposed that the Commission should take an even more radical approach, keeping only the first sentence of paragraph (2) and moving it to paragraph (3), which provided important clarification on the cases in which a State's capacity could be considered to be manifestly exceeded.

The proposal by Mr. Forteau was adopted.

Paragraph (2), as amended, was adopted.

Paragraph (3)

56. Sir Michael WOOD proposed simplifying the first sentence to read: "The words 'to the extent that' clarify that the national response capacity of an affected State may not always be sufficient or insufficient in absolute terms."

Paragraph (3), as amended, was adopted.

Paragraph (4)

57. Sir Michael WOOD said that, for the sake of consistency, the words "an affected State considers" in the second sentence should be deleted. The end of the sentence would thus read: "... where the resources of the State are inadequate to meet protection needs".

58. Mr. MURPHY said that the terms "right to food" and "right to the supply of water" in the third sentence did not correspond to the standard language used to refer to those rights, namely the "right to adequate food" and the "right to safe drinking water", respectively, and should therefore be amended accordingly. In the following sentence, he proposed replacing the word "held" with "said" in the English version, as it was more neutral, and using the language of general comment No. 6 of the Human Rights Committee,⁴⁹⁴ cited in parentheses, so the end of the sentence would read: "... a State's duty in the fulfilment of the right to life extends beyond mere respect to encompass a duty to protect the right by adopting positive measures".

Paragraph (4), as amended, was adopted.

Paragraph (5)

59. Sir Michael WOOD said that the penultimate sentence, which was identical to a sentence in paragraph (3) of the commentary to draft article 6 that the Commission had amended at a previous meeting, should be amended in the same way.

Paragraph (5) was adopted subject to the necessary amendments in the penultimate sentence.

⁴⁹⁴ Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V.

Paragraph (6)

60. Sir Michael WOOD proposed that, in the English version of the sentence after the second indented quotation, the word "implicit" should be deleted and the words "affected States" should be replaced with "the affected State" and "engage in" with "have recourse to".

Paragraph (6) was adopted, with those amendments to the English version.

Paragraph (7)

61. Mr. VALENCIA-OSPINA (Special Rapporteur) recalled that, when the Commission had considered paragraph (27) of the commentary to draft article 3, on the definition of the term "relief personnel", it had decided that the reference to the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief ("Oslo Guidelines")⁴⁹⁵ did not belong there and should be moved to the commentary to draft article 15, draft article 8 or draft article 11.⁴⁹⁶ Mr. Murphy had submitted wording proposed for insertion in the commentary to draft article 11. Many States and international organizations had expressly requested that a reference to the Oslo Guidelines be included in the commentary to draft article 3 as an element of the definition of the term "relief personnel," and he remained convinced that the reference made sense only in that context. However, as the Commission had taken another position, and having carefully reread the commentaries to draft articles 8, 11 and 15, he had concluded that the only other place where reference to the Oslo Guidelines could reasonably be made was paragraph (7) of the commentary to draft article 11, where they were already mentioned. The Commission must therefore address two points: the draft text proposed by Mr. Murphy, and where it should be inserted. The text in question read: "In accordance with the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief ("Oslo Guidelines"), foreign military and civil defence assets should be requested only as a last resort, where there is no comparable civilian alternative to meet a critical humanitarian need (footnote: Guideline 5)". With regard to where it should be placed, he proposed inserting it after the first sentence of paragraph (7).

62. Mr. FORTEAU said that he agreed with the Special Rapporteur that the reference to the Oslo Guidelines would be more appropriate in the commentary to draft article 3, in which humanitarian personnel were mentioned for the first time.

63. Sir Michael WOOD said that it would be preferable not to include the new text but, if the Commission wished to insert it in the paragraph under consideration, it should be careful not to suggest that the idea expressed in guideline 5 of the Oslo Guidelines, namely that civilian assistance was better than military assistance, was a principle. To that end, it should simply include a citation with the exact wording of guideline 5, preceded by an introductory formula such as "The Oslo Guidelines provide that ...".

⁴⁹⁵ United Nations, OCHA, Oslo Guidelines: Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, Revision 1.1, November 2007.

⁴⁹⁶ See, above, the 3332nd meeting, para. 76.

64. Mr. HMOUD said that he endorsed Sir Michael's position, but if the citation were included, it should not be in the commentary itself but in a footnote.

65. Mr. PETRIČ said that he agreed with Sir Michael that the Oslo Guidelines established a hierarchy between civilian and military assistance in favour of the former, which, in practice, could work to the detriment of victims, since the most important thing was not the nature of the assistance, civilian or military, but rather its effectiveness.

66. Mr. SABOIA said that, in his view, it was not for the Commission to tell States what kind of assistance they should seek. In addition, it seemed that the guideline in question covered cases in which post-disaster assistance operations might be used as a pretext to interfere in the internal affairs of a country, but that had no bearing on the topic at hand.

67. Mr. KAMTO pointed out that the Oslo Guidelines were mentioned in the commentary to draft article 6. They were cited there merely as a document that had helped in drafting the commentaries, and not as setting out rules that the Commission was endorsing.

68. Mr. VÁZQUEZ-BERMÚDEZ said that, since a not insignificant number of States had requested that a reference to the Oslo Guidelines should be included, it was important to mention them, either in paragraph (7) of the commentary to draft article 11 in accordance with Sir Michael's proposal, or in a footnote, as proposed by Mr. Hmoud.

69. Mr. WISNUMURTI said that he had strong reservations concerning the provisions of the Oslo Guidelines, on which the text read out by the Special Rapporteur was based, as they did not reflect the real situation on the ground. His country, Indonesia, had been hit by many disasters, and in such cases the priority was always to coordinate the actions of military and civilian organizations in order to provide the most effective assistance possible. It was for the affected State to decide, based on the circumstances and its needs, what role each actor should play.

70. Mr. NOLTE said that he agreed with Mr. Wisnumurti and Sir Michael; the wording of the Oslo Guidelines should not be taken out of context and should therefore not be included in the commentary to draft article 11.

71. Mr. FORTEAU said that, like Mr. Nolte, he was of the view that the text in question should not be separated from the instrument to which it belonged. The Oslo Guidelines dealt with the use of military forces to provide assistance in the event of disasters and, as such, were a relevant source for the purposes of the topic. It was therefore appropriate to refer to them, for example in a footnote, which could read: "Concerning the use of military forces for the purposes of disaster assistance, see the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief ("Oslo Guidelines")."

72. Mr. McRAE said that the Commission could not omit a reference to the Oslo Guidelines, as that would give the impression that it had not even considered them.

The Commission could perhaps refer to the Guidelines in a footnote, but not in the terms proposed by Mr. Forteau, which suggested that the Commission was incorporating the Guidelines. It should note that it had taken account of the Guidelines, but it must take a position with respect to the hierarchy they established between military and civilian assistance, with which several members clearly did not agree.

73. Ms. JACOBSSON said that she shared the views expressed by Mr. Petrič and Mr. Wisnumurti and, like Mr. McRae, considered that the Commission could not simply make reference to the Oslo Guidelines, even in a footnote, without commenting on their content.

74. Mr. MURPHY said that the Commission did not need to refer to the Oslo Guidelines in the commentary to draft article 11 in order to show that it had taken them into consideration, since they were already mentioned in the second footnote to paragraph (24) of the commentary to article 3. The issue was whether a reference to the Guidelines was necessary in the context of draft article 11.

75. Sir Michael WOOD said that he remained convinced that the reference to the Oslo Guidelines did not add anything in the context of article 11. If, however, the Commission decided to mention them in a footnote, it could perhaps begin: "The Oslo Guidelines contain the following:". That would be followed by the quotation of the relevant provision and a sentence recalling that it must be read in the context of the Guidelines as a whole.

76. Mr. NOLTE said that, when he had spoken of the need to read the provision in question in context, he had not meant in the context of the Guidelines as a whole, but rather of guideline 5, from which the sentence was taken, but which was not particularly clear when read in full. The Commission could simply add a neutral footnote, as proposed by Mr. Forteau, in which it would quote guideline 5 in full, without further commentary.

77. Mr. VALENCIA-OSPINA (Special Rapporteur) said that it was clear from the discussion that the majority of Commission members were opposed to including in the commentary to draft article 11 the wording proposed by Mr. Murphy based on paragraph 5 of the Oslo Guidelines. He would not go against the majority, but recalled that a reference to that particular provision had been proposed for inclusion in response to an express request made by many States, which he was duty-bound to reflect in his capacity as Special Rapporteur. If the Commission did not cite the text of the provision itself, it could perhaps keep a reference to guideline 5 by inserting what was currently the second footnote to paragraph (27) of the commentary to draft article 3 at the end of the second sentence that paragraph.

The proposal was adopted.

Paragraph (7) was adopted.

Paragraph (8)

78. Mr. FORTEAU, referring to the 2008 judgment by the International Court of Justice in the *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* case, proposed adding the words "in principle"

after “in the best position” in the first sentence, placing a full stop after “its national response capacity”, and amending the second sentence to read: “Having said this, this assessment must be carried out in good faith”, in order to recognize that the assessment could not be purely objective but that, regardless of States’ room for manoeuvre in that area, the principle of good faith still applied.

79. Mr. NOLTE said that this principle was undoubtedly an objective standard and the assessment could therefore not be considered not to be objective since it must be carried out in good faith. The issue was to what extent the margin of appreciation of an affected State could be limited by an objective criterion such as the obligation of good faith.

Paragraph (8) was adopted with the amendments put forward by Mr. Forteau.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

80. Sir Michael WOOD proposed deleting the words “the Commission does not encourage” and replacing “to seek assistance” with “should not seek assistance” in the first sentence.

With that amendment, and with a minor drafting change to the English version, paragraph (10) was adopted.

The commentary to draft article 11, as amended, was adopted.

The meeting rose at 6 p.m.

3335th MEETING

Thursday, 4 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 (concluded) (A/CN.4/L.882 and Add.1)

1. The CHAIRPERSON invited the Commission to pursue its consideration of chapter IV of the draft report

and to resume its discussion of the portion contained in document A/CN.4/L.882/Add.1.

E. Text of the draft articles on the protection of persons in the event of disasters (concluded)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (concluded)

Commentary to draft article 12 (Offers of external assistance)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

2. Mr. FORTEAU proposed that, in the final sentence, the word “fundamental” [*fondamental*] be deleted, in order to better reflect the language of the preamble. Furthermore, the phrase “in accordance with draft article 13” [*comme l’indique le projet d’article 13*] should be replaced with the phrase “in accordance with the conditions set forth in draft article 13” [*dans les conditions énoncées dans le projet d’article 13*]. Lastly, the phrase, in the French text, *et sur lequel repose l’ensemble du projet d’articles* was not entirely accurate and it might therefore be preferable to delete it.

3. Mr. KAMTO said that he supported the drafting changes proposed by Mr. Forteau, with the exception of the deletion of the word “fundamental”. The principle of sovereignty was generally recognized as just that – fundamental – and there was no reason to delete the word.

4. Mr. SABOIA said that he supported the statement made by Mr. Kamto in favour of retaining the word “fundamental”. As for the proposed deletion, in the French text, of the phrase *et sur lequel repose l’ensemble du projet d’articles*, he suggested that the issue was a translation-related one, as there was no problem with the same phrase in the original English text, which read: “which informs the whole set of draft articles”.

5. Mr. EL-MURTADI SULEIMAN GOUIDER said that he, too, would prefer to retain the word “fundamental”, the addition of which was in no way contrary to the draft articles.

6. Sir Michael WOOD said that he supported all the amendments proposed by Mr. Forteau. In order to reflect the balanced language of the preamble, he proposed further amending the beginning of the final sentence to read: “In line with the principle of the sovereignty of States, stressed in the preamble, and the corresponding primary role of the affected State”. Assuming those amendments were acceptable to the Commission, the phrase “which informs the whole set of draft articles” could be retained, as both the principle of sovereignty and the primary role of the affected State would be understood as informing the whole set of draft articles.

7. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he had no problem with Mr. Forteau’s proposal to add a reference in the final sentence to the conditions under which a State might or might not accept offers of assistance. He agreed with the amendments to the final sentence proposed by Sir Michael and with the retention of