

Document:-  
**A/CN.4/3102**

**Summary record of the 3102nd meeting**

Topic:  
**Protection of persons in the event of disasters**

Extract from the Yearbook of the International Law Commission:-  
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Europe; moreover, the Commission should not purge references to the socialist past from its terminology.

78. Mr. PELLET (Special Rapporteur) said that he was not in favour of establishing a general rule whereby the political systems of countries could not be mentioned. In general, that aspect could be germane, and in the specific example relating to the immunity of State vessels, it was particularly revealing to see that the States that had entered what qualified as an “extensive reservation” were socialist States.

79. The CHAIRPERSON, speaking as a member of the Commission, said that the reference to “socialist” States was indeed historically important, given that they usually took positions as a bloc. The manner in which a State’s ideological choices determined its behaviour was not irrelevant.

80. Mr. McRAE said that, if it was true that socialist countries typically made extensive reservations, then it would indeed be appropriate to retain the word “socialist”.

*Paragraph (9), as amended by Sir Michael Wood, was adopted.*

*The meeting rose at 1.05 p.m.*

## 3102nd MEETING

*Monday, 11 July 2011, at 3 p.m.*

*Chairperson:* Ms. Marie G. JACOBSSON  
(Vice-Chairperson)

*Present:* Mr. Caflich, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

### Protection of persons in the event of disasters<sup>262</sup> (A/CN.4/638, sect. D, A/CN.4/643,<sup>263</sup> A/CN.4/L.794<sup>264</sup>)

[Agenda item 7]

#### REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the members of the Commission to begin their consideration of the topic

<sup>262</sup> At its sixty-second session (2010), the Commission adopted draft articles 1 to 5 and the commentaries thereto (*Yearbook ... 2010*, vol. II (Part Two), pp. 185–190, paras. 330–331) and took note of draft articles 6 to 9 provisionally adopted by the Drafting Committee (*ibid.*, p. 180, para. 297).

<sup>263</sup> Reproduced in *Yearbook ... 2011*, vol. II (Part One).

<sup>264</sup> Mimeographed; available from the Commission’s website, documents of the sixty-third session.

of the protection of persons in the event of disasters. She reminded them that, before listening to the Special Rapporteur’s introduction of his fourth report on the topic, they needed to revisit draft articles 6 to 9, on which the Drafting Committee had completed work in 2010 and of which the Commission had taken note at its 3067th meeting, on 20 July 2010. She drew the Commission’s attention to the draft articles, contained in document A/CN.4/L.776,<sup>265</sup> and invited members to adopt them one by one.

Article 6. *Humanitarian principles in disaster response*

*Article 6 was adopted.*

Article 7. *Human dignity*

*Article 7 was adopted.*

Article 8. *Human rights*

2. Mr. PELLET, supported by Mr. CAFLISCH, said that the use in the French text of the word “*touché*” to mean “affected” seemed inappropriate. He preferred to see the English term translated as “*affected(e)*” when it was used to refer to both persons and States.

3. Mr. NOLTE said that the term occurred quite often and that the change should be made throughout the text.

4. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he intended, in due course, to propose a provision on the definitions and expressions used, and that the phrase rendered in English as “affected State” would be included there. The change proposed by Mr. Pellet, which he himself supported, could then be made throughout the text.

*It was so decided.*

*Article 8 was adopted, subject to that editorial correction to the French text.*

Article 9. *Role of the affected State*

*Article 9 was adopted, subject to an editorial correction to the French text.*

5. The CHAIRPERSON said she took it that the Commission wished to adopt the report of the Drafting Committee on the protection of persons in the event of disasters, the complete text of which was contained in document A/CN.4/L.776.

*It was so decided.*

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR

6. The CHAIRPERSON invited the Special Rapporteur to introduce his fourth report on the protection of persons in the event of disasters (A/CN.4/643).

7. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, as Secretary-General Ban Ki-moon had noted when he had opened the third session of the Global Platform for

<sup>265</sup> Mimeographed; available from the Commission’s website, documents of the sixty-second session.

Disaster Risk Reduction in May 2011, in Geneva, no city or country was immune from disasters.<sup>266</sup> They indiscriminately struck the most developed and best prepared countries as well as the poorest and most vulnerable ones. In 2010, the Centre for Research on the Epidemiology of Disasters of the Catholic University of Louvain had estimated that some 373 natural disasters worldwide had caused nearly 296,800 deaths, affected close to 208 million people and cost nearly US\$ 110 billion.<sup>267</sup>

8. The proliferation and escalation of natural disasters had prompted States, intergovernmental and non-governmental organizations and scholars to analyse the various aspects of the issue and look for appropriate responses. The General Assembly, at its sixty-fifth session, had adopted no less than a dozen resolutions on disasters, including resolution 65/264 of 28 January 2011, entitled “International cooperation on humanitarian assistance in the field of natural disasters, from relief to development”. In those resolutions, some provisions recurred regularly. Others, more topical, had been adopted for the first time, such as those in resolution 65/135 of 15 December 2010, entitled “Humanitarian assistance, emergency relief, rehabilitation, recovery and reconstruction in response to the humanitarian emergency in Haiti, including the devastating effects of the earthquake”. On 6 April 2011, the Security Council had adopted a statement by its President, entitled “The question concerning Haiti”.<sup>268</sup> In that statement, the Council had noted that the recovery of Haiti was a long-term challenge and had called on the international community to continue to support the Haitian authorities to ensure that the most vulnerable population groups had access to basic social services and to justice. It had also hailed the efforts of donors and called on them to honour all their financial commitments without delay. It had stressed the links between recovery efforts, national security, the rule of law and the credibility of democratic institutions. It had stated that security and development were closely linked and interdependent and had reiterated the need for security to be accompanied by economic and social development. In the Council’s view, rapid and tangible progress in the recovery and reconstruction of Haiti was fundamental to achieving lasting stability.

9. With the quinquennium drawing to a close, the time was ripe to take stock, however briefly, of the Commission’s work on the subject. In the four years since he had been appointed Special Rapporteur, he had submitted four reports, one a year. The first, submitted in 2008, had been of a preliminary nature.<sup>269</sup> In it he had given an overview of the relevant legal sources and of earlier attempts at codification and progressive development of the law pertaining to the subject. The report had also outlined the main legal issues to be examined. In his second report,<sup>270</sup>

submitted in 2009, he had analysed the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis* as well as issues related to the definition of the term “disaster” as it applied to the topic, and he had embarked on a study of the fundamental duty to cooperate. In 2010, in his third report,<sup>271</sup> he had examined the principles underlying the protection of persons in the event of disasters, including humanity, neutrality, impartiality and non-discrimination, as well as the question of the primary duty of the affected State to protect persons within its territory. On that subject, when introducing his third report in July 2010, he had said that he intended to propose in his fourth report one or several provisions detailing the scope and limits of the exercise by a State of its primary duty as the affected State.<sup>272</sup> He had kept that promise.

10. In his second and third reports, he had also made specific proposals for draft articles on the scope of the topic, the definition of the term “disaster” and the duty to cooperate, as well as on humanitarian principles in disaster response, human dignity and the primary responsibility of the affected State. Regarding the latter, he had proposed wording, contained in draft article 8, paragraph 2, affirming the principle of consent of the affected State. After having been examined in detail by the Commission in plenary,<sup>273</sup> the provision had been sent to the Drafting Committee which, for lack of time, had not been able to consider it.

11. In his fourth report, he was proposing three new draft articles: on the duty of the affected State to seek assistance where its national response capacity was exceeded (art. 10); on its duty not to arbitrarily withhold its consent to external assistance (art. 11); and on the right of the international community to offer assistance (art. 12).

12. The broad concept of protection that he had proposed since his first report called for recognition of the tensions between protection and the principles of sovereignty and non-intervention (or non-interference). In all of his four reports, he had underlined the importance of those two fundamental principles and, by extension, of the consent of the affected State. The tensions, however, had been mirrored in the Commission’s discussions of the first three reports, and especially of the draft articles on the duty to cooperate (art. 5) and on the primary responsibility of the affected State (art. 9). Nevertheless, the divergences of view had been overcome and the draft articles proposed in the second and third reports had received the general approval, not only of Commission members, but also of representatives in the Sixth Committee. Thus, in just two years, the Commission had been able to adopt by consensus nine draft articles dealing with formidable issues of principle. Those nine draft articles, plus the three new provisions he was proposing in his fourth report—if they were adopted, as he hoped they would be—would serve to underpin the whole set of draft articles on the topic, with the remainder covering more operational aspects. The Commission would then be able to move forward swiftly in its work on a topic that had been included in its programme of work, at the request of the United Nations Secretariat, under the heading of “new

<sup>266</sup> *Proceedings of the Third Session of the Global Platform for Disaster Risk Reduction and World Reconstruction Conference, Geneva, 8–13 May 2011*, p. 4 (available from [www.preventionweb.net/globalplatform/2011/documents/GP2011-Proceedings.pdf](http://www.preventionweb.net/globalplatform/2011/documents/GP2011-Proceedings.pdf) (accessed 28 December 2016)).

<sup>267</sup> See United Nations International Strategy for Disaster Reduction, Press release, 24 January 2011 (available from [www.unisdr.org/files/17613\\_2011no3.pdf](http://www.unisdr.org/files/17613_2011no3.pdf) (accessed 28 December 2016)).

<sup>268</sup> S/PRST/2011/7.

<sup>269</sup> *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598.

<sup>270</sup> *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615.

<sup>271</sup> *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/629.

<sup>272</sup> *Ibid.*, vol. II (Part Two), pp. 184–185, para. 329.

<sup>273</sup> *Ibid.*, pp. 183–184, paras. 316–324.

developments in international law and pressing concerns of the international community as a whole”.<sup>274</sup>

13. Turning to the three draft articles proposed in his fourth report, he recalled that after the adoption of draft article 9 (Role of the affected State), which articulated the duty of the affected State, by virtue of its sovereignty, to ensure the protection of persons and the provision of disaster relief and assistance on its territory, it was now necessary to consider the obligations of that State in situations when the magnitude or duration of a disaster exceeded its response capacity. To that end, it was necessary, first and foremost, to recall the core principles of State sovereignty and non-interference, implied in the requirement of consent of the affected State, as clearly set out in draft article 9, paragraph 2. The principles of sovereignty and non-interference and the requirement of the consent of the affected State were to be considered, not in isolation, but rather in the light of the responsibilities borne by States in exercising their sovereignty. Such obligations could be horizontal, in relation to other States, or vertical, in relation to the populations or persons residing on their territory and placed under their jurisdiction. The scope of those obligations and how they related to the basic principles of sovereignty and non-interference and to the requirement of the consent of the affected State were central to the fourth report, which sought solutions that struck a balance between those two imperatives.

14. Draft article 10 (Duty of the affected State to seek assistance), as it appeared in paragraph 45 of the Special Rapporteur’s fourth report, read:

“The affected State has the duty to seek assistance, as appropriate, from among third States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations if the disaster exceeds its national response capacity.”

Through that wording, the rights of the affected State were acknowledged and upheld in at least three regards. First, the obligation to seek assistance arose only when the State in question was not able to do what was required by the situation. It was a reaffirmation of the principle already enunciated in draft article 9 concerning the primary role of the affected State in the direction and supervision of disaster relief operations. As was stated in paragraph 49 of the fourth report, the Government of a State was in the best position to determine the severity of a disaster situation and the limits of its national response capacity. That position was in line with the “margin of appreciation” principle adopted by the European Court of Human Rights, which held that “national authorities enjoy a wide margin of appreciation under article 15 [of the European Convention on Human Rights] in assessing whether the life of their nation is threatened by a public emergency” (*A. and Others v. the United Kingdom*, para. 180).

15. Secondly, as was indicated by the phrase “as appropriate” and, in the English version, the word “among”, for which there was no equivalent in Spanish and French, the affected State had the freedom to seek assistance from any other entity which, in that State’s

view, could provide such assistance in the form that best suited the specific requirements of the situation and most fully respected the State’s sovereignty. A State was not obliged to seek assistance from all entities or even from all those that stood ready to provide it. Humanitarian assistance, as defined in paragraph 1 of the resolution on humanitarian assistance adopted by the Institute of International Law at its Bruges session in 2003, signified “all acts, activities and the human and material resources for the provision of goods and services of an exclusively humanitarian character, indispensable for the survival and the fulfilment of the essential needs of the victims of disasters”.<sup>275</sup> In draft article 10, the term “assistance” reflected the broad ambit of operational aspects of the provision of humanitarian protection and underscored the affected State’s right to decide on the scope and nature of the assistance that were best suited to the fulfilment of its responsibilities under international human rights law and customary international law.

16. Thirdly, referring to the affected State’s obligation to “seek” assistance rather than to an obligation to “request” assistance was a way of stressing the basic principle according to which an affected State was not obliged to accept all offers of assistance. The term “seek” appeared in article III, paragraph 3, of the 2003 Bruges resolution of the Institute of International Law, which read: “Whenever the affected State is unable to provide sufficient humanitarian assistance to the victims placed under its jurisdiction or *de facto* control, it shall seek assistance from competent international organizations and/or from third States.” At the same time, draft article 10 restated the purpose of the draft articles under review as contained in draft article 2, namely, to meet the essential needs of those affected by the disaster, with full respect for their rights. It was also an expression of the duty to cooperate enunciated in draft article 5, as it assumed a link between the affected State and third parties, including other States and intergovernmental and non-governmental organizations.

17. Paragraph 36 of the fourth report indicated that the duty to cooperate was incumbent not only upon third States but also upon affected States. The instruments mentioned in paragraphs 36 to 39 of his report, on cooperation, suggested that the vertical exercise of sovereignty included, for the affected State, the obligation to seek assistance when its response capacity was exceeded. As the General Assembly had noted in the preamble to its resolution 45/100 of 14 December 1990, “the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity”. The centrality of the principle of human dignity had been strongly affirmed in draft article 7 as adopted by the Commission and was made apparent yet again in the duty to seek assistance.

18. Draft article 11 (Duty of the affected State not to arbitrarily withhold its consent), as contained in paragraph 77 of the Special Rapporteur’s report, affirmed that duty, logically enough, immediately following the reference to the duty to seek assistance contained in draft article 10. As had been stressed earlier, the provision

<sup>274</sup> *Yearbook ... 2006*, vol. II (Part Two), p. 185, paras. 256–257, and p. 206, annex III.

<sup>275</sup> Institute of International Law, *Yearbook*, vol. 70 (2003), Session of Bruges (2003), Part II, p. 265 (available from [www.idi-ii.org](http://www.idi-ii.org)).

represented a delicate balance between the requirements of protection and the principles of sovereignty and non-interference which underlay the need for the consent of the affected State.

19. General Assembly resolution 45/100, which had already been cited, alluded to cases where the position of disaster victims had been worsened due to a denial that the situation constituted a disaster or because the appropriate relief or offers thereof had not been consented to, or had been consented to belatedly. Assistance to persons affected by a disaster was indispensable, especially if the inability or unwillingness of the affected State to respond adequately and effectively jeopardized, or even violated, the rights and dignity of those affected. Even though, generally speaking, consent presupposed the possibility of refusing humanitarian assistance, restrictions on the right to refuse such assistance appeared in various legal regimes for protecting persons, such as international human rights law, the law concerning internally displaced persons and international humanitarian law—three domains analysed in paragraphs 59 to 66 of the fourth report. That analysis led to the conclusion, contained in paragraph 70 of the report, that in order to effectively discharge its obligation to provide protection and assistance, a State could not invoke its fundamental right of consent if that resulted in a lack or reduction of protection and assistance when external assistance was needed and available.

20. Whether a decision not to accept assistance was arbitrary depended on the circumstances and should be determined on a case-by-case basis. Practice in that regard was inconclusive and therefore of little value in distilling a general rule. Obviously, the lack of a clear need to provide assistance could be a reason for a refusal that was not arbitrary. Another reason a refusal might not be arbitrary was when certain criteria were not met—for example, if the humanitarian principles cited in draft article 6 were not respected.

21. Furthermore, a decision to reject humanitarian assistance implied an obligation of the affected State to furnish the assisting State with legitimate grounds for its decision. Finally, the affected State must not unjustifiably extend the time frame for deciding whether to accept an offer of humanitarian assistance. The first conclusion was most apparent in the context of international humanitarian law, where, according to the commentary to article 70 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), agreement may only be refused “for valid reasons, not for arbitrary or capricious ones”.<sup>276</sup> Furthermore, the commentary to article 18 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), provided that “[t]he authorities ... cannot refuse such relief without good grounds”.<sup>277</sup> Regarding the second conclusion, the commentary to article 70 of Protocol I stated that “[i]n concrete terms, the delay can only really be justified if it is impossible for reasons

of security to enter the territory where the receiving population is situated”.<sup>278</sup> It was crucial to provide relief swiftly. The affected State’s decision with regard to outside assistance or offers of assistance needed to be communicated to all parties concerned as quickly as possible. That was why, in the preamble to its resolutions 43/131 of 8 December 1988 and 45/100 of 14 December 1990, the General Assembly had noted that “in providing humanitarian assistance ... rapid relief will avoid a tragic increase in the number of victims”. According to article 3, paragraph (e), of the 2000 Framework Convention on civil defence assistance, “offers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time”.

22. Based on the preceding considerations, the two paragraphs contained in draft article 11 read:

“1. Consent to external assistance shall not be withheld arbitrarily if the affected State is unable or unwilling to provide the assistance required.

“2. When an offer of assistance is extended pursuant to draft article 12, paragraph 1, of the present draft articles, the affected State shall, without delay, notify all concerned of its decision regarding such an offer.”

23. Draft article 12, entitled “Right to offer assistance” and contained in paragraph 109 of the report of the Special Rapporteur, consisted of the following single paragraph:

“In responding to disasters, States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations shall have the right to offer assistance to the affected State.”

While draft articles 10 and 11 concerned the duties of the affected State, draft article 12 dealt with the right of State and non-State actors to offer assistance. It recognized the international community’s legitimate interest in protecting persons in the event of disasters, which had been identified as far back as 1758 by de Vattel,<sup>279</sup> quoted in paragraph 14 of the preliminary report. Even if that interest needed to be viewed in the broader context of the primary responsibility of the affected State, the offer of assistance was an important expression of the solidarity, based on the principles of humanity, neutrality, impartiality and non-discrimination, evoked in draft article 6. The primary responsibility of the affected State and the interest of non-affected States and non-State actors in protecting persons in the event of disasters were complementary to the right of non-affected States to offer assistance. Such offers were the practical manifestation of solidarity and a logical corollary of the recognition that the protection of persons in the event of disasters was an inherently global matter, confirming the central role of the affected State as bearing the primary responsibility for the protection of its population. That dual nature of disaster response—as the primary responsibility of the affected State, on the one hand, and as an event of

<sup>276</sup> International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht, Kluwer, 1987, p. 819, para. 2805.

<sup>277</sup> *Ibid.*, p. 1479, para. 4885.

<sup>278</sup> *Ibid.*, p. 826, para. 2846.

<sup>279</sup> E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, vol. III, book II, Washington, D.C., Carnegie Institution of Washington, 1916, chap. I, pp. 114–115.

interest for the international community as a whole, on the other—was highlighted in paragraph 13 (b) of the 2005–2015 Hyogo Framework for Action, which stated that “in the context of increasing global interdependence, concerted international cooperation and an enabling international environment are required to stimulate and contribute to developing the knowledge, capacities and motivation needed for disaster risk reduction at all levels”.<sup>280</sup> Such a holistic approach had long been part of the evolution of international law, including international humanitarian law, as was noted in paragraphs 85 to 87 of the fourth report of the Special Rapporteur. Aside from the law of armed conflict, it had inspired more recent developments in international law, as evidenced by the treaties and other international instruments described in paragraphs 88 to 95 of the report. In that connection it was worth citing article IV, paragraph 1, of the 2003 Bruges resolution of the Institute of International Law: “States and organizations have the right to offer humanitarian assistance to the affected State. Such an offer shall not be considered unlawful interference in the internal affairs of the affected State, to the extent that it has an exclusively humanitarian character.”<sup>281</sup>

24. The interest of the international community in protecting persons in the event of disasters could be effectively channelled through the timely intervention of international organizations and other humanitarian actors, with due respect for the principles cited in draft article 6 and the core principles of sovereignty and non-intervention manifested in the requirement of the consent of the affected State. Paragraphs 97 to 104 of the fourth report listed the relevant texts, including General Assembly resolutions 36/225 of 17 December 1981, 43/131 and 46/108 of 16 December 1991, which deemed the Secretary-General competent to call on States to offer assistance to victims of natural disasters and similar emergency situations. In resolution 43/131, the General Assembly also acknowledged the essential role of non-governmental humanitarian organizations in providing assistance. The disasters that had recently afflicted various regions of the world, including the tsunami that had hit Asian countries in 2004 and the earthquakes in Haiti and Japan in 2010 and 2011, had highlighted the existence of extensive and consistent practice of States in offering assistance to affected States. After the earthquake and tsunami that had struck Japan in early 2011, a total of 28 international organizations had offered humanitarian assistance.

25. Finally, it was also important to mention what was not in draft article 12. While the text recognized the right to offer assistance, it in no way required the affected State to accept such an offer. The provision of assistance on the affected State’s territory remained subject to that State’s consent. The draft article should also not be interpreted as recognizing the principle that all offers of assistance were legitimate. An offer of assistance could in no way

be subject to the acceptance by the affected State of conditions that entailed any limitation whatsoever of its sovereignty. The draft article simply asserted that offers of assistance were not in themselves internationally wrongful acts and could not be construed as interference in the internal affairs of the recipient State. The same point was made in the commentary to article 18 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), according to which the International Committee of the Red Cross (ICRC) was entitled to offer its services without such a step being considered as interference in the internal affairs of a State or as infringement of its sovereignty, whether or not the offer was accepted.<sup>282</sup> Principle 25 of the Guiding Principles on Internal Displacement provided that offers of assistance should not be regarded as unfriendly acts or as interference in a State’s internal affairs.<sup>283</sup> It was thus quite clear that the affected State could make its acceptance of an offer of assistance subject to respect by the donor of certain conditions that guaranteed the full exercise of the affected State’s sovereignty—conditions that would be examined in his next report.

26. Mr. SABOIA said that the fourth report, which was concise but drew on international legal sources and the practice of various international and regional organizations, provided a solid foundation for the proposed draft articles. In the chapter on the responsibility of the affected State to seek assistance when its national response capacity is exceeded, and especially in paragraph 31, the Special Rapporteur had carefully articulated and balanced the principles of sovereignty and non-interference and the requirement of State consent, on the one hand, with the principle of the affected State’s responsibility to seek assistance if its response capacity was exceeded, on the other. He had developed and illustrated that line of reasoning in paragraphs 32 to 45, drawing on case law, practice and the international instruments that made it possible to regard the obligation to seek assistance as a rule of international law, as was the case in draft article 10. As paragraph 44 explained, the duty to “seek” rather than to “request” assistance implied that the affected State continued to play the leading role in overseeing and coordinating aid efforts and that the assistance sought and provided was in line with the principles of humanity, impartiality and non-discrimination set forth in the draft articles that had already been considered.

27. The following chapter dealt with the duty of the affected State not to arbitrarily withhold its consent to external assistance. The duty to cooperate, as set forth in Articles 55 and 56 of the Charter of the United Nations, formed the legal basis of most obligations relating to human rights and economic, social and humanitarian cooperation. Such cooperation must, of course, be a two-way street. The Special Rapporteur had abundantly demonstrated how important it was for the affected State and the international community to cooperate in good faith to provide the necessary relief to populations affected by

<sup>280</sup> Hyogo Declaration 2005, Report of the World Conference on Disaster Reduction, held in Kobe, Hyogo, Japan, 18–22 January 2005, A/CONF.206/6 and Corr.1, chap. 1, resolution 2 (“Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters”), p. 9.

<sup>281</sup> Institute of International Law, *Yearbook*, vol. 70 (2003) ... (see footnote 275 above), p. 271.

<sup>282</sup> ICRC, *Commentary on the Additional Protocols of 8 June 1977* ... (see footnote 276 above), p. 1480, para. 4892.

<sup>283</sup> Report of the Representative of the Secretary-General, Mr. Francis M. Deng (E/CN.4/1998/53/Add.2), Addendum, p. 13, para. 2.

disasters. He gave many examples of provisions dealing with the duty not to arbitrarily withhold consent. Several of the examples came from international humanitarian law, including the Geneva Conventions for the protection of war victims and their additional Protocols of 8 June 1977, or the law on displaced persons. Draft article 11, as proposed in paragraph 77 of the fourth report, articulated that duty and contained a cross reference to draft article 12. He suggested that the phrase “in conformity with the principles established in these draft articles” be added after the words “external assistance”, in order to stress the importance of the principles of impartiality and non-discrimination and the primary role of the affected State.

28. In the final chapter, contained in paragraphs 78 to 109 of the report, which dealt with the right to offer assistance in the international community, the Special Rapporteur argued convincingly that this right stemmed from the idea that the protection of persons in a given country was a legitimate concern, not only of that society and the State in question but also of the international community as a whole, just as was true of human rights protection. He also emphasized the fact that offers of assistance should not be considered unfriendly acts or interference in the affected country’s internal affairs, as long as the assistance offered conformed to the basic principles that safeguarded the integrity of the affected State’s sovereignty and its primary role. The dual nature of disasters, which concerned not only the affected country but also the international community as a whole—on the basis either of solidarity or of the enlightened self-interest of non-affected States—was exemplified by the International Health Regulations (2005)<sup>284</sup> mentioned in paragraph 82. Those regulations, which were mandatory, doubtless arose from an obligation that had a solid basis in national legislation—not to endanger the health of others—but they also contained elements relating to prevention and assistance to disaster victims. In conclusion, he said that all the proposed draft articles should be referred to the Drafting Committee.

29. Mr. MELESCANU said the Special Rapporteur was right to point out that the events of the past year demonstrated the significance of the Commission’s work on the topic. In paragraph 27 of his report, the Special Rapporteur noted that in 2010, some 373 natural disasters—including the recent earthquake and tsunami in Japan, the flooding in Colombia and elsewhere and the storms in the United States—had killed over 296,800 people, affecting nearly 208 million others and costing nearly US\$ 100 billion, according to the Centre for Research on the Epidemiology of Disasters of the Catholic University of Louvain.

30. The first part of the report under discussion dealt with comments by Governments: at the sixty-fifth session of the General Assembly, those comments had focused on the nine draft articles on the protection of persons in the event of disasters prepared by the Commission thus far. Generally speaking, Governments had welcomed the rapid progress made and stressed the importance and timeliness of the topic.

31. Regarding the duty to cooperate set out in draft article 5, he supported the idea of addressing cooperation with international and non-governmental organizations. Provisions on the specific issues that such cooperation might entail would be extremely valuable. The principle of non-discrimination should certainly be included in draft article 6, which should make it clear that differential treatment of persons in different situations, mainly particularly vulnerable persons, did not constitute discrimination. He supported the provision according to which the territorial State had the primary duty of protecting persons and providing humanitarian assistance on its territory. Nonetheless, it was important to strike a balance between State sovereignty and human rights protection.

32. Turning to the following chapters of the report under discussion, he welcomed the fact that the Special Rapporteur had adopted a very prudent and balanced approach to some of the most important issues raised, taking into account the views of States as well as existing practice.

33. As for the affected State’s duty to seek assistance when its response capacity was exceeded, that aspect of the text was the natural and logical extension of draft article 9, which dealt with sovereignty and the duty to ensure protection in the event of disasters. In support of that approach, which was based on the principles of sovereignty and non-interference, the Special Rapporteur cited decisions of the ICJ; General Assembly resolution 46/182 of 19 December 1991, which contained guiding principles for assistance in disaster situations; and a resolution adopted by the Institute of International Law at its Bruges session in 2003. He also rightly noted that the affected State had a clear responsibility with regard to individuals on its territory, advancing convincing evidence in support of his position: for example the provisions of the International Covenant on Economic, Social and Cultural Rights, the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of Persons with Disabilities. From his analysis of the documentation, the Special Rapporteur concluded that “the ‘internal’ aspect of sovereignty, reflected in an affected State’s primary responsibility towards persons within its territory, may encompass a duty to seek external support where national response capacities are overwhelmed” (para. 39). That position had been affirmed by the Inter-Agency Standing Committee (IASC) in its *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*, published by the Brookings–Bern Project on Internal Displacement.<sup>285</sup> The principle of human dignity was also affirmed in draft article 7 as provisionally adopted by the Drafting Committee.

34. The Special Rapporteur considered that, as a matter of international law, the affected State had the right to refuse an offer of assistance. He added, however, that that right was not unlimited. In the preamble to its resolutions 43/131 and 45/100, the General Assembly had made it abundantly clear that “the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity”. However, the main

<sup>284</sup> WHO, Fifty-eighth World Health Assembly (Geneva, 16–25 May 2005), Resolutions and decisions (WHA58/2005/REC/1), resolution WHA 58.3, “Revision of the International Health Regulations”, annex, article 9, pp. 16–17.

<sup>285</sup> IASC, *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*, the Brookings–Bern Project on Internal Displacement, September 2011 (available from [www.brookings.edu/](http://www.brookings.edu/)).

question was to what extent States were free to give or withhold their consent. In the field of humanitarian law on armed conflicts, Protocols I and II to the Geneva Conventions for the protection of war victims were held to imply that consent could not be withheld arbitrarily, as otherwise their provisions would be deprived of their meaning. A similar formulation appeared in the resolutions adopted in 1989<sup>286</sup> and 2003<sup>287</sup> by the Institute of International Law, as well as in a report prepared in 1995 by Dietrich Schindler for the United Nations Educational, Scientific and Cultural Organization (UNESCO).<sup>288</sup> The analysis just outlined indicated that the rejection of humanitarian assistance was not “arbitrary” when certain criteria were not met (for example, “neutrality” and “impartiality” implied that the assistance offered had no political connotations and that nothing was expected in return). Furthermore, the decision to reject humanitarian assistance implied an obligation on the part of the affected State to at least furnish legitimate grounds to substantiate its decision. Draft article 11 as proposed in the report reflected international practice in the area of humanitarian assistance. Although the Commission should adopt it, he thought that paragraph 2 of the draft article should expressly state that the reasons for a refusal must be given. The Drafting Committee might examine that proposal at the same time as it considered draft article 11.

35. As for the international community’s right to offer assistance, the Special Rapporteur had devoted the final part of his fourth report to the support that other States and international organizations could provide to the affected State. He had adopted a holistic approach and, in paragraph 84 of his report, he explained his point of view very well. The approach was based on various provisions found in documents such as Convention I of 1907 for the Pacific Settlement of International Disputes, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I), the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts, and other instruments, including regional ones, such as the 1991 Inter-American Convention to Facilitate Disaster Assistance.

36. The Special Rapporteur had also studied the issue of offers of assistance by international organizations. International rules and practice in that regard were examined in the final paragraphs of the fourth report, which included many examples of practice. He himself fully supported the Special Rapporteur’s conclusion in paragraph 106 that “the right to offer assistance is not limited to non-affected States, but applies also to international organizations whose mandate may be interpreted as including such offers, and other humanitarian organizations”.

37. The fourth report ended with draft article 12, according to which States, the United Nations and other competent

intergovernmental and non-governmental organizations had the right to offer assistance to the affected State in responding to a disaster. He supported the idea of referring the draft article to the Drafting Committee.

38. Mr. PELLET said that, on the whole and with minor exceptions, he had no major objections to the three draft articles proposed by the Special Rapporteur. He was, however, troubled by three methodological problems. The first concerned the relationship between the three draft articles and humanitarian law. According to draft article 4, as adopted by the Commission in 2010, the “draft articles do not apply to situations to which the rules of international humanitarian law are applicable”.<sup>289</sup> That provision seemed very sensible, as it would not be good to cover in the same set of draft articles the protection of persons in the event of armed conflict and the protection of persons in the event of other types of disasters. He therefore wondered why the Special Rapporteur relied so heavily on instruments that were applicable only in time of war, thus creating a problem of coherence that would need to be addressed in the commentaries. The second methodological problem was more serious: the fourth report seemed highly theoretical, even though the Special Rapporteur had shown at the outset to what extent the stakes were very real. With the exception of paragraph 105, which contained some references to actual disasters, the whole exposition focused either on what the Special Rapporteur deemed appropriate, which was commendable but certainly less useful than examples of practice, or on texts adopted by respectable and authoritative entities. However, practice could not be reduced simply to a series of texts; it was made up not simply of what the General Assembly, the Institute of International Law or the ICRC might have to say, but also of the actual attitudes of States whose land and inhabitants had suffered disasters—for example, the reluctance of the Government of Myanmar to accept assistance after the flooding in that country—and the reactions of other States, NGOs, and so on. The Special Rapporteur hardly mentioned such matters, which was regrettable. The Commission would thus do well to take seriously the advice given to it and referred to in paragraph 24 of the report, and to follow it in drafting the commentaries that would appear in the final version of the articles. Thirdly, he was also surprised and a little bit disappointed at the near-absence in the report of the new and, in his view, auspicious concept of the responsibility to protect. The Special Rapporteur alluded to the concept in paragraph 81, *inter alia*, but did not give it all the attention it deserved, whereas it could and even should be the guiding principle of the entire set of draft articles. It would then be possible to refocus the commentaries to future draft articles, firm up arguments and stop being needlessly cautious.

39. He had always disapproved of the inclusion in the Commission’s programme of work of that politically delicate topic, which to him seemed to lend itself much more to diplomatic negotiation than to codification by a body of independent experts. However, since the Commission was seized of it—had seized it, in actual fact—it might as well take a bold and stimulating plunge into progressive development, shunning excessive caution and procrastination. On that basis, he was ready to approve the general thrust of the draft articles proposed by the

<sup>286</sup> Institute of International Law, *Yearbook*, vol. 63 (1989), Session of Santiago de Compostela (1989), Part II, resolution on the protection of human rights and the principle of non-intervention in internal affairs of States, p. 338.

<sup>287</sup> Institute of International Law, *Yearbook*, vol. 70 (2003) ... (see footnote 275 above).

<sup>288</sup> International Colloquium on the Right to Humanitarian Assistance, Paris, 25–27 January 1995, D. Schindler, “The right to humanitarian assistance: right and/or obligation?” (SHS-95/CONF.805/6), rule 6, p. 3.

<sup>289</sup> *Yearbook* ... 2010, vol. II (Part Two), pp. 185–190, paras. 330–331.



Special Rapporteur, even though he was uneasy with the methodology used and would have liked to see a more resolute approach.

40. Having said that, he wished to see a few more nuances in the texts proposed. To begin with, he was disturbed by the idea—which came up repeatedly in the report—that the affected State should seek assistance if it was unwilling to assist its imperilled population: that seemed bizarre. If the State chose not to use its own resources, then why, and above all by what right, should it appeal for international solidarity? In paragraph 37, where the Special Rapporteur quoted a statement made on behalf of the Nordic countries, and again in paragraph 71, in which he expressed a similar idea, he seemed to concede that a State whose population was struck by a disaster such as those defined in draft article 3 could refuse to use its own resources to assist the population. Yet it certainly could not do so, in his own view, since such was the very essence of the responsibility to protect—a State must protect its people—and one could not acknowledge, even implicitly, that it might not. It was also difficult to reconcile that view with draft article 9, paragraph 1, on the role of the affected State. Accordingly, he did not approve of equating, in draft article 11, paragraph 1, situations in which the State lacked the capacity to handle a situation with those in which it lacked the will to do so. Obviously a State might lack resources, for which it could not be blamed, but it did not have the right to lack will: it must be willing to assist the affected populations. The current wording of draft article 11, paragraph 1, implied that a State could foist its responsibility to protect onto the international community or other States, something that would be incompatible with draft article 9, paragraph 1, to which Mr. Melescanu had drawn attention.

41. Regarding draft article 11, he wished to comment on three other details. First, it was necessary to define what “all concerned” meant in the context of the draft articles; he understood that the Special Rapporteur would do that. Secondly, notifying all concerned of the affected State’s decision did not suffice; it was also necessary to substantiate the decision, and there he entirely agreed with Mr. Melescanu. Thirdly, it would make much more sense to reverse the order of draft articles 11 and 12, first because draft article 11 cited draft article 12 and secondly because it seemed logical to mention the offer of assistance that was the subject of draft article 12 before referring to the reactions to such an offer, which were addressed in draft article 11.

42. He had no objections to draft articles 10 and 12, except that he found the underlying logic rather tortuous and, unlike Mr. Melescanu and Mr. Saboia, he was unconvinced by the subtle distinctions made in paragraph 44. Still, the right result was obtained, since the Special Rapporteur conceded that an affected State finding itself short of resources had an obligation to seek external assistance, the only caveat being that it was perhaps not appropriate for it to have recourse first to the United Nations, whose primary mission was not to provide disaster relief. There remained two details on which he wished to comment. First, in paragraph 95 of the French version of the fourth report, article IV of the 2003 resolution on humanitarian assistance adopted by the Institute of International Law was misquoted. Paragraph 2 of the article should read: “*Les États et les organisations*

*ont le droit d’offrir une assistance humanitaire aux victimes se trouvant sur le territoire des États affectés, sous réserve du consentement de ces derniers.*”<sup>290</sup> In the French version of all the draft articles in the report, it would be better to replace the word “*touché*” with the more appropriate term “*affecté*”. It was to be hoped that the Drafting Committee and the Special Rapporteur would agree. Secondly, in the *A. and Others v. the United Kingdom* case cited in paragraph 49 of the report, the European Court of Human Rights had recognized, in paragraph 173 of its decision, the wide margin of appreciation enjoyed by States in assessing whether the nation was threatened by a public emergency, but had added: “Nonetheless, Contracting Parties do not enjoy an unlimited discretion.” That did not contradict what the Special Rapporteur had written but rather confirmed the need to seek a balance between State sovereignty and basic humanitarian considerations, in other words, between a liberal element—sovereignty—and a “welfarist” element—solidarity, to paraphrase the title of a recent book by Emmanuelle Jouannet, soon to be published in English as *The Liberal-Welfarist Law of Nations: A History of International Law (Le droit international libéral-providence: Une histoire du droit international)*.<sup>291</sup> He would like draft articles 10, 11 and 12 to be referred to the Drafting Committee.

43. Sir Michael WOOD, referring to Mr. Pellet’s comment that the responsibility to protect should be a guiding principle of the text, said that it seemed to him, given the context, that the reference was to the territorial State’s duty to protect its own population: Mr. Pellet was not thinking of the new concept of a “responsibility to protect”, which the Commission had already rejected.

44. Mr. PELLET said that in English, the reference should be to a “duty to protect”. He, for one, had never rejected the concept of a responsibility to protect: while the issue was primarily one of the territorial State’s responsibility to protect its population, the international community also had the duty to help the State to protect its population and, if necessary, to oblige it to do so. He disagreed entirely with Sir Michael when he said that the concept was to be rejected. On the contrary, it was useful and fit in perfectly with the topic, and the Special Rapporteur seemed to have had it in mind when he prepared his report, even if he had, unfortunately, neglected to mention it outright.

45. Mr. WISNUMURTI said that he agreed with Sir Michael. The Commission had discussed the concept of the responsibility to protect at length<sup>292</sup> and had decided not to use it for the current undertaking. It was important to remember that the responsibility to protect had very specific parameters, being used in the context of genocide, crimes against humanity and war crimes.<sup>293</sup>

<sup>290</sup> Institute of International Law, *Yearbook*, vol. 70 (2003) ... (see footnote 275 above), p. 270.

<sup>291</sup> E. Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law*, Cambridge University Press, 2014.

<sup>292</sup> See *Yearbook ... 2008*, vol. II (Part Two), pp. 133–134, paras. 247–250, and *Yearbook ... 2009*, vol. II (Part Two), p. 135, para. 153, and p. 137, para. 164. See also *Yearbook ... 2008*, vol. I, 2978th to 2982nd meetings, pp. 129–184, *passim*.

<sup>293</sup> 2005 World Summit Outcome, General Assembly resolution 60/1 of 16 September 2005, paras. 138–139. See also the Secretary-General’s report entitled “Implementing the responsibility to protect” (A/63/677) and General Assembly resolution 63/308 of 14 September 2009.

46. Mr. VASCIANNIE said that, in the given situation, the Special Rapporteur needed to reconcile the responsibility to protect with domestic sovereignty. In his report, the Special Rapporteur did in fact affirm the responsibility to protect without, as Mr. Pellet had noted, openly stating that he was doing so.

47. Mr. NOLTE said that Mr. Pellet's attitude seemed contradictory: he had opposed the consideration of the current topic because it was political in nature, linked to the ongoing political debate over the status of the responsibility to protect in international law, but now that the topic was included in the Commission's programme of work, he wished the Commission to treat the responsibility to protect as a guiding principle. He himself thought that the Special Rapporteur had been very wise to avoid mentioning the politically controversial idea of the "responsibility to protect" while including its main elements, which originated elsewhere—the obligation to protect, in the field of human rights, the principles of cooperation and solidarity, in other fields—in order to apply them to the topic at hand. The fact that the Special Rapporteur did not explicitly mention the concept of the responsibility to protect meant, not that he rejected its core elements, but rather that he was applying them intelligently to the topic of the protection of persons in the event of disasters.

48. Mr. PETRIČ voiced a plea for the debate on the approach taken by the Special Rapporteur in his fourth report not to be reopened, at the risk of seeing the work on the topic grind to a halt. The Commission had already decided to focus on natural disasters and not on humanitarian law, the laws of war or the concept of the responsibility to protect. The resulting approach, taking into account the implications of that decision, was perfectly balanced and the only one that would enable the Commission to continue its work on the topic.

49. Mr. MURASE thanked the Special Rapporteur for his excellent fourth report and said that before commenting on it, he wished to refer to the disaster that had struck Japan in March 2011, from which much could be learned. During the past four months, Japan had truly felt the great value of international solidarity and assistance. Soon after 11 March, when the country had been devastated by an earthquake and the tsunami that followed it, the Government of Japan and the population had received help and encouragement from countries around the world. To update the figures cited by the Special Rapporteur in paragraph 104 of the report, he said that Japan had thus far received offers of assistance from 161 countries and 43 international organizations. It had received huge quantities of relief supplies, sizeable monetary donations and hands-on help from a large number of disaster relief teams from many countries, regions and organizations, all of which were to be heartily thanked. The Japanese people would never forget that the world had stood by them when they were most in need.

50. It was deeply regrettable that the nuclear accident in Fukushima had caused such anxiety in Japan and abroad. Japan apologized to the international community for the human factors that had led to the accident and was relieved to have escaped an even greater catastrophe, doubtless thanks to the authorities, which had mobilized the best

resources available to them under the circumstances. The Government of Japan had presented a report<sup>294</sup> to the Ministerial Conference on Nuclear Safety,<sup>295</sup> organized by the International Atomic Energy Agency from 20 to 24 June 2011, in which it had emphasized the importance of conducting a preliminary assessment of the situation in disaster areas, thereby sharing with the international community the lessons learned from the accident. He was certain that the Government of Japan would pursue its efforts to strengthen international nuclear safety by disseminating adequate information in a prompt and transparent fashion.

51. The experience of Japan showed that the principles of solidarity and international cooperation were a cornerstone of the entire set of draft articles; as he understood them, then, the articles proposed by the Special Rapporteur were hortatory, facilitative and promotional in nature, rather than obligatory or enforceable. It would obviously be inappropriate for the Commission to try to formulate norms in terms of a rigid legal relationship between rights and obligations. Its goal was not to seek to establish State responsibility for the breach of an obligation or to apply sanctions in case of non-fulfilment of that responsibility. The basic goal, rather, was to facilitate the protection of persons in the event of disasters. Thus, the Special Rapporteur was right to use the term "duty" rather than "obligation": in his own view, the notion of "duty" fell somewhere between a moral dictate and a legal obligation.

52. Those few countries that refused external assistance or, at best, were selective about accepting it remained, of course, a source of concern. Everyone knew that those countries—there was no need to name them—had leaders who did not care that hundreds of thousands of people were starving, even in normal conditions. In such cases, it was tempting to apply a strict enforcement approach rather than soft, facilitative and promotional approaches. But that would not solve the problem of how to facilitate relief activities, since it was almost impossible to hold those States accountable. The issue should be considered from a broader perspective rather than in the context of the current topic. The Commission had rightly decided that the notions of humanitarian intervention and responsibility to protect were not relevant to its work on that topic.

53. If the Commission preferred not to use the term "obligation" in draft article 12, it should also refrain from using the term "right". To talk of a legal right would be to go beyond the practice of States and international organizations. While States could certainly offer assistance, such offers were made not to exercise a legal right but as expressions of international goodwill and cooperation. Therefore, the title of draft article 12 should be simply "Offer of assistance", and in the text of the draft article, the words "shall have the right to offer assistance" should be replaced by the words "can offer assistance".

<sup>294</sup> "Report of Japanese Government to the IAEA Ministerial Conference on nuclear safety: The accident at TEPCO's Fukushima nuclear power stations" (available from [http://japan.kantei.go.jp/kan/topics/201106/iaea\\_houkokusho\\_e.html](http://japan.kantei.go.jp/kan/topics/201106/iaea_houkokusho_e.html), accessed 28 February 2017).

<sup>295</sup> "IAEA Ministerial Conference on Nuclear Safety, 20–24 June 2011", report by the Director General (available from [www.iaea.org/About/Policy/GC/GC55/GC55InfDocuments/English/gc55inf-10\\_en.pdf](http://www.iaea.org/About/Policy/GC/GC55/GC55InfDocuments/English/gc55inf-10_en.pdf), accessed 28 February 2017).

54. An important aspect of protecting victims of natural disasters was surely to encourage a sense of solidarity with the people affected. Material and financial assistance and cooperation were valuable, but expressions of solidarity could be equally precious. In that connection, he wished to cite the example of an Ambassador of a small island State in Asia that had been devastated by a tsunami in 2004. In order to show his country's solidarity with Japan, he had voluntarily reported for duty in Tokyo at a time when many diplomats and businesspeople were fleeing the city for fear of radioactive contamination, leaving the Japanese with a sense of abandonment. Soon after his arrival, the Ambassador had visited evacuation centres in the affected area; his Government had donated US\$ 1 million and 3 million bags of tea to the victims and had sent 15 members of the military to participate in clean-up operations in the tsunami-stricken area. With those actions, the State in question had gone beyond its basic diplomatic duties and won the respect of the Japanese nation.

55. Given that a great many rules for conducting relief operations already existed, the Commission should not become involved in detailed rule-making and should leave that to bodies responsible for relief activities. However, it was important to stress that speed was crucial for rescue work, as the survival rate of victims trapped under earthquake rubble fell sharply after 72 hours. It was also necessary to remove legal obstacles so that rescue teams and rescue dogs could arrive at the scene as early as possible. Mention should perhaps also be made of the fact that disaster relief teams should be self-supporting so that they did not place additional burdens on disaster-affected areas.

56. Volunteers and NGOs were indispensable in relief activities. As he had proposed once before, well before new disasters actually occurred, a competent international organization should establish a roster of qualified and reliable NGOs that could be accredited to conduct relief operations. Those organizations should meet internationally accepted standards for competent, reliable and effective relief organizations, and any affected State could choose suitable organizations from the roster. Such a mechanism might alleviate some of the concerns of affected States about the competence of assisting organizations and speed up the admittance of relief workers into disaster areas. The Government of Japan had conducted negotiations with neighbouring countries regarding cooperation on disaster management, a subject on which agreement had been reached on 9 April 2011 at a Special ASEAN–Japan Ministerial Meeting.<sup>296</sup> Furthermore, on 22 May 2011, China, Japan and the Republic of Korea had concluded a trilateral cooperation agreement on disaster management<sup>297</sup> in order to make maximum efforts to enhance disaster prevention and to strengthen relief capabilities and the disaster assistance system. Under the agreement, when a grave disaster occurred in one of the three countries, the two others would evaluate the situation, identify the needs of the affected country and dispatch emergency rescue teams and relief supplies as quickly as possible on the basis

of requests by the affected country. The affected country in turn would facilitate cooperation by admitting disaster relief teams and supplies as swiftly as possible to the extent permitted by national legislation and taking into account international practices and the situation on the ground. In conclusion, he said that a framework convention would facilitate and promote the conclusion of similar bilateral, trilateral and regional agreements between neighbouring countries. He had initially been sceptical of the topic's relevance but was now convinced that, through its work, the Commission would be able to make a contribution to the international community.

57. Mr. PETRIČ thanked Mr. Murase for a statement that had been as compelling as it had been moving and said he welcomed the good progress made by the Special Rapporteur, whose fourth report took a balanced approach that would enable the Commission to move forward with its work. Mr. Murase had been right to emphasize the importance of solidarity, which was a cornerstone of the topic under consideration—namely, how to react when, following a natural disaster, thousands of people were hungry, displaced or in danger of dying? It should also be recalled that in Ethiopia, more than a million people had died in a year from hunger but also through the negligence of the authorities, who had not taken the necessary measures, had refused to admit that a disaster was occurring and had not requested, much less accepted, assistance that, once sent, in the end could not be distributed. That situation differed greatly from the case of Japan, in that in Ethiopia, the solidarity expressed had been stymied.

58. The Commission's objective was to establish rules to ensure that in the event of a natural disaster, the affected population could receive assistance. To reach that goal, and in fact to make any progress towards it, it needed to use a balanced approach. That was what it had done at its previous session in adopting four very important draft articles. The Commission should also keep in mind that the primary obligation to provide assistance lay with the affected State, on the grounds of its sovereignty but also for practical reasons. Dispatching aid without that State's consent and cooperation could pose problems and even be counterproductive. In his fourth report, the Special Rapporteur proposed three draft articles which, by establishing certain limits, including on the affected State's sovereignty, made it possible to send aid despite any concerns or fears that the State might have. The texts, whose wording could surely be improved, were perfectly in line with the outcome expected by the Commission: they were headed in the right direction and thus deserved support. According to draft article 10 (Duty of the affected State to seek assistance), in situations like those mentioned earlier—Ethiopia and Myanmar—the State would be obliged to seek assistance, and that was laudable. As for draft article 11 (Duty of the affected State not to arbitrarily withhold its consent), while the word “arbitrarily” might need to be fleshed out further in the commentary, the text was an important step forward, as it set boundaries for the decision-making powers of the affected State in the event of natural disasters without compromising its sovereignty. According to paragraph 2 of the draft article, when an offer of assistance was extended pursuant to draft article 12, paragraph 1, the affected State should, without delay, notify all concerned of its decision regarding such an offer.

<sup>296</sup> See <http://asean.org/chairman-s-statement-on-the-special-asean-japan-ministerial-meeting-jakarta-9-april-2011/>.

<sup>297</sup> See the website of the Trilateral Cooperation Secretariat (<http://tcs-asia.org>) and the statement from the 22 May 2011 summit (available from [http://tcs-asia.org/bbs/board.php?bo\\_table=catg&wr\\_id=1469&sca=217](http://tcs-asia.org/bbs/board.php?bo_table=catg&wr_id=1469&sca=217)).

In short, the best way for the affected State to avoid being accused of failing in its duty not to arbitrarily withhold its consent was to respond in a transparent manner. Draft article 11 was thus both prudent and realistic, and it, too, was headed in the right direction. As for draft article 12 (Right to offer assistance), one could perhaps even speak of a “duty of solidarity”, but at least the text enunciated the right to offer assistance—which, of course, had nothing to do with interference in a State’s internal affairs.

59. The Special Rapporteur had noted in his fourth report that the topic of natural disasters had aroused significant interest within the international community, and that was quite understandable. Indeed, the view that the international community should take action when people were victims of natural disasters like those mentioned was gaining ground, while the older notion of sovereignty, according to which no one should under any circumstances intervene in the internal affairs of a State, was gradually losing ground. The Commission should not move too far in that direction, however, at the risk of being counterproductive. He concluded by congratulating the Special Rapporteur on his fourth report, which was a significant step forward on a topic that was important, sensitive and timely. The report struck the proper balance between the recognized principles of international law relating to the protection of persons in the event of natural disasters and the need to assist disaster victims and to ensure that their dignity and human rights were respected at a time when that mattered the most.

*The meeting rose at 5.55 p.m.*

### 3103rd MEETING

*Tuesday, 12 July 2011, at 10 a.m.*

*Chairperson:* Ms. Marie G. JACOBSSON  
(Vice-Chairperson)

*Present:* Mr. Adoke, Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

#### **Protection of persons in the event of disasters (continued) (A/CN.4/638, sect. D, A/CN.4/643, A/ CN.4/L.794)**

[Agenda item 7]

#### **FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)**

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the fourth report on the protection of persons in the event of

disasters (A/CN.4/643). She welcomed the new member, Mr. Adoke, and said that his colleagues looked forward to working with him.

2. Mr. NOLTE thanked the Special Rapporteur for his rich and balanced fourth report, which provided an excellent basis for the Commission’s deliberations. It recalled the dramatic situations that underlay the abstract term “disaster” and the Commission’s responsibility to formulate appropriate and balanced rules to deal with them.

3. The way Commission members responded to the fourth report depended to some extent on the final formulation to be given to the role of consent, a question that was still before the Drafting Committee in the context of draft article 8, paragraph 2. While he agreed in principle with the requirement of consent by the affected State to the provision of humanitarian assistance by other States or actors, he was not in favour of formulating such a requirement in an absolute way: for example, there might be exceptional situations in which the affected State could not give its consent.

4. He endorsed the basic approach taken by the Special Rapporteur in draft articles 10 to 12, in particular the premise that an affected State had a duty to seek assistance, a duty arising from its primary responsibility to ensure the protection of all persons in its territory. The reference in paragraph 33 of the report to General Comment No. 12 (1999) of the Committee on Economic, Social and Cultural Rights on the right to provide adequate food<sup>298</sup> was pertinent in that regard. However, the statement by the Special Rapporteur in paragraph 40 of his fourth report that “where the national capacity of a State is exhausted, seeking international assistance may be an element of the fulfilment of an affected State’s primary responsibilities” was somewhat weak; where national capacity was exhausted, seeking international assistance was the duty of an affected State. The Special Rapporteur ultimately seemed to recognize that fact, yet in draft article 10 he indicated that the affected State had the duty to seek assistance “as appropriate”. The words “as appropriate” should be used only with reference to the mode of implementation of the duty to seek assistance.

5. The duty to seek assistance embodied in draft article 10 could not and should not be separated from the corollary duty, expressed in draft article 11, not to withhold consent, and the right to offer assistance set out in draft article 12. Where a disaster exceeded the capacity of a State, that State had the duty to seek assistance from other States and relevant actors, which had the collateral right to offer such assistance; in both cases, the affected State had the duty not to withhold consent arbitrarily. Separating those interrelated and collateral rights and duties could lead to artificial distinctions in practice and to formalistic arguments in emergency situations.

6. If it was true, as the Special Rapporteur suggested in paragraph 44 of his report, that “a duty to ‘seek’ assistance implies the initiation of a process through

<sup>298</sup> *Official Records of the Economic and Social Council, 2000, Supplement No. 2 (E/2000/22-E/C.12/1999/11)*, Report on the twentieth and twenty-first sessions of the Committee on Economic, Social and Cultural Rights, annex V, p. 102.