

Document:-  
**A/CN.4/2979**

**Summary record of the 2979th meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
**2008, vol. I**

*Downloaded from the web site of the International Law Commission  
(<http://legal.un.org/ilc/>)*

Group to Prepare a Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance, for example, was founded on the premise of a need for specialized attention, notwithstanding the earlier recommendation of the Committee that the existing body of international instruments was commensurate with the task and that the work of implementation had higher priority.

78. With regard to Mr. Nolte's question concerning the definition of "government" contained in the Inter-American Democratic Charter, he said that the judiciary was obviously a part of government for the purposes of State practice in international law; nevertheless, in the case of the Inter-American Democratic Charter, the issue of *lex specialis* arose. That Charter was founded on the premise that OAS member States were a kind of league of democracies, the notion being that when a State diverged from an agreed set of democratic norms, the principle of non-intervention should be accorded less significance, and procedures for international intervention should be invoked. One of the specific procedures provided for was that the Secretariat could undertake a mission to a member State's territory with the consent of that member State's government. The technical question that arose was whether the Charter should be interpreted to mean that "government" for the purposes of giving such consent meant only the executive, which was the ordinary branch of government that had international capacity under the 1969 Vienna Convention and other relevant instruments, or whether the invitation could be submitted by the judiciary, if it considered, for example, that its own rights under a democratic constitutional structure had been breached by the executive. That was a difficult question of interpretation; some might argue that it was fundamentally a policy question. He would hesitate to offer a view on the matter at the current juncture, as the Committee had not yet discussed it.

79. Mr. HASSOUNA said that the activities and experience of the Inter-American Juridical Committee might be useful to other regional organizations, such as the League of Arab States and the African Union. Consequently, he would like to propose that some form of cooperation be established between the various judicial bodies for the benefit of all concerned.

80. International criminal responsibility was an important issue, not only in the Americas, but in all regions of the world. Given that some OAS member States, such as the United States of America, had not yet signed the Rome Statute of the International Criminal Court whereas others were perhaps already parties to it, he wondered whether OAS had a common position concerning the desirability of signing and ratifying that Statute.

81. The CHAIRPERSON, speaking as a member of the Commission, said that, like Mr. Vasciannie, he had had the honour of serving on the Inter-American Juridical Committee. On the basis of that experience, he felt it was necessary to strengthen cooperation between the International Law Commission and other regional bodies concerned with the codification of international law, and also between those regional bodies and the Inter-American Juridical Committee. As for the proposal to

establish an inter-American court of justice, he was inclined to think that it might create more problems than it solved.

82. Mr. PÉREZ (Inter-American Juridical Committee), responding to Mr. Hassouna's question, said that there was no common inter-American position regarding the International Criminal Court; however, there was a consensus that States that wished to join the Court should be able to do so, and that they should make every effort to overcome any technical barriers thereto within their domestic legal systems. In that spirit, the Committee had sought to serve its technical and administrative function of solving member States' problems on the basis of lessons learned from other member States. In that sense, it was the least political and most dispassionate form of international civil service. The suggestion, made by Mr. Hassouna and supported by the Chairperson, for closer interregional cooperation was in keeping with that spirit, and he would commend it to the Committee.

83. In closing, he thanked members for their very thoughtful and revealing questions and comments, which he would take back to the Committee so that all its members could learn from them.

84. The CHAIRPERSON thanked the representative of the Inter-American Juridical Committee for his valuable contribution to the work of the Commission, and wished him a safe journey home.

*The meeting rose at 12:50 p.m.*

---

## 2979th MEETING

*Wednesday, 16 July 2008, at 10 a.m.*

*Chairperson:* Mr. Edmundo VARGAS CARREÑO

*Present:* Mr. Al-Marri, Mr. Brownlie, Mr. Cafisch, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

---

### Protection of persons in the event of disasters (continued) (A/CN.4/590 and Add.1–3, A/CN.4/598)

[Agenda item 8]

PRELIMINARY REPORT OF THE SPECIAL  
RAPPORTEUR (continued)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the Special Rapporteur on the protection of persons in the event of disasters (A/CN.4/598).

2. Ms. ESCARAMEIA thanked the Special Rapporteur for his extremely detailed and instructive report and for the contacts he had made with bodies within and outside the United Nations system. She supported the approach he had adopted in his preliminary report, the purpose of which was to identify the basic assumptions on which the Commission's work would be based, focusing on the scope of the topic. The Special Rapporteur seemed to have proceeded on three basic assumptions. The first was that a broad approach should be adopted. The study should cover natural and man-made disasters, State and non-State actors, and the several different phases, namely prevention, mitigation of damage and rehabilitation. The second assumption was that an approach based on victims' rights should be adopted, and the third presupposed the existence of some kind of responsibility to protect.

3. She fully supported the first assumption and noted with interest how the Special Rapporteur had derived the scope of the topic from its title, as reflected in paragraphs 10 to 12 of his preliminary report. He had then defined the scope *ratione materiae*, *ratione personae*, *ratione temporis* and even, without explicitly saying so, *ratione loci*, since he had addressed the question of the location of the disaster in paragraph 47 of his report.

4. It was important not to confine the scope of the topic *ratione materiae* to natural disasters for the reasons given by the Special Rapporteur in paragraph 49 of his report, namely that natural disasters could be aggravated by human activity or failure to take timely action. The definition contained in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, cited in paragraph 46 of the report, offered a sound basis on which to proceed. She also agreed with the Special Rapporteur that protection of the environment and property should be covered since they were linked with the protection of persons. She had some difficulty in understanding the distinction made by the Special Rapporteur in paragraph 51 of his report between protection *sensu lato* and protection *stricto sensu*, and would welcome some clarification in that regard.

5. With regard to the scope of the topic *ratione personae*, she agreed with the Special Rapporteur that the practice and role of non-State actors should also be studied, especially since they had spearheaded the development of existing rules. All phases of the temporal dimension of the topic should be studied, from disaster prevention to post-disaster rehabilitation.

6. Turning to the second assumption, she welcomed the fact that the Special Rapporteur had adopted an approach based on victims' rights. In that connection, he had cited the Secretary-General of the United Nations, who had stated in his 1998 report on the work of the Organization that a rights-based approach dealt with situations not just in terms of human needs, "but in terms of society's obligation to respond to the inalienable rights of individuals",<sup>189</sup> which seemed to imply some sort of right to humanitarian assistance. Although legal opinion was clearly divided on the subject, the rules developed by the Red Cross and the

Red Crescent as well as the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies<sup>190</sup> recognized a basic right to such assistance. The Institute of International Law also treated it as a right in its 2003 resolution on humanitarian assistance, equating non-assistance with a violation of the rights to life and human dignity.<sup>191</sup> It was therefore necessary to study the question of the right to assistance.

7. The third—albeit very tentative—assumption regarding the existence of some kind of responsibility to protect flowed logically from the foregoing considerations. It really amounted to a principle rather than an enforceable rule. In any case, if a right to assistance existed, there should also be a corresponding obligation. The next question was who owed the obligation. While it seemed to be generally recognized that the State in which the disaster occurred had an obligation to protect, one might also enquire about the obligations of third States, non-State actors and even individuals. Questions also arose with regard to the content of the obligation and whether it encompassed prevention, reaction and rebuilding. A further question was what triggered the obligation: did it ensue automatically from the disaster, was a decision by some organ required, or should a claim be filed by an individual? A further question concerned the means available to enforce the obligation nationally or internationally. In any event, the responsibility to protect was a question that could not be ignored and the Special Rapporteur would do well to submit a separate report on the subject.

8. In the *Military and Paramilitary Activities in and against Nicaragua* case, the ICJ had concluded that the provision of humanitarian aid could not be regarded as unlawful intervention, or in any other way contrary to international law. Moreover, the idea of a responsibility to protect had been widely accepted since the High-level Panel on Threats, Challenges and Change had published its report,<sup>192</sup> the conclusions of which had been bolstered by the Secretary-General's report entitled "In larger freedom: towards development, security and human rights for all", which referred to the need to ensure "the accountability of States to their citizens, [and] of States to each other".<sup>193</sup> Furthermore, according to the 2005 World Summit Outcome document, each individual State had the responsibility to protect its populations from genocide, war crimes, crimes against humanity and ethnic cleansing.<sup>194</sup> All those documents should be analysed, as well as the voluminous 2001 report of the International Commission on Intervention and State Sovereignty entitled *The Responsibility to Protect*.<sup>195</sup> It thus seemed to be

<sup>190</sup> See J. M. Ebersole, "The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance", *Human Rights Quarterly*, vol. 17, No. 1 (1995), pp. 192–208.

<sup>191</sup> Institute of International Law, *Yearbook*, vol. 70 (2003), Session of Bruges (2003), Part II, pp. 263 *et seq.*

<sup>192</sup> "A more secure world: our shared responsibility" (A/59/565 and Corr.1).

<sup>193</sup> "In larger freedom: towards development, security and human rights for all" (A/59/2005 and Add.1–3, para. 22).

<sup>194</sup> General Assembly resolution 60/1 of 16 September 2005, paras. 138–140.

<sup>195</sup> *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, Ottawa, International Development Research Centre, 2001.

<sup>189</sup> *Official Records of the General Assembly, Fifty-third Session, Supplement No. 1 (A/53/1)*, p. 23, para. 174.

generally accepted that States had an obligation to protect people present in their territory and that foreign entities might assist them in the task, subject to their consent. While that assumption was virtually unchallenged, opinions were deeply divided on whether such foreign entities could protect people without their consent—or indeed whether they were under an obligation to do so. Lastly, she cited article 11 of the Convention on the Rights of Persons with Disabilities, which required States to protect persons with disabilities in situations of risk, including those pertaining to natural disasters.

9. With regard to sources, she agreed with the Special Rapporteur that the principal sources were international humanitarian law, international human rights law and international law relating to refugees and internally displaced persons. However, other sources should also be studied, for instance privileges and immunities law, customs law and transport law, which were important in operational terms. Moreover, account should be taken of international and domestic jurisprudence, domestic legislation, General Assembly resolutions and also the general comments of treaty monitoring bodies. The Special Rapporteur held that there was no relevant customary law but emphasized the importance of general principles. She submitted, however, that some of those principles, such as the principle of cooperation and the principle of humanity, could be held to form part of customary law.

10. With regard to the final form of the Commission's work on the subject, she agreed with the Special Rapporteur that the Commission should take a decision at a relatively early stage and concurred with his suggestion that a framework convention would be highly appropriate, since it would lay down general principles that States could incorporate in bilateral or regional treaties.

11. Mr. HMOUD, thanking the Special Rapporteur for his excellent preliminary report on the protection of persons in the event of disasters, said that while the report and the Secretariat's study drew attention to a large number and wide range of legal instruments and soft law dealing with different aspects of disasters, it was essential to identify more clearly the areas that warranted adoption by the Commission of draft articles or guidelines on the topic. What problems were encountered in protecting persons in the event of disasters? The answer to that question was of key importance when it came to delimiting the scope of the topic, which seemed from a reading of the preliminary report to be very broad. Should the Commission adopt a practical approach, creating norms to be applied in dealing with problems of prevention and relief on the ground and in improving available means of response, or would it be preferable to adopt a conceptual approach, developing rules that were applicable in a great variety of situations and might therefore overlap with existing rules? He was in favour of the former approach, namely, first identifying the core problems and then creating legal norms to be applied in resolving them, thereby enhancing actors' ability to respond to such situations. This would also limit the scope of the topic and enable the Commission to contribute usefully to the legal framework in the area of disasters.

12. Disasters had detrimental consequences for individuals exposed to them and for the State on whose territory

the disaster occurred or might occur. A disaster prevented individuals from enjoying several basic rights, such as the rights to life, food, property, housing and work. Victims should continue to enjoy such rights, as far as possible, in the event of a disaster, and should subsequently resume their full enjoyment. The State was also confronted with a disruption of the functioning of society which affected its ability to exercise certain rights and discharge certain responsibilities. While persons in disaster situations were the primary concern in dealing with the topic, the consistency of their rights with the interests of the State contending with the disaster should also be taken into account. The rights of the individual and those of the State were interdependent under the circumstances. A State without access to international relief would be unable to assist affected persons. A rights-based approach focusing on the human person should bear that premise in mind. Moreover, State sovereignty and the principle of non-intervention should not be viewed as incompatible with the rights-based approach. Sovereignty entailed obligations owed by the State to its population, and non-intervention could not serve as a pretext for a State to deny its population access to international assistance when it was unwilling or unable to provide such assistance itself during a disaster.

13. The Commission should consider, in that perspective, whether existing general principles should be reviewed or amended, namely the principles that the State had a duty to protect persons in the event of a disaster and to request assistance, and that a requested entity had the discretion to offer or withhold such assistance. It should also consider whether the establishment of a right to humanitarian assistance, which would either complement or amend the principles in force, would solve existing problems, or whether there were other ways of achieving a solution. Would the right to assistance serve as the core principle for enhancing the existing prevention, response and assistance regime? Such questions did not need to be answered at this stage, but the issue of the right to assistance was directly related to the rights-based approach.

14. With regard to the classification of disasters, the distinction between natural and man-made disasters did not, as such, justify the exclusion of the latter from the scope of the study. The basic goal, namely strengthening protection and dealing with problems, was the same for the two categories of disaster that disrupted the functioning of societies. The rights of persons were jeopardized in both cases and the legal principles were generally applicable to the two categories of disaster. However, the content of the principle of prevention could entail more obligations in the case of man-made disasters. During an armed conflict, international humanitarian law was, as affirmed by the ICJ, a *lex specialis*, but that did not rule out the application of other laws to the extent that they were not incompatible with international humanitarian law. Nevertheless, armed conflict was a particular situation in which the State's ability to act differed from its ability to act in peacetime. States addressed questions of access, freedom of movement for relief workers and the privileges and immunities of such workers from the standpoint of military imperatives that did not exist in peacetime. War situations should therefore be excluded from the scope of the study.

15. It was also extremely important to define protection for the purposes of the topic, inasmuch as it determined the rights and obligations of the different beneficiaries and actors in a disaster situation. In the absence of a clear definition, such rights and obligations would not be properly implemented. In his preliminary report, the Special Rapporteur stated that the concept of protection embraced response, relief and assistance, adding that there was a general all-encompassing concept of protection which included protection in the strict sense, denoting a rights-based approach, and other concepts, in particular assistance. The Secretariat, on the other hand, considered in its memorandum that the concept of protection included humanitarian access to victims, the creation of safe zones, the provision of adequate and prompt relief, and ensuring respect for human rights. There was thus clearly a disparity that the Commission must address by defining the concept correctly. It could not draw an analogy from the definition in other fields of law such as international humanitarian law, international human rights law or international refugee law. Defining the concept of protection would also offer guidance regarding the content of the protection regime, including which rights of persons were to be protected. In any case, he did not think it would be wise to include environmental protection, since it would broaden the scope of the topic and was subject to other fields of law governing matters such as prevention, mitigation, containment and rehabilitation. Given the importance of swift action in situations where persons were most vulnerable, the Commission should concentrate on identifying rights and obligations that were particularly relevant in emergency situations. It should also avoid developing principles that might be deemed to contravene the rule of non-intervention in the internal affairs of a sovereign State. Recent situations had demonstrated that States remained unwilling to assert that they had a "right" to provide assistance to people in difficulty in a State in which a disaster occurred against the will of that State.

16. With regard to the *ratione personae* aspect, problems pertaining to the legal framework applicable to disasters clearly related not only to the rights of victims but also to the status, rights and obligations of providers of relief and assistance. They included other States, international organizations and NGOs. The problems related, *inter alia*, to access, movement, privileges and immunities, and protection of relief workers. It was essential to regulate, where necessary, the status and rights of all actors, including the State in which the disaster occurred, which also had legitimate rights and concerns. As there were already several legal instruments concerning the protection of United Nations and associated personnel, including NGO personnel, the Commission should concentrate on areas in which the existing regime was inadequate.

17. With regard to the *ratione temporis* aspect, he agreed in principle with the Special Rapporteur that the scope of the topic should include the pre-disaster, disaster and post-disaster phases. However, to avoid broadening the scope beyond reasonable limits, the Commission should identify areas of law that needed to be developed in order to create specific obligations incumbent on States. Disasters often arose from complex and unpredictable sources, including a combination of natural and man-made factors. It would be necessary to determine

what could legitimately be expected of the State in which the disaster occurred or of other States in terms of the duty of prevention. He did not share the Special Rapporteur's view that the Commission's work on the prevention of transboundary damage was relevant, since the content of that topic was different and entailed different rights and obligations. First, as it dealt with transboundary damage, it created rights that could be invoked by potentially affected States against the State in which the hazardous activity originated. Second, the latter State had knowledge of the activity in question and controlled to some extent the manner in which it was conducted. Hence, that State could legitimately be expected to prevent damage, coordinate with potentially affected States and manage the risk. The situation was different in the case of natural disasters, particularly so-called "complex disasters". It followed that the Commission should take up the question of prevention only when it could ascertain the circumstances in which it would be useful and appropriate to have a set of rules.

18. Lastly, as it was still necessary to identify the rules requiring codification and those requiring progressive development as well as the areas in which binding principles were necessary and those in which guidelines would suffice, he shared the Special Rapporteur's view that it was preferable to defer any decision on the final form of the draft articles until work on the topic was completed.

19. Mr. CAFLISCH thanked the Special Rapporteur for his clear and wide-ranging report, especially the background section, which had convinced him of the importance and usefulness of a study by the Commission. He proposed to follow the structure of the Special Rapporteur's preliminary report, dealing first with the question of sources and rules applicable to the protection of persons in the event of disasters (paras. 21-42 of the report). The first sources mentioned were international humanitarian law and international human rights law. With regard to the former, the Commission should resist the temptation to reproduce all rules flowing from international humanitarian law in a set of draft articles. As far as the individual right to protection was concerned, while the situation was certainly comparable to that of a person asserting a human right *vis-à-vis* the State, the question arose as to how enforcement could be ensured. Multilateral and bilateral treaty law was also an important source, although the relevant provisions were widely dispersed.

20. The role played by "other key instruments", analysed in paragraphs 37 to 40 of the report, showed that the Commission was confronted with a major task of systematization, involving *lex ferenda* rather than *lex lata*, progressive development rather than codification. That fact should be borne in mind, since the nature of the task entrusted to the Commission could—at least partially—determine the nature of the outcome. Of course, it was not only a matter of *lex ferenda*. As suggested by the Special Rapporteur in paragraph 42, relevant customary rules might also exist. Some had perhaps already been identified: the rules governing sovereignty and intervention. However, they were not positive rules but precepts limiting persons' rights in the event of disasters. Steps should therefore be taken to ensure that the limits applied were not unduly restrictive.

21. With regard to the delimitation of the topic, he noted that the Special Rapporteur, in paragraphs 44 to 49 of his

report, opted for a broad definition of the term “disaster”, which would include three separate phases, both natural and man-made disasters, and both sudden-onset and slow-onset or creeping disasters, but which would exclude armed conflicts as such. He supported that approach, at least in the early stages of the Commission’s work. It would probably prove easier to reduce the scope of the study, if necessary, than to broaden it. As far as armed conflicts were concerned, there was little to be gained from reviewing a topic that had been carefully studied and regulated in great detail.

22. With regard to the form of the final product, a question that was raised, *inter alia*, in paragraph 59 of the preliminary report, it would seem at first glance that the development of principles, guidelines or a code would be most appropriate, but it was probably still too early to decide, unless simply as a form of guidance.

23. In general, he supported the Special Rapporteur’s approach. The next steps should be, in his view, to compile a sort of inventory of points to be covered so as to have a clearer vision of where the work was heading.

24. Mr. DUGARD, congratulating the Special Rapporteur on his interesting report on a subject that would undoubtedly present the Commission with a great challenge, said that the Commission should determine the scope of the topic at the outset, as requested by the Special Rapporteur in paragraph 43 of his report. He also supported the idea of considering both natural and man-made disasters and the proposal to adopt a rights-based approach. In other words, the study should supplement international humanitarian law, international human rights law and environmental law, and it should undertake a close analysis of concepts such as humanitarian intervention.

25. Although the whole concept of an armed conflict was rapidly expanding, he also shared the Special Rapporteur’s view that situations of armed conflict should be excluded from the scope of the topic for the reasons set out in paragraph 24 of the report.

26. The Special Rapporteur had rightly noted that, unlike refugees, displaced persons did not enjoy adequate protection under international law, and that the Commission could make a useful contribution in that regard. He suggested broadening the concept of the duty to protect contained in the 2005 World Summit Outcome document adopted by the General Assembly in its resolution 60/1 of 16 September 2005 so that it was no longer confined to extreme circumstances. In general, the Commission’s study could supplement existing international law, especially where it failed to deal adequately with the obligation to protect in cases of natural or man-made disasters.

27. The Commission should address controversial issues such as situations in which a State not only failed to protect its own people but actually deprived it of assistance or distributed assistance selectively. They were controversial issues because such situations were considered by some to fall within domestic jurisdiction. For instance, the practice of the Security Council had recently shown that States defended the right of a State to oppress its own people and to deny them access to food and other resources.

28. While the Commission should delimit the scope of the topic, it would certainly need to consider not only the obligations of the State in which a disaster occurred but also the rights and obligations of the international community in such a situation. In that area, it could make an important contribution to the development of *erga omnes* obligations. As noted by the Special Rapporteur and as emphasized by Mr. Caflisch, the Commission’s work on the subject would tend to fall into the category of progressive development rather than codification, especially when it considered the rights and obligations of the international community, but that should not dissuade members from tackling the subject.

29. Mr. BROWNLIE drew the attention of Commission members to a question of methodology. While the compartmentalization of international law into international humanitarian law, international human rights law, international refugee law and other branches was useful for compiling a textbook, in practice it proved to be entirely artificial. Instead of basing itself on sources, which already involved creating separate “boxes”, it would be preferable for the Commission to base its approach on the problems that arose in practice. Quite a substantial corpus of law already existed, for example, on the situation of displaced persons, and there was little to be gained from simply adding more material.

30. To illustrate more clearly what he meant by a problem-based approach, he referred to the 2007 tsunami, which had originated off the coast of Sumatra. Among the many villages on the Indian coast located very close to the ocean, one had been spared solely because a diplomat based in Singapore who was a native of the village had sensed the danger and warned the inhabitants by telephone, urging them to take refuge in the surrounding hills. India actually had an early warning system for earthquakes, but only if they occurred in its territory. That was one instance of an enormous deficiency that the international system could easily remedy by developing standards of care and of risk assessment and management.

31. As a further illustration of the types of problems on which reasoning could be based, he drew attention to the need to develop standards to ensure that foreigners and minorities, among others, would receive the same treatment as the rest of the population in the event of a disaster. Another case was that of major rivers requiring international risk management. In the case of the Indus, for example, pressure from the Tarbela dam was such that the manner in which the Pakistani authorities maintained and monitored the site was crucial for the countries located downstream. Such situations again afforded material for developing international norms applicable to what were termed “preventable” disasters.

32. Lastly, he had proposed some time ago that food banks should be established in different regions. It was an idea that should be explored in greater depth, with a view to developing appropriate standards. For example, there had been serious famines in India in the 1940s and the then-administration had sought to tackle the problem. Unfortunately, the foodstuffs it had sent were inappropriate for the cultural and religious context in the affected areas. Although that was a purely practical matter, human rights, quality and religious standards should have been taken into account to ensure that the food banks were not

at odds with the local circumstances and could alleviate the disasters they were intended to mitigate.

33. Mr. AL-MARRI congratulated the Special Rapporteur on his report. He had adopted an appropriate approach by addressing the question of protection of persons in the event of disasters during the three phases of every disaster situation, namely pre-disaster, the disaster itself and post-disaster, by mentioning different types of accident or other circumstances likely to result in a disaster, and by considering the protection of property and the environment in addition to the protection of persons. The Special Rapporteur had also mentioned, as a further dimension of the topic, the various domestic or transboundary circumstances that disrupted the functioning of society, exceeding a State's ability to deal with a disaster or threatening human life and health or the environment. Given the nature of the Commission's work and the task assigned to it, he had focused on human rights (the rights to life, food and housing), taking into account the rights of children, women and persons with disabilities. He had also emphasized the need to explore the concepts of humanity, neutrality, sovereignty and non-intervention as well as other principles affirmed by the ICJ. He had not confined his remarks to individual needs but had also mentioned society's obligation to provide assistance, and the need to ensure that victims enjoyed a right to justice and were not mere beneficiaries of charity. Mr. Al-Marri said that it would be worth carrying out further studies to fully understand all these elements, especially the people and the time frames that must be taken into account. The starting point is the study of the limits and the importance of the principle of the responsibility to protect because these rights and obligations, in particular the rights and obligations of third parties, are complex and unclear, and sometimes contradictory, especially with regard to State responsibility and perhaps the obligation of protection. The importance of the international peacekeeping and security programme of the United Nations must be emphasized. The report also addresses the question of the role of state actors and, in particular, non-state actors, in all phases of disasters and the right of victims to assistance—no doubt it would also be worth carrying out additional studies to examine these aspects more closely.

34. Mr. DUGARD, referring to the problem-based approach mentioned by Mr. Brownlie, said that it would be helpful if the Special Rapporteur were to draw up a list of the topics that he wished to consider and those which, in his view, fell outside the scope of the study.

35. Mr. HMOUD said he agreed that the problem-based approach was a far more practical way of tackling the subject. He supported Mr. Dugard's suggestion that the Special Rapporteur identify relevant topics.

36. Mr. PETRIČ, concurring with Mr. Brownlie and Mr. Dugard, presented an example which showed why the Commission should adopt a problem-based approach. In 1974, he was living in Ethiopia when a major famine had claimed the lives of between 700,000 and 900,000 people. The situation was critical but, oddly enough, although everyone in Addis Ababa was talking about the famine that was raging, mostly in Tigre and Wollo, the Government remained oblivious, reacting only very cautiously when it could no longer ignore the displaced people, some of whom had

begun to seek refuge in churches. On recognizing the facts, the Government sought the assistance of the international community, which responded out of solidarity rather than on the basis of an obligation. The Government was reluctant to accept assistance from Western countries, since it was hoping for assistance from the East, which failed to materialize. Finally, after a considerable delay during which people were dying, the Government accepted aid from the United States, the European Community, NGOs and other sources. When the aid began to arrive, however, the Government proved unable to distribute it efficiently. The food, instead of reaching the needy, rotted in trains and boats. Moreover, the Government tried to confine aid to the regions under its control, withholding it from guerrilla-controlled areas, where the impact of the military conflict was compounded by that of the famine. Finally, the Eastern countries decided to send aid, which was channelled by Governments and was not based on solidarity. It arrived very late, when the famine was virtually over and rehabilitation had begun. The Government then decided to resettle displaced persons from the north to the western and southern regions of the country. As they were unaccustomed to the new climate, the displaced persons died in droves, so that the operation was an absolute disaster.

37. There could be no doubt that States had a responsibility to act, but the question was which criteria the Commission should take into account and how far it should go. Two points should be borne in mind: first, the fact that needy persons should receive aid was the basic principle and *lex maxima*; and second, State sovereignty was a major problem that could not be ignored. Failure to address the issue of State sovereignty might well prove counter-productive, impeding rather than facilitating the delivery of aid.

38. Ms. ESCARAMEIA cautioned against implying that there was any conflict between the problem-based approach and the rights-based approach. That had certainly not been the intention of the Special Rapporteur. On the contrary, the Special Rapporteur had been referring in all likelihood to the problem-based approach when setting out a general approach with a breakdown into categories, within which he had listed existing problems. The rights-based approach was, however, of fundamental importance because the study could not be confined to purely operational problems such as how to speed up the delivery of visas or the acceptance of credentials. The focus should remain on the rights of victims of tragic situations. Thus, the Commission could discuss the extent to which the rights of persons prevailed and the question of State sovereignty, but it should be aware that they were complementary and not conflicting issues, so that a problem-based approach could be adopted while focusing on human rights.

39. Ms. JACOBSSON concurred with Ms. Escarameia. She did not fully understand what was meant by a problem-based approach and she would be very reluctant to adopt it if the Commission decided to depart from a rights-based approach. However, that was perhaps not what Mr. Brownlie had intended, since he had stated very strongly that international law was not a collection of different legal components such as humanitarian law, refugee law or the law of the sea. Even if a problem-based approach was adopted, it was essential to have an overview of the proposed general structure of the topic and to establish, as noted by Mr. Dugard, how that approach

related to the concept of *erga omnes* obligations, to States' responsibility to protect their own people and to questions such as non-intervention and sovereignty. The question of the protection of persons could not be dealt with on a case-by-case basis without contemplating how the Commission's work fit into the system of international law.

40. M. HMOUD said that the alleged conflict between the rights-based approach and the problem-based approach stemmed from a misunderstanding. He had raised the point in order to state his view that, when a problem arose, the first step was to identify the applicable rules and to codify them. There was no conflict with the rights-based approach because one was clearly referring to rights. A conflict might arise between, for example, the duties of States and the rights of individuals, but not between the two approaches, which were complementary. The Commission must, however, identify the problems facing the existing regime of disaster relief and prevention and try to assist in solving them. It must therefore review existing rights (individual rights, right of access, etc.) and consider what kind of responsibility flowed from denial of such rights.

41. Mr. PETRIČ agreed that there had been a misunderstanding. He supported the approach based on victims' rights, as presented by the Special Rapporteur. However, he shared Mr. Brownlie's view that the Commission, while adopting as its guiding principle the well-being of persons exposed to grave danger, should bear in mind the real problems that must be addressed. It all depended on the structure and scope of the topic: the scope clearly included natural disasters but the question of armed conflicts, such as that in Darfur, also arose. The first step was to determine what kind of disaster should be dealt with.

42. Mr. VALENCIA-OSPINA (Special Rapporteur) thanked Mr. Brownlie for having raised the question of what he had characterized as the "problem-based approach", the purpose of which was to set standards for concrete cases of natural disasters or, to use the terminology of international disaster relief law, for the operational part of the problem. There was no contradiction, in his view, between the rights-based approach and the problem-based approach, but it was precisely because one or the other was emphasized depending on the perspective adopted that a false impression of such a distinction was given. He had referred in his report to the initial study carried out by the Secretariat,<sup>196</sup> which might be considered to have adopted a problem-based approach, although its scope had subsequently been broadened to include the protection of persons, which corresponded to a rights-based approach. The members had received two sets of guidelines produced by institutions that dealt with real problems: the guidelines used by the IFRC,<sup>197</sup> which adopted an operational or problem-based approach, and the Operational Guidelines on Human Rights and Natural Disasters adopted in 2006 by the Inter-Agency Standing Committee on Post-War and Disaster Reconstruction and Rehabilitation,<sup>198</sup> which took a rights-based or, more precisely, a human-rights-based approach. The two sets were not irreconcilable and, to make it clear that he was fully

aware of the two approaches, he had stated in paragraph 62 of his report that "[w]ork on the topic [could] be undertaken with a rights-based approach that [would] inform the operational mechanisms of protection". He had sought to encapsulate in that sentence, which was perhaps too lapidary, the problems that had been raised in the mini-debate.

### Organization of the work of the session (*continued*)<sup>\*</sup>

[Agenda item 1]

43. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that it had been agreed, following consultations, that the Working Group on expulsion of aliens should be composed of the following members: Mr. Brownlie, Mr. Caffisch, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Mr. McRae, Mr. Niehaus, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue and Mr. Yamada. Ms. Escarameia, Mr. Kamto, Special Rapporteur, and he himself as Chairperson of the Drafting Committee were *ex officio* members.

*The meeting rose at 11.30 a.m.*

## 2980th MEETING

*Thursday, 17 July 2008, at 10.05 a.m.*

*Chairperson:* Mr. Edmundo VARGAS CARREÑO

*Present:* Mr. Al-Marri, Mr. Brownlie, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

### Protection of persons in the event of disasters (*continued*) (A/CN.4/590 and Add.1–3, A/CN.4/598)

[Agenda item 8]

PRELIMINARY REPORT OF THE SPECIAL  
RAPporteur (*continued*)

1. The CHAIRPERSON invited the Commission to continue its debate on the preliminary report of the Special Rapporteur (A/CN.4/598).

2. Mr. NIEHAUS said he wished to thank the Special Rapporteur for a very lucid and inspiring preliminary report, and also the Secretariat for its outstanding memorandum on the topic, which represented an entirely new area of study for the Commission. As the Special

<sup>196</sup> See *Yearbook ... 2006*, vol.II (Part Two), p. 206, annex III.

<sup>197</sup> See footnote 183 above.

<sup>198</sup> Reproduced in the addendum to the Report of the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin (A/HRC/4/38/Add.1).

<sup>\*</sup> Resumed from the 2971st meeting.