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Summary record of the 2980th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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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,¹⁹⁶ 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,¹⁹⁷ 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,¹⁹⁸ 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*)^{*}

[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

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

¹⁹⁷ See footnote 183 above.

¹⁹⁸ 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).

^{*} Resumed from the 2971st meeting.

Rapporteur rightly noted, the topic constituted a major challenge and marked the beginning of a new era in which action at the international level would empower individuals to request and receive assistance as a right, not as a form of charity. The report was necessarily preliminary in character and was mainly intended to stimulate a general debate on the topic with a view to delimiting its scope. The topic was complex and fraught with problems, and the Special Rapporteur had already succeeded in awakening a high level of interest—indeed, in his own case, enthusiasm—in that novel undertaking.

3. With regard to the need clearly to define the topic and elucidate its core principles and concepts, he agreed with the Special Rapporteur that an initial step must be to determine the scope not only *ratione materiae*, but also *ratione personae* and *ratione temporis*. The Special Rapporteur was right to infer from the topic's title that the work to be undertaken should focus on the consequences of disasters from the standpoint of the protection of persons and should consider those persons as victims demanding a response to their legitimate rights. The fairly short section of the report dealing with the evolution of the protection of persons in the event of disasters should be read as evidence of the scant attention paid to the question until the beginning of the twentieth century.

4. As was pointed out in paragraph 20 of the report, international disaster response laws had a great deal in common with international humanitarian law, international human rights law and international law on refugees and internally displaced persons, and the Special Rapporteur rightly viewed those areas as sources of relevance to the Commission's own topic. To those sources must be added multilateral and bilateral treaties, domestic legislation and various non-binding instruments concerning disaster relief.

5. With regard to the concept and classification of disasters, referred to in paragraphs 44 to 49 of the report, he agreed with the Special Rapporteur on the need for a broad definition of disasters in order to achieve the underlying objective of progressive development of the topic and its codification. There was no doubt that the need for protection was equally strong in all disaster situations, the categorization of such situations was a complex matter, the categories might overlap and it was sometimes difficult to maintain a clear delineation between the causes of disasters. Armed conflict *per se* would obviously be excluded as it was already covered by international humanitarian law.

6. As for the concept of protection of persons, referred to in paragraphs 50 to 55 of the report, emphasis should be placed on the basic principle that informed not only international humanitarian law but also international human rights law and international law relating to refugees and internally displaced persons, namely protection, *stricto sensu*, of the human person in all circumstances.

7. Protection entailed respect for fundamental rights, and, first and foremost, for the fundamental right to life. Accordingly, respect for the other principles relating to the protection of persons in the event of disasters, such as humanity, impartiality, neutrality and non-discrimination,

and beyond that, sovereignty and non-intervention, must be subjected to some order of priority. While it would certainly be desirable to uphold all those principles, he wondered whether, realistically, that would always be possible. With specific reference to paragraph 53 of the report, in which the Special Rapporteur requested guidance as to whether protection of property and the environment should also be treated, he would be inclined to reply in the negative. To include those aspects of protection of persons within the scope of the topic would be both unrealistic and overambitious.

8. As to the scope of the topic *ratione personae*, he agreed with the Special Rapporteur's conclusion that the Commission's work would clearly need to take proper account of the multiplicity of actors involved in disaster situations.

9. He had a number of doubts concerning the scope of the topic *ratione temporis*, addressed in paragraphs 57 and 58 of the report. In principle, he endorsed the suggestion that a broad approach should be adopted with regard to the phases to be included in the definition so as to ensure complete coverage from the legal standpoint. In practice, however, it was hard to understand how assistance was to be provided in all phases of disasters—not only in the response phase, but also in the pre- and post-disaster phases, involving prevention, mitigation and rehabilitation. Were prevention and mitigation applicable in all disasters, and was rehabilitation feasible in every case? Those questions would no doubt be clarified in the course of the Commission's discussion.

10. As to the form that the final product should take, he was of the view that the Commission's drafts constituted both codification and progressive development of international law. Irrespective of the fact that the Commission might wish to complete its work on the topic before deciding on the form to be recommended to the General Assembly for its final draft, he endorsed the Special Rapporteur's suggestion that the Commission might wish to arrive at an early understanding of what the final form should be. In that case, it might be more realistic to suppose that States would find the final draft more acceptable if it took the form of guidelines, rather than a convention.

11. Mr. NOLTE said that the Special Rapporteur's thoroughly researched and thought-provoking report provided an excellent introduction to the subject. The discussion held at the previous meeting on whether to adopt a rights-based or a problem-based approach to the subject had been very valuable and should be continued. He concurred with the Special Rapporteur's view that the two approaches were not contradictory but instead complemented each other, and that it was essentially a matter of emphasis. The question of emphasis therefore merited further and ongoing discussion.

12. In accordance with its mandate, the International Law Commission should, in principle, adopt a law-based approach. Its members were not well-versed in the operational aspects of disaster relief and had to rely on consultations with experts, as they had done in the work on shared groundwaters. Although disaster relief was perhaps not as far removed from its area of expertise as was

hydrology, the Commission should nevertheless be mindful of its limitations. That did not mean that he disagreed with Mr. Brownlie; on the contrary, if the Commission's work was to be useful to those in urgent need of protection, it must be aware of realities on the ground and capable of ascertaining where the problems lay in practice.

13. A law-based approach was not necessarily a human rights-based approach. Although human rights should play an important part in the current exercise, it would not be advisable to make them the sole basis for the Commission's work, as many other legal and non-legal principles also came into play. For example, a large proportion of disaster relief resources was provided out of a sense of solidarity and of moral rather than legal obligation. Although, taking a rights-based approach, one might say that victims were entitled to disaster relief, any attempt to place the international solidarity on which many disaster relief efforts relied on a purely legal basis might run the risk of cutting off a most valuable source of such relief. He was not advocating a charity-based approach, but simply saying that human rights should be only one component of an overall law-based approach to the issue. If, for the purposes of the current exercise, the Commission nevertheless wished to emphasize the role of human rights, it might wish to consider using the concept of a "human rights-oriented approach", which left more room for other important legal principles and for focusing on specific problems on the ground.

14. With regard to the scope of the topic *ratione materiae*, he was not in favour of using the definition of the term "hazard" found in the Hyogo Framework for Action 2005–2015,¹⁹⁹ which was much too broad. He preferred the one found in the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, which more clearly highlighted the emergency nature of the issues being addressed by the Commission.

15. In paragraph 47 of the report, assisting actors were referred to as "agents of humanity". While that might be the way those actors saw themselves, it was perhaps too presumptuous a designation; "agents *for* humanity" might be a better rendering, in that it underscored that their perception of their role must always be measured against their success in accomplishing it.

16. On the question whether the topic should be limited to natural disasters or should cover all disaster situations, including man-made disasters, he agreed that there was a considerable overlap between natural and man-made disasters (of which the situation in Darfur provided a good example); nevertheless, he was not convinced that this justified adopting a holistic approach. Even when natural disasters resulted from human activity, they clearly had a non-political dimension that made it easier for States to accept special assistance. He would therefore tend to place the emphasis on natural disasters, and include only those man-made disasters that had acquired the characteristics of natural disasters.

17. A similar approach could be taken with regard to the question of whether the protection of property and the environment should be included in the scope of the topic. His suggestion would be that if the disaster affected or threatened persons' lives, bodily integrity or basic needs, then the concept of disaster relief should be extended to include those related issues. If, on the other hand, only their degree of affluence, or the environment in general, was affected, such protection should not fall within the scope of the study.

18. Paragraph 54 raised the question whether a right to humanitarian assistance should be recognized. While it was certainly too early to discuss the matter in detail, he had no problem, in principle, with regarding such a right as implicit in international human rights law, and his instinct would be to regard it as an individual right that was typically exercised collectively. At the same time, a right to humanitarian assistance must be enforceable in the same manner as other human rights; in particular, there was no right or obligation to enforce it through the unauthorized use of force. Thus conceived, such a right would not challenge the principles of sovereignty and non-intervention. The concept of the responsibility to protect should be understood in the light of that classical interpretation of the law; it remained primarily a political and moral concept that had not altered the law relating to the use of force. It would not be appropriate for the Commission to propose changes in that area.

19. As for the scope of the topic *ratione personae*, paragraph 56 of the report raised the question whether—and if so, how—the practice of non-State actors should be assessed and what weight should be accorded to it. That question came close to touching on the very nature of international law. While not wishing to deal with the matter at length, he would venture the opinion that although the practice of non-State actors might be relevant for the purposes of identifying best practices, it could not, as such, constitute practice relevant for the development of customary international law or the interpretation of treaty law. It was States, not non-State actors, that were competent to make and change the rules at the international level. Thus, while States might delegate or recognize the rule-making or practice of other actors (which they were doing increasingly often, perhaps particularly in the area of disaster relief), the fact remained that they themselves had the last word and the legal authority to recognize a certain practice by a non-State actor as legally relevant.

20. Clearly there were other dimensions to the legal status of non-State actors. A human rights-oriented approach raised the question of the obligations of non-State actors. In that connection, he could recommend Andrew Clapham's book entitled *Human Rights Obligations of Non-State Actors*.²⁰⁰ He cautioned against accord-ing quasi-official status to non-State actors: while they might have a so-called "right of initiative", why should that right not simply derive from the universal freedom of expression? Non-State actors might have an obligation to protect, but only on the basis of and within the limits of general human rights law, and certainly not in

¹⁹⁹ Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters (A/CONF.206/6, chap. I, resolution 2).

²⁰⁰ *Collected courses of the Academy of European Law*, vol. 15/1, Oxford University Press, 2006.

the same way as States had obligations to protect. To a certain extent, persons in need of protection had a right in relation to non-State actors, but account had to be taken of the fact that many disaster relief efforts were fuelled by a sense of solidarity and charity, not out of a sense of legal obligation. As far as commercial subcontractors were concerned, his initial instinct was that there should be no distinction in law, in principle, between commercial and non-commercial non-State actors, since good intentions alone did not justify privileges.

21. Lastly, on the question of what form the Commission's work on the topic should take, the answer depended on whether the emphasis was to be placed on codification and strictly operational pointers, or on progressive development. A convention would make sense only if those States that typically hesitated to allow a free flow of disaster relief would be likely to ratify it. Such States would ratify a convention only if it was a credible effort to codify existing law and ensure good practice. If, on the other hand, the emphasis was placed on progressive development, the approach that the Special Rapporteur seemed to favour, then guidelines would be more appropriate. Personally, he would be inclined towards a more cautious approach, in the interest of providing effective relief to disaster-stricken persons, and he would therefore be open to a framework convention.

22. Mr. VASCIANNIE said that the Special Rapporteur's preliminary report had got the project off to an excellent start, not only by carefully identifying the main issues to be considered, but also by pulling together different strands of practice and posing specific questions concerning the way forward. He wished to thank the Secretariat for its comprehensive review of the topic, and in particular for its memorandum of 11 December 2007 and the addenda thereto (A/CN.4/590 and Add.1-3).

23. The topic prompted a number of legal and organizational questions. With regard to the legal questions, the Special Rapporteur had suggested in paragraph 12 of his report that the title suggested "a definite rights-based approach". The essence of such an approach was the identification of a specific standard of treatment to which the victim of a disaster was entitled. That was an important starting point, given that the individual should be at the centre of the Special Rapporteur's work. As the project went forward, however, the Special Rapporteur might wish to give greater precision to the concept of rights in the context of the current topic. In a disaster, an individual might have both legal and moral rights. In respect of the former, some State or entity would have duties arising from existing regimes. Thus, for example, some rights might arise from the principles of humanity, neutrality and impartiality applicable in disaster situations, and a State providing assistance to a disaster-stricken country should respect those principles. Likewise, individual victims in a disaster would retain their enforceable legal rights as set out in applicable conventions, such as the International Covenant on Civil and Political Rights, and under customary law.

24. It was important, however, to distinguish those binding legal rights from moral rights or morally desirable results. As an illustration of that distinction, in the event of a disaster, the State in which it occurred would remain

obliged as a matter of existing law to respect the right to life. On the other hand, the question arose whether the State would also have a duty to satisfy, for example, some of the programmatic rights enumerated in the International Covenant on Economic, Social and Cultural Rights. While moral rights were of critical importance, it was not clear that they existed on the legal plane. Because they were unquestionably important, there would be a strong inclination, even a temptation, to say that they should be given the status of legally enforceable rights held by individuals and immediately available. However, if one said that an individual in a disaster area had certain legal rights, it was also necessary to identify the State whose duty it was to satisfy those rights. Assigning that duty to the victim State was perhaps counterproductive, in that it imposed an additional legal duty on it at its time of greatest need. Alternatively, if the Commission were to assign that duty to non-victim States, it would have to confront the fact that neither State practice nor *opinio juris* supported that perspective. For the time being, the point was that there were some legal rights and duties that might be readily accepted as such in the instrument that emerged from the Commission, while there were others—such as moral rights and duties—that would need to be recommended *de lege ferenda*.

25. If the Commission decided to take a rights-based approach to the topic, he hoped that it would avoid the temptation to describe every result that might be desirable as a human right. With reference to the debate prompted by Mr. Brownlie at the previous meeting, he assumed that a rights-based approach did not alter the fact that the instrument resulting from the current project would need to incorporate standards that promoted solutions to specific real-world issues pertaining to disasters.

26. Another question of general significance raised by the report was whether there existed a right to humanitarian assistance, which, in that context, referred to the right to impose assistance on a State that did not want it. The Special Rapporteur had adopted a balanced position, concluding in paragraph 54 that "[t]ension is created between, on the one hand, the principles of the sovereignty of States and of non-intervention and, on the other, international human rights law". While the Special Rapporteur might have good reasons for finding the question of the existence of the right to humanitarian assistance in the law to be an area of uncertainty, in his personal view, the weight of the argument was heavily against the existence of the right to impose such assistance.

27. In the first place, as the Special Rapporteur had noted, such a right would directly conflict with the principles of sovereignty and non-intervention—no strangers among the core principles of the international system. Secondly, States themselves had expressly adopted the view, affirmed in General Assembly resolution 46/182 of 19 December 1991, that humanitarian assistance was to be provided "with the consent of the affected country and in principle on the basis of an appeal by the affected country".²⁰¹ As a matter of *opinio juris*, therefore, the principle of sovereignty gave the victim State the right to decide whether to accept

²⁰¹ General Assembly resolution 46/182 on the strengthening of the coordination of humanitarian emergency assistance of the United Nations, annex, para. 3.

humanitarian assistance, and the principle of non-intervention prevented third States from imposing the compulsory acceptance of assistance on the victim State.

28. States' views on that matter seemed unequivocal. Footnote 75 to paragraph 22 of the Secretariat memorandum (A/CN.4/590) was instructive. At least 18 countries, developed and developing, weak and strong, large and small, some more prone to natural disasters than others and from different geographical regions, had been quoted in that footnote as attaching central importance to State sovereignty and non-intervention in the context of humanitarian assistance. That exemplified a general attitude. To suggest, therefore, that the right to humanitarian assistance in times of disaster could trump the principles of sovereignty and non-intervention would conflict, at the very least, with the views of a majority of States.

29. Admittedly, that conclusion on the positive law could sometimes be harsh, particularly in the midst of humanitarian crises that would shock the conscience of mankind if they were brought about by human action. Furthermore, with regard to the emerging concept of the responsibility to protect, and State pronouncements in favour of that concept, it might be possible to suggest that certain policy arguments in favour of intervention in some circumstances had gained ground in the international system. Yet, even if that premise was accepted, the right to humanitarian assistance, which would allow forcible intervention in cases of disaster, was still untenable. The notion of the responsibility to protect had developed outside the context of disaster relief to address a particular, well-known dilemma, namely, gross human rights abuses. Hence, even if it was now part of the law, it would not be readily transferable to the realm of disaster relief without clear State support.

30. Moreover, there were good policy reasons to resist establishing the right to provide humanitarian assistance against the will of the receiving State. Those included, first, the fact that the right could easily be abused to undermine or overthrow a Government, whether or not democratically elected; second, the fact that it could easily be abused to force Governments to adopt foreign policy and other positions that were contrary to the State's will—a point of special importance for small and weak countries; third, the fact that such a right would entrench an undesirable double standard, for it would hardly be enforceable in practice with respect to rich countries; and, fourth, that the threshold point for intervention would be arbitrary.

31. The fact that such policy problems could result from the right to humanitarian assistance at the very time the victim State's attention should be directed towards the disaster counselled against acceptance of that right. Yet people might be dying at the hands of a recalcitrant or incompetent Government, and the need to respect the most basic human rights might plead urgently in favour of a relief effort. The answer to that dilemma was not to allow intervention, but to encourage diplomatic action through the United Nations and by other peaceful means. In the case of disaster relief, the virtuous end of saving lives did not justify means that involved taking lives. He therefore suggested that the Special Rapporteur should proceed on the express assumption that there was no right to impose humanitarian assistance in international law.

32. Turning to some specific questions raised in the preliminary report, he fully endorsed the Special Rapporteur's suggestion that the topic should cover disasters irrespective of whether they occurred in one or in several States. He also supported the idea of including both man-made and natural disasters, both of which caused human suffering, but of excluding armed conflicts.

33. As suggested in paragraph 57 of the report, all stages of a disaster should be covered, although, as Mr. Brownlie and Mr. Hmoud had implied, the standards applicable in the different stages might vary.

34. The proposed rules for the protection of persons could cover matters pertaining to loss of property and environmental issues, but such matters need not be explored in detail. The rules should be broad in scope, taking into account actors such as States, international organizations, NGOs and commercial entities. However, while those entities might take the initiative, to refer to a right of initiative in all cases might imply that the victim State had a duty in law to respond to every commercial entity that offered assistance, which was not the case.

35. As to the form of the final product, it was too early to tell. The Special Rapporteur should commence with the treaty form and, at a later date, the Commission and the Special Rapporteur could consider whether that was the appropriate legal vehicle for the rules proposed.

36. Mr. DUGARD expressed concern that Mr. Vascianie appeared to be recommending that the Special Rapporteur should proceed on the express assumption that there was no right in humanitarian law with respect to the provision of humanitarian relief. That was not a principle that should be assumed by the Special Rapporteur, but one that should be considered by the Commission. There were rules relating to humanitarian intervention and the duty to afford protection that might provide a basis for such a right. He would therefore advise the Special Rapporteur and the Commission to leave the issue open for the time being.

37. He sought clarification regarding the intent of Mr. Nolte's statement to the effect that the Commission should consider man-made disasters only if they had acquired the characteristics of natural disasters. He wondered whether that would include the withholding of food aid, essential utilities and relief to communities in times of crisis for political purposes. It seemed to him that the result would be the same as in both cases. The statement could be construed as a useful formulation to avoid politicization of the topic; and if that were its intent, he would raise no objection.

38. Mr. NOLTE confirmed that this had indeed been his intent. The justification for disaster relief and the principles on which it rested presupposed that the situation was considered as having moved out of the realm of political conflict. He was in favour of a broad interpretation of natural disasters, and cautioned against attempts to apply neutral principles to conflicts that were subsequently defined as disasters, and against the politicization of disaster relief.

39. Mr. HMOUD said that the right of States to provide humanitarian relief was a very contentious issue and should be considered only after the Commission had decided on the scope of the topic; he hoped that it would not hinder the Commission in its work. Nonetheless, he supported Mr. Vasciannie's view that it was not a right under international law. Even those States that were the most fervent advocates of the responsibility to protect did not claim that the right of States to provide humanitarian relief existed under international law, but viewed it as an emerging right. Recent events showed that there was no *opinio juris* among States that there was a right of intervention in the event of a natural disaster.

40. Mr. BROWNLIE said he wished to comment on the concept of humanitarian intervention, not in terms of its legality, but on the assumption it was a concept which could be approached on a factual and policy basis. One aspect of the NATO intervention in relation to Kosovo that had never been discussed was whether the modalities of the force used had been in conformity with the concept of humanitarian intervention. Aside from the loss of life, much of the infrastructure of the Federal Republic of Yugoslavia had been destroyed. There had seemingly been no correlation between the choice of targets and the allegedly "humanitarian" purpose of the intervention. Thus, when the Commission embarked on a discussion of intervention, as it was entitled to do by way of the progressive development of the law, it needed to reflect carefully on what exactly was meant by the term "intervention". For instance, the treaty-based right of intervention exercised by Turkey in 1974 had involved a full-scale assault on a populated island by NATO-level armed forces and the bombing of forest areas with napalm. In other contexts, however, "intervention" might be construed as something narrow, instrumental and relatively harmless.

41. Mr. PETRIČ expressed support for Mr. Dugard's views. On the assumption that the Commission was working within the framework of *lex ferenda*, he would be reluctant to say at the outset that something was or was not a right. Instead, the Commission should rely on the Special Rapporteur's guidance and the outcome of its own debate. If, however, it decided to work within the more restrictive framework of *lex lata*, then he would be more inclined to agree with Mr. Vasciannie's point of view.

42. Mr. VASCIANNIE said his basic position was that States did not have the right to impose assistance on other States. It was for the State in need of assistance to determine whether it wished to request it, and to consent thereto. That was a statement of the current law, but it should also be a statement of *lex ferenda*, because there were serious policy consequences. If the Commission were to accept that humanitarian assistance could be imposed on another State, that right could be exercised by major Powers over smaller States, citing pretexts that might be less humanitarian than political.

43. However, there were other considerations. It was increasingly claimed that humanitarian intervention was permissible in the context of the responsibility to protect. Even if that controversial idea was accepted as part of the law, that did not necessarily mean that the right to intervene to provide relief had also to be accepted. The context

for humanitarian intervention, namely, gross human rights violations, was well established. Humanitarian intervention should be distinguished from disaster relief, particularly in the event of natural disasters, where the Government of the victim State had to deal with the crisis and at the same time was at the mercy of larger States. Intervention for disaster relief purposes was neither part of *lex lata* nor justifiable *de lege ferenda*.

44. Ms. JACOBSSON said that the current debate showed the need for a more structured and organized approach to the issue; she shared Mr. Dugard's view that the Commission should make no assumptions regarding the existence or otherwise of a right to provide humanitarian assistance. The question of its legal implications also needed to be discussed.

45. She welcomed the fact that Mr. Brownlie had raised the issue of the concept of intervention *per se*, rightly observing that the intervention in relation to Kosovo had been far from humanitarian. It was important clearly to define the concept of intervention and to determine how it differed from, for instance, interference in the internal affairs of a State. She hoped that the Special Rapporteur would address those issues and allow the Commission an opportunity to return to them at a later date.

46. Mr. CANDIOTI said he fully shared Mr. Vasciannie's view that there was a very considerable difference between the right to impose humanitarian assistance and the right to provide it.

47. Mr. DUGARD endorsed Ms. Jacobsson's remarks. Several aspects of the issue required further consideration. The sort of "humanitarian" intervention involving the use of force referred to by Mr. Brownlie was clearly unacceptable. There was also a distinction to be made between imposing and providing assistance. Another matter that troubled him was whether food aid dropped by aircraft by one State into another State, thereby invading its territorial airspace, was a permissible form of humanitarian intervention. Since ultimately the topic involved both codification and progressive development, the Commission should not attempt to limit the scope of the debate at such an early stage, but should instead allow for its further development.

Shared natural resources (concluded)* (A/CN.4/588, sect. B, A/CN.4/591, A/CN.4/595 and Add.1, A/CN.4/L.722, A/CN.4/L.724)

[Agenda item 4]

CONFERRAL OF A SPECIAL AWARD ON MR. CHUSEI YAMADA
BY THE INTERNATIONAL ASSOCIATION OF HYDROGEOLOGISTS

48. The CHAIRPERSON welcomed Mr. Wilhelm Struckmeier, Secretary General of the International Association of Hydrogeologists, and Mr. Shaminder Puri, member of that Association, to the Commission. The morning was a special one for the Commission, as one of its members, Mr. Yamada, was to receive a well-deserved award from the International Association of Hydrogeologists for his work

* Resumed from the 2971st meeting.

as Special Rapporteur on the law of transboundary aquifers, which would shortly conclude with the adoption of draft articles. Through its work on the topic, the Commission had demonstrated its ability to adapt its working methods by taking a collaborative, multidisciplinary approach to difficult technical questions so as to produce texts that were “user-friendly” for practitioners. In order to ensure that members had a better understanding of those technical and scientific issues, Mr. Yamada worked tirelessly to organize exchanges with relevant experts in groundwater resources. UNESCO and the International Association of Hydrogeologists had played a critical role in facilitating that dialogue. Mr. Yamada was to be congratulated on his outstanding achievement. His efforts would serve as an example to the Commission when it came time to take up other complex multidisciplinary topics in the future.

The meeting was suspended at 11.10 a.m. to enable the award ceremony to take place and resumed at 11.55 a.m.

Effects of armed conflicts on treaties (concluded)**
(A/CN.4/588, sect. D, A/CN.4/589, A/CN.4/592 and Add.1, A/CN.4/L.721, A/CN.4/L.726, A/CN.4/L.727/Rev.1 and Add.1)

[Agenda item 5]

REPORT OF THE DRAFTING COMMITTEE (*concluded*)

49. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) introduced the revised texts of draft articles 5 and 13 [10] and the annex (reproduced in document A/CN.4/L.727/Rev.1/Add.1) adopted by the Drafting Committee on first reading on 9 and 10 July 2008, which read:

Article 5. Operation of treaties on the basis of implication from their subject matter

In the case of treaties the subject matter of which involves the implication that they continue in operation, in whole or in part, during armed conflict, the incidence of an armed conflict will not as such affect their operation.²⁰²

Article 13 [10]. Effect of the exercise of the right to individual or collective self-defence on a treaty

A State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right.

Annex. Indicative list of categories of treaties referred to in draft article 5

- (a) Treaties relating to the law of armed conflict, including treaties relating to international humanitarian law;
- (b) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;

- (c) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;
- (d) Treaties for the protection of human rights;
- (e) Treaties relating to the protection of the environment;
- (f) Treaties relating to international watercourses and related installations and facilities;
- (g) Treaties relating to aquifers and related installations and facilities;
- (h) Multilateral law-making treaties;
- (i) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;
- (j) Treaties relating to commercial arbitration;
- (k) Treaties relating to diplomatic relations;
- (l) Treaties relating to consular relations.

50. In introducing the Drafting Committee’s second report on the effects of armed conflicts on treaties, he recalled that the Commission had considered the Committee’s first report on the topic (A/CN.4/L.727/Rev.1) at its 2973rd meeting on 6 June 2008, when it had adopted 17 draft articles on first reading and had referred draft article 13 back to the Drafting Committee. With respect to draft article 5, the Special Rapporteur had undertaken, during the period between the two parts of the session, to prepare an annex to the draft articles, which would enumerate several categories of treaties the subject matter of which involved the implication that they continued in operation during armed conflict. The Drafting Committee had completed the work with which it had been seized at two meetings on 9 and 10 July 2008.

51. He wished to pay tribute to the Special Rapporteur, Mr. Ian Brownlie, whose mastery of the subject, perseverance, openness and positive spirit of cooperation had greatly facilitated the Drafting Committee’s task. He likewise acknowledged with gratitude the important role played by Mr. Cafilisch, who had chaired the Working Group on the topic, in helping the Drafting Committee to find balanced solutions to the difficult legal and policy problems confronting it.

52. On draft article 5, it would be recalled that, at its 2973rd meeting, the Commission had adopted draft article 5 as amended by the insertion of the phrase “in whole or in part” at the end of the sentence. The footnote to that draft article contained a cross reference to the annex which the Drafting Committee was to consider. In its review of the annex containing an indicative list of the categories of treaties referred to in draft article 5, the Drafting Committee, among other things, considered the implication of the phrase “in whole or in part” in relation to the whole scheme under the draft articles. It had been the Drafting Committee’s understanding that it was not always the case that the operation of the entire treaty would be affected; in some instances, only certain provisions would be affected. That understanding was relevant to the indicative list of categories of treaties referred to in article 5. There had thus been a general impression that, as a matter of drafting, it would be appropriate to insert the phrase “in whole or in part” in the text between the first occurrence of the word “operation”

** Resumed from the 2973rd meeting.

²⁰² At its 2973rd meeting, on 6 June 2008, the Commission amended and adopted draft article 5 by adding the phrase “in whole or in part” at the end of the sentence. In its review of the annex containing an indicative list of categories of treaties referred to in article 5, the Drafting Committee considered it appropriate as a matter of drafting to have the phrase inserted within the text between “operation” and “during armed conflict”. Draft article 5 was revised accordingly.

and the words “during armed conflict”, rather than at the end of the sentence. Furthermore, the Drafting Committee, having adopted an annex containing an appropriate reference to draft article 5, had decided to delete footnote 2 linking the draft article to the annex. The title of the draft article remained unchanged.

53. It was his hope that the Commission would deem it appropriate to reconsider draft article 5 as amended in the light of circumstances.

54. As for draft article 13, the debate in plenary had revolved around the question whether the phrase in the latter part of the draft article, “subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor”, contradicted the opening phrase of the draft article, which spoke of self-defence “in accordance with the Charter of the United Nations”. That wording had also given some members the impression that it enshrined a right of pre-emptive self-defence. It had further been held that there was an overlap between that draft article and draft article 14. At the time it had been decided to refer the draft article back to the Drafting Committee, some ideas had been put forward on how to address the problem. For example, it had been suggested that the draft article could begin with the phrase “A State purporting to exercise its right of individual or collective self-defence”. Although that proposal had met the concerns of some members, it had failed to satisfy others, who did not see how an inherent right of self-defence could be purportedly exercised. It had also been suggested that the latter part of the draft article should be deleted, since it contradicted the first part and the situation foreseen in the last part of draft article 13 was in any case addressed in draft article 14.

55. After considering draft article 13, the Drafting Committee had decided to delete the phrase “subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor”, on the understanding that the application of draft article 13 would be subject to any consequences that might ensue, given the “without prejudice” provisions of draft article 14.

56. The annex contained a list of categories of treaties to which reference was made in draft article 5, namely categories of treaties the subject matter of which involved the implication that they continued in operation, in whole or in part, during armed conflict. That list was only indicative. Although the selection of categories was based largely on doctrine and available State practice (because admittedly there was more State practice in some categories than in others), it was recognized that the categories were not rigid and that there might be some overlaps. The Drafting Committee’s work had been based on a proposal submitted by the Special Rapporteur.

57. In considering the various categories of treaties concerned, the Drafting Committee had discussed whether treaties embodying *jus cogens* norms should be included in the list. The preponderant view had been that such a category would not be qualitatively similar to the other categories listed in the annex. The effect of *jus cogens* principles and rules was not prejudiced by the provisions of draft article 5. Moreover, inasmuch as such norms were ubiquitous, they would cut across the various categories

of treaties already identified. Some members had nevertheless felt that it would have been appropriate to include such a category. The consensus finally reached had been that treaties containing *jus cogens* provisions should be left out of the list of the categories under consideration, since those categories were based on a classification by subject matter, while *jus cogens* was a cross-cutting notion of fundamental importance to the law of treaties as a whole. It had further been agreed that the Special Rapporteur would clarify that issue in the commentary.

58. The adoption of the second report by the Drafting Committee meant that the current stage of work on the topic had been completed, and the Drafting Committee was pleased with this achievement. The Chairperson wished to congratulate and pay a special tribute to the Special Rapporteur for the conclusion of the work on that important topic, which was a remarkable accomplishment. A sensitive and complex matter had been dealt with in just four years of intense discussions and profound reflection on legal and policy issues. In the process, significant conclusions had been drawn which had resulted in the product now before the Commission. While that success was certainly a result of the Commission’s collective labours, it was largely attributable to the Special Rapporteur’s personal dedication and commitment. He had worked hard on the topic and had frequently advised members on the best path to pursue and the best approach to follow. His advice had always been based on sound doctrine and solid State practice. His hard work had been fully rewarded, for the draft articles on the effects of armed conflicts on treaties were an outstanding product. Accordingly, he invited the Commission to take action on the Drafting Committee’s second report, so as to complete its first reading of the draft articles.

59. The CHAIRPERSON endorsed the tribute paid to the Special Rapporteur and invited the Commission to adopt the two draft articles 5 and 13 [10] and the annex contained in document A/CN.4/L.727/Rev.1/Add.1.

Draft article 5 and the footnote thereto

Draft article 5, including the footnote thereto, was adopted.

Draft article 13

Draft article 13 was adopted.

Annex

The annex was adopted.

The two draft articles 5 and 13 [10] and the annex contained in document A/CN.4/L.727/Rev.1/Add.1, as a whole, were adopted.

**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)

60. Mr. SABOIA commended the Special Rapporteur’s well-prepared preliminary report on the protection of persons in the event of disasters and his lucid presentation of

the report. He was also grateful to the Secretariat for its memorandum, which contained a wealth of useful background information. The report and memorandum demonstrated the topic's contemporary relevance and the wide range and diversity of available legal sources and practice in matters of protection and assistance in the event of disasters. Although there were very few comprehensive universal legal instruments on the matter, national legislation, bilateral and regional instruments and practice by States and organizations abounded.

61. The different approaches adopted presented the Commission with the challenge of deciding on the most appropriate treatment of the topic. As the Special Rapporteur had indicated, it would therefore be necessary to define its scope in terms of the Commission's mandate, namely the progressive development and codification of international law. In light of that mandate, it seemed best to concentrate on the legal aspects of the question and to avoid unnecessary overlaps with operational or technical issues.

62. He agreed with those members who saw no incompatibility between a "problem-based" and a "rights-based" approach. When approaching the topic from the perspective of the victims of disasters and their rights, it would be necessary to take account of all the specific problems that arose in disaster situations. At the same time, the Commission ought to concentrate on those aspects of the subject in which its contribution as a body of legal experts advising the General Assembly would be most helpful.

63. The Special Rapporteur had drawn attention to a shift in emphasis from "relief" or "assistance" to "protection". In his own opinion, the new choice of title indicated a preference for a delimitation concentrating on the protection of persons, rather than on the operational aspects of relief. That view had been borne out by the statement made at the previous meeting by Ms. Escameia, who had taken part in the deliberation process leading to the change. He also agreed with the Special Rapporteur that the concept of the protection of persons should apply to all phases of assistance in the event of disasters.

64. Furthermore, he concurred with the view that, although natural disasters should be the main phenomenon to be considered under the topic, a broader definition of disasters was needed, to take in man-made disasters, complex humanitarian disasters and situations where different contributory causes and factors were present, including elements of armed conflict. Like the Special Rapporteur, however, he thought that armed conflicts proper should remain outside the scope of the topic, because a well-delimited *lex specialis* was applicable to them.

65. There were indeed similarities between the basic principles of international humanitarian law, such as humanity, neutrality, non-discrimination and impartiality, and the core rules on protection and relief when disasters struck. To the extent that those similarities could be extended to situations other than armed conflict, they could provide guidance when guidelines were being prepared on the topic under consideration.

66. Human rights standards and international human rights instruments also provided indispensable inputs.

Those standards should apply to the protection of persons in the event of disasters, as should standards covering categories of highly vulnerable persons such as refugees, displaced persons, women and children, the elderly and persons with disabilities. Vulnerability in times of disaster could be exacerbated by people's individual circumstances or, as was the case for minorities and indigenous peoples, because they were less favourably viewed by the State or dominant social group.

67. Human rights must be seen as a cross-cutting, complex body of standards that encompassed economic, civil, cultural, political and social rights and applied to various categories of holders of those rights. Human rights should therefore be viewed not only from the point of view of the individual, but also from that of persons who, as members of families and communities with specific cultural or social characteristics, were more easily affected by disasters.

68. Using a rights-based approach should not, however, lead the Commission to adopt the extreme position of denying the role of other general principles of international law underpinning international relations and cooperation. Respect for the sovereignty and territorial integrity of States and the principle of non-intervention must be taken into account along with human rights standards. States were the primary guarantors of respect for human rights and the rule of law at the national level and, at the same time, they were the institution primarily responsible for protecting and assisting of persons under their jurisdiction who were victims of a disaster.

69. States' ability to act might also be severely curtailed by disasters. While that predicament was the main basis for international solidarity and assistance, the prevailing circumstances, and, sometimes, the security situation, might force the State to impose restrictions on the enjoyment of certain human rights, or might limit its ability to deliver certain services or goods which might be seen as social rights. Human rights instruments such as the International Covenant on Civil and Political Rights made provision for emergencies and allowed carefully circumscribed derogations from certain rights.

70. A new principle was emerging, that of the right to humanitarian assistance, especially when disaster-stricken States were unable to fulfil their primary obligation to provide prompt and effective assistance to disaster victims but refused, or were reluctant, to accept offers of international assistance. In extreme situations, that attitude might give rise to justified and grave concern to the international community, which could not remain indifferent to the human suffering brought about by calamities. Legally competent bodies might then deem political, diplomatic and legal measures to be warranted in order to ensure that humanitarian assistance reached victims. It would, however, be necessary to provide safeguards against the misuse of that concept.

71. While he personally was in favour of the development of international law with a view to affording greater protection for the rights of persons and took a positive view of the notions of a right to humanitarian assistance and the responsibility to protect, he counselled the Commission to be cautious in dealing with those new

principles, as their legal status and their implications with regard to other principles of international law were still relatively unclear, as the current debate had shown.

72. As the Special Rapporteur had pointed out in paragraph 52 of his report, the different regimes relating to the protection of persons—international humanitarian law, international human rights law and international law on refugees and internally displaced persons—were guided by a basic identity of purpose: the protection of the human person in all circumstances. In the same paragraph, the report stressed that the protection of persons in the event of a disaster was also predicated on the principles of humanity, impartiality, neutrality, and non-discrimination, as well as sovereignty and non-intervention.

73. It was too early to adopt a position on the final form of the project. In principle, given that the Commission would be engaging mostly in the progressive development of international law, it would be prudent to envisage the formulation of draft articles with a view to providing legal guidelines. The evolution of the work and States' reactions might, however, lead the Commission in a different direction.

74. While he had not addressed all the questions posed by the Special Rapporteur, the idea that he had endeavoured to convey was the importance of preserving a balance between the individual and collective human rights of persons affected by disasters, the duties of and limitations upon States affected by disasters, and the legal and institutional framework best suited to the exercise by the State and other actors of the duty of solidarity and humanitarian assistance in disaster situations.

75. Mr. GAJA commended the Special Rapporteur's outstanding work on a complex topic, which provided an overview of the subject and thereby offered the Commission an opportunity to think about the possible options. Recent events in Myanmar showed the timeliness of the subject matter and the magnitude of the problems arising in relation to disasters. The Special Rapporteur's first report had been usefully supplemented by the Secretariat's memorandum, which was a remarkable piece of work, indeed one of the best of its kind. The Commission had been provided with a wealth of carefully presented material covering a wide range of legal instruments and practice.

76. The Special Rapporteur favoured a wide scope for the topic, encompassing a variety of questions relating to the protection of persons in the event of disasters. It could be argued that a more narrow approach, based on the idea of simply facilitating the provision of assistance when a State had requested it, would prove less controversial and would therefore ultimately be more useful to persons in need. However, once the Commission had defined the subject matter as protection of persons, it seemed inevitable that some more contentious issues should be addressed, such as whether a State might make an offer of assistance before receiving a request from the State in whose territory the disaster had occurred. The General Assembly had stated that, in principle, such action was undesirable, although there might be cases in which a different view might be taken. Another much more difficult question was whether that State could lawfully refuse assistance, even

when it was essential for the victims' survival. The point at issue was not whether assistance could be imposed, but whether the State had a duty to accept it. Perhaps the Commission should examine the consequences of what might possibly constitute an unlawful refusal of assistance. The resolution on humanitarian assistance adopted in 2003 by the Institute of International Law²⁰³ indicated some of the problems which would have to be discussed in the future and offered some possible solutions. That text deserved to be given greater prominence because of the manner in which it had attempted to strike a balance between the conflicting implications of State sovereignty and the rights of the victims.

77. Paragraph 49 of the report made a convincing case for not restricting the subject matter to natural disasters. The Special Rapporteur noted that the need for protection was equally strong in all disaster situations and that it was not always possible to maintain a clear delimitation between causes. One might add that the causes of a disaster might be uncertain. One sad example of such an event had occurred in 1963 in northern Italy, when over 1,000 people had perished after a rockslide had caused water to overflow from a reservoir. It had not been immediately clear whether the rockslide had been due to the existence of the reservoir. That question had been debated at length in the courts. Hence it would be preferable not to make the application of the future draft articles conditional upon what might be a complex assessment of whether the causes of the disaster were natural. Accordingly, the Commission should follow the Special Rapporteur's suggestion to allow for as few exceptions as possible. It should also discuss in greater depth the relationship between disasters and armed conflicts. Perhaps the Commission should not totally disregard the consequences of armed conflicts, but should exclude only those aspects of the question that were governed by the law of armed conflict.

78. He believed that the Commission should not only aim at drafting a series of rules of conduct for all the actors concerned, but should also consider the institutional aspects addressed in paragraphs 175 to 189 of the Secretariat memorandum. One possible outcome of the Commission's work might be a proposal to establish a specialized agency within the United Nations system with the function of responding to large-scale disasters, wherever they occurred. Were assistance from States to be channelled through such an agency, that would offer the great advantage of it being more willingly accepted and perceived as impartial. The agency could delegate some of the response action to other entities, leaving ample scope for the involvement of non-governmental actors as well as States. The coordination of international assistance, in cooperation with the competent authorities of the State concerned, was often problematic, and having a central agency would help to avoid gaps, overlaps and conflicting offers of various types of assistance.

79. He had a procedural proposal to make, elaborating points made by Mr. Cafisch and Mr. Dugard about the need to know more about the kind of issues that would have to be dealt with in the future. In view of the broad

²⁰³ Institute of International Law, *Yearbook*, vol. 70 (2003), Session of Bruges (2003), Part II, pp. 263 *et seq.*

scope of the topic, it would seem advisable for the Special Rapporteur to submit a provisional plan for future work, to be discussed in a working group, if possible at the current session. That would provide an opportunity for a comprehensive exchange of views that could give further indications regarding the best way to proceed.

80. Mr. McRAE said that the topic presented a number of challenges, the first issue that he wished to address being that of scope. Given the topic's extreme breadth, the question was how it could be framed in a way that was both meaningful and manageable. The second important issue related to the objective of the Commission's work—not the final form, but rather what the Commission hoped to achieve substantively.

81. On the question of scope, he agreed with the Special Rapporteur that disasters should include man-made as well as natural disasters, but was not sure that the definitional difficulties were that easily resolved. As the Special Rapporteur pointed out, man-made disasters could result from direct but also from indirect human action, as in the case of famine and epidemics. More clarification was needed on whether the varying needs in such a wide range of disaster circumstances could all be subsumed under one heading, and whether a meaningful regime that would cover all of them could be developed.

82. The related point made by the Special Rapporteur that armed conflict *per se* should be excluded also required further clarification. Did that mean that as long as an armed conflict was in progress, the resulting disaster would not be covered by the Commission's work on the topic? That the consequences of an armed conflict, once the conflict had ceased, would fall within the scope of that work? The consequences of armed conflict were as much a man-made disaster as any other kind of disaster. However, that raised the difficult question of the overlap with international humanitarian law. The purpose of the current exercise was obviously not simply to replicate such law for non-conflict disaster situations. In short, further clarity with regard to definitions and scope was required.

83. Another aspect of scope was the question of whether the Commission's work should cover all phases—pre-disaster, immediate response and post-disaster. In his view, they all fell within the scope of the topic, but that did not mean that the Commission should deal with them all at once. It might be that a more manageable approach would be to address each aspect separately—although not necessarily dealing with the pre-disaster, response and post-disaster phases sequentially. Perhaps the initial focus should be on the response to disaster, and once that aspect of the topic had been fully developed, the other two aspects could then be addressed.

84. The second important issue was what the Commission hoped to achieve in taking up the topic. For better or worse, by taking it up, the Commission had raised expectations. It was a topic of great contemporary relevance and high public visibility, and the Commission's work on it would be closely scrutinized. It was thus important to ensure that its efforts would stand up to that kind of scrutiny. At its previous meeting, it had held an interesting but rather strange debate about the false dichotomy between

a rights-based approach and a problem-based approach. However, not only were the two approaches not alternatives, but neither provided a particularly useful perspective on the best way forward.

85. The real question was what consequences flowed from the Special Rapporteur's focus on a rights-based approach. It was no doubt correct to say that the topic of protection of persons must be centred on persons. The real question, however, was whether the best way to protect persons in the event of disasters was to focus on their rights. He doubted that attempting to codify and progressively develop a catalogue of the rights of persons in the event of disasters was a useful exercise. To some extent, that would mean simply articulating rights that already existed, thereby embroiling the Commission in lengthy and perhaps unproductive debates. It would also mean that attention would have to be given to the enforcement of rights. He suspected that such an approach would not live up to the international legal community's expectations. The fact that individuals affected by disasters had rights was of course an important part of the background to the topic, but it was only the background. The real question was what action needed to be taken to protect those rights; and if action had to be taken, then there must be obligations to act.

86. Thus, obligations should be the real focus of the topic. What were the obligations that would facilitate the action needed to protect persons in the event of disasters? What obligations derived from existing law, and what obligations needed to be developed *de lege ferenda*? They might be obligations on the State or States in which the disaster had occurred, obligations placed on third States, obligations placed on relevant international organizations and, in a novel development, obligations placed on NGOs and perhaps even on corporate entities engaged in disaster relief.

87. To build on Mr. Nolte's comments somewhat, it was necessary to move from an approach based on solidarity and charity to consideration of whether any legal obligations could be articulated in addressing the protection of persons in the event of disasters. Such an approach should be viewed as independent of any identification of a responsibility to protect, a subject on which it was not necessary for the Special Rapporteur to embark. What was needed was a much more pragmatic approach—identifying specific needs and determining the obligations that would respond to those needs. It might be that, in the future, observers would see the Commission's work on the topic as an illustration of a responsibility to protect, but it would not necessarily further the acceptance of that work to argue that specific obligations could be deduced from a principle of the responsibility to protect at the present time.

88. Although it would be premature to decide on the final form of the work on the topic in its initial stage, the Special Rapporteur was right to take the view that the Commission should have some idea of where it was going. The pragmatic goal was to lay down a framework of rules, guidelines or mechanisms that would facilitate practical international cooperation in responding to a disaster, in order to make such responses more effective and thus provide protection to individuals who were entitled to it. The Commission had to work towards principles or

guidelines that would facilitate such cooperation, which would involve placing obligations on States, international organizations and NGOs. That might ultimately mean the conclusion of a draft convention.

89. Mr. WISNUMURTI welcomed the commencement of discussion on a subject of paramount importance. The earthquake and tsunami that had struck Aceh, Indonesia and other parts of Sumatra and the coasts of Sri Lanka and India, the cyclone that had hit Myanmar and the destructive earthquake in China that had brought about the loss of thousands of lives, human misery and devastation and destruction all made the need for a study on the protection of persons even more urgent.

90. He agreed with the Special Rapporteur that there was a need at the preliminary stage to clearly define the topic, elucidating its core principles and concepts. He endorsed the Special Rapporteur's view that it was necessary, as an initial step in the process, clearly to determine its scope, and that a rights-based approach should be adopted to the treatment of the topic.

91. The report extensively reviewed the evolution of the protection of persons in the event of disasters and the different sources of international disaster protection and assistance. Together with the Secretariat's excellent and extensive memorandum, it showed that a number of core principles underpinned legal instruments related to disaster relief activities—the principles of humanity, neutrality, impartiality, non-discrimination and cooperation; sovereignty and non-intervention; and prevention, mitigation and preparedness. While all those principles should guide the Commission's work, none should have primacy over the others. It was essential, however, to recognize the importance of respect for the principles of sovereignty and territorial integrity, so as to ensure the success of international efforts to protect persons in the event of disasters. Paragraphs 20 to 23 of the Secretariat memorandum (A/CN.4/590) elaborated the principles of sovereignty and non-intervention, as established by the ICJ in 1949 in the *Corfu Channel* case and in 1986 in the *Military and Paramilitary Activities in and against Nicaragua* case. In resolution 46/182, the General Assembly had stated that humanitarian assistance was to be provided "with the consent of the affected country and in principle on the basis of an appeal by the affected country".²⁰⁴ It was also recognized that, during a disaster, the affected country had the primary responsibility for the protection of persons on its territory or subject to its jurisdiction or control.

92. Nevertheless, the principles of sovereignty and non-intervention should not be unreasonably and illegitimately invoked at the expense of international cooperation aimed at protecting people who needed urgent relief assistance. Indeed, in paragraph 12 of his report, the Special Rapporteur suggested that in line with the title, the Commission should adopt a rights-based approach to the topic. That approach was certainly warranted, given that the victims' very survival was at stake. The Special Rapporteur seemed to define the essence of a rights-based approach to protection and assistance as the identification of a specific standard of treatment to which the individual, the victim

of a disaster *in casu*, was entitled. Before proceeding further, however, it was imperative to know exactly what was meant by a rights-based approach and what its parameters were. It should be clear from the start that a rights-based approach must be defined as encompassing not only the right of the victims to humanitarian assistance but also the rights of the affected country. In various resolutions, the General Assembly had reaffirmed the sovereignty of the affected States and their primary role in the initiation, organization, coordination and implementation of humanitarian assistance within their respective territories. The principle of the primary responsibility of the affected State had been reaffirmed in the ASEAN Agreement on Disaster Management and Emergency Response of 26 July 2005.

93. Mr. Brownlie's remark concerning the need to adopt a problem-based approach to the topic had sparked an interesting debate. As he himself saw it, a problem-based approach was a methodology whereby lessons learned from various disasters, especially recent and ongoing major disasters, could be an instrument to develop both the concept of the rights of persons in the event of disasters and also new standards of treatment.

94. In paragraphs 44 to 49 of his report, concerning the scope of the topic *ratione materiae* and the concept and classification of disasters, the Special Rapporteur had confirmed that there was no generally accepted legal definition of the term "disaster" in international law. For the Commission's purposes, however, the definition of disaster contained in the Tampere Convention of 1998 could be used as a guide. He also concurred with the various methods of classifying disasters listed by the Special Rapporteur in paragraphs 47 and 48 of the report.

95. As to the conceptual scope of the topic, the Special Rapporteur argued in favour of a broader scope covering both natural and man-made disasters, rather than one limited initially to natural disasters. He himself had serious doubts that such a broad scope would offer the best way forward. Man-made disasters raised complex issues, such as who was to decide whether a disaster was man-made or a natural phenomenon and to whom responsibility should be apportioned. A case in point was a major disaster currently occurring in Sidoarjo, East Java, caused by a volcanic eruption of mud, that was affecting the lives and livelihood of hundreds of families and rendering a vast area uninhabitable. There was no consensus among scientists and experts as to whether the disaster was a natural phenomenon related to the earthquakes that had occurred in different parts of Java, or a man-made disaster resulting from a faulty system of oil drilling and negligence for which a private company was responsible. It would therefore be prudent for the Commission to focus for the time being on natural disasters, while recognizing that man-made disasters were sometimes relevant to natural disasters.

96. On the concept of protection of persons, addressed in paragraphs 50 to 55 of the report, he was of the view that it should cover response, relief and assistance. He fully concurred with the statement in paragraph 52 with regard to the principles on which the protection of persons in the event of disasters was predicated. As to the question raised in paragraph 53, in accordance with the title of the topic, the Special Rapporteur should confine his study to

²⁰⁴ See footnote 201 above.

the protection of persons and not extend it to protection of property and the environment, which would only complicate the discharge of his mandate.

97. Paragraphs 54 and 55 of the report highlighted the tension between the principles of sovereignty of States and non-intervention and international human rights law, and between the rights and obligations of the assisting actor and those of States affected by a disaster. While those tensions or potential tensions undoubtedly existed, the Commission's work on the topic should lead to the elaboration of a concept and provisions that would prevent or minimize them.

98. In paragraph 55 and elsewhere, the Special Rapporteur referred to the emerging principle of the responsibility to protect, which, in his view, was a euphemism for humanitarian intervention. The United Nations 2005 World Summit Outcome adopted by the General Assembly in its resolution 60/1 had recognized in its paragraphs 138 and 139 that “[e]ach individual State ha[d] the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity” and to act to prevent such crimes, and had reaffirmed the responsibility of the international community to take collective action, should national authorities fail to protect their population from such crimes. It had also stressed the need for the General Assembly to continue consideration of the responsibility to protect in that context. It was therefore obvious that while the responsibility to protect was recognized by the United Nations, it was not yet operational. It was his understanding that the Secretary-General had initiated the process of elaborating that principle. In that process, one thing that had to be recognized was that collective action against a country accused of having committed those serious crimes, pursuant to the principle of responsibility to protect, could work only with the consent of the Government concerned. In that connection, he wished to associate himself with the view expressed by Mr. Vasciannie to the effect that, under current law, States did not have the right to impose humanitarian assistance on affected States against their will. That being the case, it would not be appropriate to extend the scope of the topic of protection of persons in the event of disasters to include the principle of the responsibility to protect.

99. The Special Rapporteur had raised a number of pertinent questions regarding the scope *ratione personae*. While the role of non-State actors in providing assistance was important, he had serious doubts as to whether the Commission should recognize that non-State actors had the obligation to protect. With regard to the scope *ratione temporis*, he agreed with the Special Rapporteur that provision of disaster assistance should encompass the pre-disaster, response and post-disaster phases, involving prevention, mitigation and rehabilitation. As to the final form of the Commission's work on the topic, he agreed that a decision on the matter should be made at an early stage, to assist in the drafting of provisions on the topic. His own preference would be for draft articles that could eventually be incorporated in a convention.

The meeting rose at 1.05 p.m.

2981st MEETING

Friday, 18 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. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, 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. Mr. PETRIČ, having congratulated the Special Rapporteur on his excellent report and thanked the Secretariat for its comprehensive study, said that the topic under consideration was not only of crucial importance—since it addressed issues of life and death—but also complex and politically sensitive. Following the preliminary report, it was essential to define the main lines of emphasis and hence to tackle head-on the dilemmas identified both by the Special Rapporteur in his report and by the members who had taken the floor. All those who had spoken agreed that the issue at stake was the protection of persons and not merely assistance, and he shared that view. However, it remained to be seen how far the Commission should go in that direction. Was it a matter of protecting specific human rights? Should a duty to protect be established? Should the right to intervene in support of humanitarian action be recognized? Or, alternatively, should the convention give primacy to State sovereignty, focusing on the development of pragmatic rules that would enable assistance to flow smoothly? Another question was whether to rest content with *lex lata* or to embark on *lex ferenda*. In the former case, State sovereignty would remain in the forefront. In the latter case, the Commission could place greater emphasis on human rights, the obligation to protect or even the right to intervene under certain extreme circumstances. He was personally in favour of going quite far in that direction.
3. With regard to the final product, he suggested first deciding on a set of principles and then formulating guidelines with a view to eventually elaborating a framework convention. However, it was unnecessary to take a decision on the matter at that stage.