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Summary record of the 2981st meeting

Topic:
Protection of persons in the event of disasters

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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.

4. With regard to scope, the approach adopted by the Special Rapporteur, who had identified the *ratione materiae*, *ratione personae* and *ratione temporis* aspects of the topic in his preliminary report, was excellent. The topic could also be broken down into three components: persons affected by disasters, the State in which the disaster occurred and assistance actors. With regard to disasters and their victims, while it might seem easier at first glance to limit the scope of the study and the concept of a disaster to natural disasters, that approach would be inadequate because most disasters were caused by a combination of natural and human factors. Moreover, the definition of a disaster should not be based on its origin, but rather on its effects.

5. It was necessary for practical purposes to set limits, deciding, for instance, whether to include epidemics or damage to the environment. With regard to armed conflicts, unlike most other members who had addressed the question and, apparently, the Special Rapporteur himself, he was unsure whether they should be excluded from the study. While he agreed that they constituted special circumstances governed by special rules of international law, he submitted that cases such as Darfur, which had already been mentioned, or southern Sudan indicated that the question needed to be examined in greater depth. With regard to the victims, the persons to be protected, he was in favour of adopting an approach based on individual rights—and not collective rights—in the event of disasters. Such rights should, of course, be exercised without discrimination, and persons belonging to vulnerable groups should be given special attention. With regard to the goal of protection, account should be taken not only of life and health, but also of different categories of property which could lead to different kinds of losses and hence also of recovery. However, as the basic goal was the protection of persons, he was in favour of concentrating on resources that were essential for the protection of life, such as medicine, water, food and shelter.

6. With regard to the phases of disasters, the Special Rapporteur proposed including rehabilitation, but he thought it was preferable to limit the study for the time being to prevention and mitigation because rehabilitation was a long-term process requiring long-term solutions. Moreover, it was affected by economic, political and other factors, raising issues that the Commission would be well advised to avoid.

7. Turning to the second component of the topic, that of the State in which the disaster occurred, he noted that it should make no difference in principle whether one or more States were involved. In practical terms, however, differences would inevitably arise. While the State in whose territory a disaster occurred had a duty to protect all victims, nationals and non-nationals, it could, exercising its sovereign authority, choose to fulfil that obligation alone, request or accept assistance from other States, or turn down or impede the delivery of assistance.

8. The role of the third component, assistance actors, who could be foreign States, international organizations, NGOs or individuals, was based on the principle of solidarity which, in his view, should not be replaced by a legal obligation. Such an obligation would undermine

State sovereignty and it would be very difficult to determine the procedures for its implementation. However, technical rules aimed at facilitating assistance ought to be elaborated. The Commission should decide to what extent those already established by the Red Cross and Red Crescent Societies, which were very active in that area, needed to be bolstered or supplemented.

9. Of course, the Commission would have to envisage cases in which the three “components” did not function “normally”. State sovereignty was the main impediment it would encounter. As already noted, a State could deprive its own people of foreign assistance, thereby greatly exacerbating the impact of the disaster, for political, economic or other reasons. The core endeavour would therefore consist in striking a balance between respect for State sovereignty and the need to protect human life and safety.

10. Mr. PELLET said that he was taking the floor to convey his interest in the work of the Special Rapporteur rather than from any conviction that the Commission would pay much attention to his statement, since he was about to contradict, to a large extent at least, what had been said so far. He would speak only about the Special Rapporteur’s preliminary report and not about the Secretariat’s memorandum, since only the two addenda thereto had been distributed in French, a fact concerning which he wished to lodge a strong protest.

11. In paragraph 59 of his report, the Special Rapporteur stated that “given the amorphous state of the law relating to international disaster response, striking the appropriate balance between *lex lata* and *lex ferenda* poses a singular challenge”. One might also state in bolder terms that, apart from some vague general principles, such as those of sovereignty and non-intervention, the topic consisted almost exclusively of *lex ferenda*. As Mr. Caffisch had rightly noted, that was not a defect in itself, but he continued to hold the view that the progressive development task entrusted to the Commission alongside its task of codification of international law should not be equated with international legislation pure and simple. The members of the Commission were not lawmakers and were not mandated to invent new rules of international law in cases where, as the Special Rapporteur had stated somewhat bluntly in his report, the existing rules had no basis in law. In other words, while the Commission could indeed contribute to the progressive development of international law, its role was not to supplant States in negotiating a new legal instrument when the instrument in question, while it could be useful, would inevitably lead to the questioning and radical reorientation of fundamental principles of international law.

12. He emphasized that he was a strong advocate of a dynamic and bold approach to the concept of the responsibility to protect, a concept of which, in his view, the protection of persons in the event of disasters was only one component, however important. He shared the view that sovereignty should not serve as a pretext to impede the channelling of assistance in the event of a humanitarian disaster, that it could not justify inaction in the face of genocide and that disorder was preferable to injustice. The problem was that all such convictions were political and ideological. The Commission’s role was not to “bring

tears to the eyes of onlookers” but the codification and progressive development of existing international law. Even though the Special Rapporteur’s preliminary report had not thrown caution to the wind and reached such an undiplomatic conclusion, it pointed inexorably towards such a conclusion and bore out his conviction that the topic, at least in the form in which it was conceived by the majority of Commission members, contributed to an insidious but increasingly pronounced trend in the International Law Commission, which was gradually evolving from what it was supposed to be, namely a body of independent legal experts, into a sort of “Sixth Committee *bis*”, minus the political legitimacy. In that connection, the discussion which had taken place at the previous meeting following Mr. Vasciannie’s unfortunately rigorous analysis had proved sadly revealing.

13. With regard to the general approach to the topic, he was quite attracted to and convinced by the idea of an approach based on the rights of disaster victims. Moreover, he felt that here the Commission was on more solid ground, juridically speaking, than if it approached the subject solely from the angle of State obligations. After all, the right to life and certain so-called “third generation” rights—the right to food, medical care, etc.—belonged in all likelihood to positive law, and one might be justified, although the case was not as clear-cut, in viewing them as “enforceable” rights, which meant that they imposed obligations on a State *vis-à-vis* its population. Nevertheless, such reasoning had almost no bearing on the “awkward” questions, at least those that the Commission would inevitably run up against if it persisted in adopting a sweepingly political approach to the issues: did international disaster response law justify the delivery of assistance within the territory of a sovereign State in the absence of consent or in the event of opposition on the part of the State in question? Quite clearly, a State that authorized such action was by no means limiting its sovereignty but exercising it, but that did not solve the problem: could a State be compelled to exercise its sovereignty for the good of its population, and who was best equipped to assess what constituted the good of the population? As no answer existed in nor could be inferred from positive law, the wisest option would certainly be to do nothing: not to codify or develop progressively, not to legislate in that area. It would be preferable for the Commission’s jurists to concede that the law was not the only recourse available, and that it was sometimes better, when faced with human suffering, to seek solutions outside or even against the law. In other words, if the Commission really wished to deal with the topic, it should refrain from indulging in vain exhortations which, he repeated, did not form part of its mandate, and should content itself with what was reasonable and responsible, namely codification and progressive development of the right to protection, without troubling itself unduly with the means, even the legal means, whereby such protection should be achieved. It would be difficult, but it might nonetheless be feasible. On the other hand, if the Commission ventured onto the slippery slope of obligations, it would doubtless succeed in moving and attracting the sympathy of some well-intentioned NGOs, but it would certainly run up against a brick wall.

14. No distinction should be made, in his view, between natural and man-made disasters, if only because, as the

Special Rapporteur had clearly explained in paragraph 49 of his report, it was often quite difficult to tell them apart. On the other hand, he was strongly opposed to the inclusion of situations of armed conflict within the scope of the topic, not necessarily for the reasons set out by the Special Rapporteur at the end of paragraph 49 of his report, but rather because they were the subject of a well-established body of rules of positive law which he feared might be unduly diluted in the exercise that the Commission was about to perform: instead of strengthening international disaster response law through humanitarian law, one ran the risk of weakening it.

15. In paragraph 53 of his report, the Special Rapporteur requested the Commission’s guidance as to whether his study should cover the protection of property and the environment. In general, there seemed to be a clear-cut case for answering in the negative, since the Commission was concerned with men and women, but it seemed equally clear that in some cases the protection of persons was intimately bound up with the protection of their property, at least in the case of vital needs such as housing and people’s environment.

16. He shared the Special Rapporteur’s view that the sooner the Commission defined the final form of its work, the sooner the Special Rapporteur could forge ahead with his study. If the Commission confined itself to codification *lato sensu* of the rights of persons in the event of disasters, a framework convention (a concept that he did not find as strange or unfathomable as Mr. Cafilisch) seemed to be an attractive option, an appropriate compromise between a traditional treaty—“hard” in form and substance—and “soft” instruments whose good intentions set alarm bells off in advance.

17. In closing his presentation, the Special Rapporteur had said that the topic assigned to him constituted “a challenge that could usher in a new era”. Those were very fine words, and they might even be true. However, as it was often wiser to let well enough alone, it would be preferable, instead of contemplating the inauguration of a new era, to make do with a modest approach, bearing in mind the limited scope of the Commission’s action, influence, mandate and responsibilities. If the study of the topic was to be pursued, the Commission could only hope to assuage human suffering—which was, after all, its goal and, broadly speaking, the goal of law in general—if it remained practical, modest and reasonable.

18. Mr. DUGARD said that the need to find a balance between conflicting legal norms (the principle of State sovereignty, respect for domestic jurisdiction, human rights and humanitarian intervention, notions of *jus cogens* and *erga omnes* obligations, etc.) was a legal exercise that fell well within the Commission’s mandate. It would not therefore be acting immodestly if it were to embark upon that task.

19. Mr. BROWNLIE said that he agreed with a great deal of what Mr. Pellet had just said and noted with satisfaction that the debate so far had proved to be of high quality and very useful. Unfortunately, however, the mini-debate that he had attempted to launch had not been picked up: his reference to the need to adopt a problem-based approach

had sparked off a debate about the conflict between that approach and the rights-based approach although the two were probably compatible, as noted by the Special Rapporteur. Such comments, however true, served little purpose, and the Commission was still bogged down in a form of conceptualism, as though everything had to be converted into some form of human rights. The examples of the large dam and tsunami that he had cited were obviously related to the human rights of victims, but they were also related to other departments of law. A considerable proportion of the work of the ICJ and international courts of arbitration concerned boundary disputes between States or territorial disputes, for instance with regard to islands. Recourse to such courts for the settlement of disputes was a substitute for the use of force and formed part of a holistic approach. There was a relationship between human rights and the peaceful settlement of boundary disputes, because if States failed to use the courts, disputes would be settled by other means entailing widespread devastation and the deaths of innocents. The very idea of making a distinction between issues that involved human rights and others that did not was extremely superficial. It was necessary instead to define priorities, as noted by Mr. Pellet. He supported Mr. Gaja's proposal to create a working group to identify the issues on which the Commission should focus and the order in which they should be addressed, in other words the priorities.

20. When he had referred to the problem-based approach, he had meant to emphasize the existence of several categories of disasters, a point that had not been taken up. Tsunamis were one category, and large dams and large water reservoirs involved an inherent risk of disaster, creating a situation in which certain legal rules were applicable, such as those related to the risk assessment project already discussed in the Commission. As noted by Mr. Wisnumurti, classifiable disasters should be dealt with as a matter of priority, with a view to ensuring that the expectations of public opinion were in line with what the Commission chose to address on a priority basis. Unfortunately, conceptualisation was still making its presence felt in the Commission. Some form of "decontamination" was necessary, but he did not expect it to take place.

21. He was fairly sure that the Commission would end up discussing some form of humanitarian intervention. Although he agreed with much of what Mr. Vasciannie had said, the idea that one could separate the notion of humanitarian assistance from that of humanitarian intervention involving the use of force was unduly optimistic. The outside world and the members of the Sixth Committee would probably find it difficult to make such a distinction. The Commission would run up against the glass ceiling of the Charter of the United Nations, since it was not supposed to take up subjects that would entail, directly or indirectly, an amendment to the Charter of the United Nations. If it were to take up the question of some form of mandatory humanitarian intervention, it would have to discuss the use of force in general, the relevant provisions of the Charter of the United Nations and the extent to which those provisions could be modified in the light of developments in customary law. Hence, there were many points to be discussed in greater depth and he urged the Commission to set up a working group to establish priorities once the content of the topic had been identified.

22. Ms. ESCARAMEIA said that she was deeply disturbed by the fact that, when the Commission addressed subjects of great interest on which the world required some kind of response, Mr. Pellet frequently cautioned that they were political subjects and should not be taken up by the Commission. It was a position that was based, in her view, on a very limited understanding of progressive development, a position that would require the Commission to content itself with compiling and organizing existing rules without proposing anything new on the grounds that its members were not negotiators. She submitted that the Commission should, on the contrary, perform the legal function of providing guidance, just like other lawyers throughout the world and in all branches of law. The protection of persons in the event of disasters was an excellent and timely topic and almost all countries had supported it in the Sixth Committee. Even if one adopted an extremely legalistic approach and dealt only with law, the fact was that in some cases there were still no rules but only general principles and, in the case in point, a number of mutually compatible principles. It was all the more difficult to accept the argument that the members of the Commission were there simply to enforce pre-existing rules at a time when the world was undergoing structural change. At times of great stability, it was admittedly easy to focus on developing precise definitions of existing rules. However, in a world where the framework was changing and questions of compatibility of rules arose, lawyers must perform the role assigned to them and take account of those changes. The contemporary world was far removed from the 1950s and 1960s when it was necessary to specify matters that were still undefined: the task now was to establish priorities and provide guidance.

23. In response to Mr. Brownlie, she expressed concern that the Commission might confine itself to operational aspects when it had a duty to go a great deal further. Although such aspects were important, they had already been addressed by the IFRC and other organizations. The Commission could have an impact if it dealt with them in the framework of a convention with binding provisions, but it would not change anything in qualitative terms. With regard to Mr. Brownlie's fear that the Commission might go astray if it failed to confine itself exclusively to operational aspects, she saw no grounds for such fear since the Commission could draw the line wherever it wished: it could take up certain aspects of assistance without necessarily addressing the question of armed intervention in support of its delivery, which should be excluded from the scope of the study.

24. Mr. PELLET said that Mr. Brownlie had failed to do justice to the Special Rapporteur's report, paragraphs 44 to 49 of which adopted a problem-based approach to the topic. Although that section remained very general in terms of content, it nevertheless envisaged a more practical approach. However, he had no objection to the creation of a working group, a proposal that Mr. Brownlie had supported. Contrary to Mr. Dugard's claim, he was in favour of including man-made disasters in the study. A second misinterpretation by Mr. Dugard was far more serious: the main goal of law was of course, as he himself had pointed out, to assuage human suffering. However, that was not the main problem. A distinction needed be drawn between two very different aspects: the protection of persons was

indeed a legal problem, but the main problem consisted in identifying who should and could deal with a specific issue and what constituted the appropriate and legitimate framework for such action. All law was political; it was generated by politics and no rule of law came from any other source. Moreover, laws were not forged in just any manner and in just any place: when they departed from established principles, they were decided upon in political circles—in State parliaments, in the General Assembly or at international diplomatic conferences. Blurring the borderlines was therefore quite unacceptable, contrary to what Ms. Escameia said and believed, without challenging her sincerity: the Commission had no mandate to take the place of States; it should simply operate within its own legal sphere. He was horrified to hear some speakers wondering whether the Commission should position itself within international law; it was not for the Commission to take up any other position, and even though jurists were clearly concerned by human suffering, it was not their job to make laws to deal with it—they should help to elaborate new rules, but they should not invent them or discard existing rules.

25. Mr. PETRIČ expressed support for Mr. Gaja's proposal to set up a working group to study the topic in detail. Some statements reminded him of debates in the 1940s and 1950s, when the idea of human rights became topical. The question he wished to raise was, given that one of the Commission's tasks was to contribute to the progressive development of international law, should it invariably lag behind States or should it take the lead? In his view, the Commission should remain slightly ahead of the field.

26. Mr. KAMTO congratulated the Special Rapporteur on the highly scrupulous intellectual approach he had displayed in his report and on having had the courage to take on a sensitive topic which fell largely within the domain of *lex ferenda*. The degree of *lex ferenda* involved was particularly difficult to assess inasmuch as the topic touched on a highly sensitive area for States, namely the conflict between their sovereignty and the intervention of foreign powers or even private actors, such as NGOs and commercial companies, invoking the principle of protection of persons in critical circumstances, a principle whose existence in international law remained to be established. The Special Rapporteur's preliminary report was cautious but detailed. He had identified the core problems and the difficulties inherent in the nature of the subject and, where necessary, had sought guidance from the Commission on specific points, particularly in paragraph 53 of the report. What he required most at the present stage of his work was not a substantive debate on the subject, but an indication of the Commission's understanding of its scope and possibly some methodological guidance.

27. With regard to the scope of the topic, the key terms "protection", "persons" and "disaster" must first be defined. In the case of protection, reference was made in some cases to the "duty to protect" and in others to the "responsibility to protect": it should be made clear whether the two terms meant the same thing and whether the duty or responsibility in question was a moral standard or a legal obligation. With regard to the scope of protection, in other words the extent of the duty or obligation, it should be made clear whether, as suggested by the

Special Rapporteur, it encompassed prevention, response and rehabilitation. He would prefer to exclude the obligation to prevent, not only because it would prove difficult in some cases, but also because it would impose obligations on many States that they would be unable to fulfil. For example, it was sometimes possible to prevent earthquakes or volcanic eruptions, but only a few States possessed the technological capacity and the financial means to set up the necessary protection systems, not to mention earthquake-resistant building specifications which developing countries were unable to apply on a systematic basis. Furthermore, some measures of protection necessitated a very long period of implementation. The Special Rapporteur should therefore focus on response and rehabilitation inasmuch as the aim of the topic was to identify the action that States or the international community should or could take when an unforeseeable and unavoidable event occurred, whether it was natural or man-made.

28. With regard to persons, the question arose whether the topic covered only natural persons or whether it also included legal entities. If legal entities were included, protective measures would be necessary even where only their property, and not the lives of natural persons, was endangered. The basic postulate underlying the topic—both when the idea was first raised in the Commission and when the United Nations discussed the responsibility to protect—was that the international community was under a moral obligation not to stand idly by in the face of crises affecting human life. The protection of persons under diverse circumstances had become a core axiological value underlying contemporary law, as reflected in the concept of "elementary considerations of humanity" in the case law of the ICJ—although it was unrelated to natural disasters. The concept, which appeared in 1949 in the *Corfu Channel* case and in other later judgments, permeated international law and could be explored in greater depth by the Special Rapporteur in the context of the topic under discussion.

29. The third key term was "disaster". Like most members of the Commission, he thought that the concept should embrace both natural and man-made disasters. However, while the definitions set out in paragraphs 45 and 46 of the report were very useful, any broadening of the concept to include damage to the environment could, as rightly noted by Mr. Pellet, raise difficulties where such damage was not accompanied by injury to natural persons. For example, should there be a duty to respond if an earthquake or volcanic eruption occurred in an uninhabited area? In his view, the Commission would be wise to limit the topic to the protection of natural persons, confining the applicability of the rules to be developed to cases in which human beings were affected by a disaster.

30. On the methodological front, several questions arose. First, the Commission would have to determine the manner in which protection should be provided, whether it should take the form of intervention or should solely involve cooperation. If persons required protection, the existence of the State on whose territory the disaster had occurred could not be ignored. A balance would therefore have to be struck between the requirements stemming from "elementary considerations of humanity" and those imposed by respect for State sovereignty. By virtue

of their sovereignty, States remained at the core of the concept of protection of persons. A second question was: who was required to protect? Was it the State on whose territory the disaster had occurred, the international community, NGOs and commercial companies, or all those actors and, if so, how were their respective roles to be defined? Where an offer of assistance was refused, as had recently occurred in practice, did international positive law, in particular the Charter of the United Nations, offer an alternative basis for assistance notwithstanding the State's refusal? The Special Rapporteur could usefully examine the various existing regimes for the protection of persons in crisis situations—for instance in armed conflicts, which should not be excluded from the scope of the subject before the Commission took stock of the current situation. The law of armed conflicts or international humanitarian law might seem to regulate certain issues while only doing so in part or not at all, so that some aspects of the impact of armed conflicts on persons should perhaps be included in the concept of a disaster.

31. A narrow legal approach would be of little relevance in either legal or practical terms, since it would basically consist in a mere reaffirmation of human rights that were already established in various international legal instruments: the right to life, the right to health, the right to food, the right to housing and so forth. The Commission's task was to determine how international law could respond when such rights required protection from violations occurring in the event of a disaster. It would have to consider what *lex lata* offered in that regard and seek to determine, in the light of current trends in international practice, whether such practice was well established or just emerging, what new rules the Commission could propose to States, *de lege ferenda*, promoting progressive development in line with its Statute. It was for States to say whether or not they supported such a development, since they alone were the final decision makers. The Commission, however, had a duty as a technical body to make their task easier by proposing rules after examining current trends in international law. With regard to the final form of the Commission's work on the topic, he thought that the Special Rapporteur should propose draft articles which could give rise to a draft framework convention or mere guiding principles, depending on what the Commission decided in due course.

32. Mr. FOMBA thanked the Special Rapporteur for his detailed preliminary report, which identified the core issues and indicated avenues that might usefully be explored. Three key concepts emerged from the current title of the topic: the concept of disaster, the concept of protection and the concept of persons. The core issues that arose in disaster situations concerned the basic rights that victims enjoyed, the rights and duties of all actors involved, and appropriate ways and means of taking rapid and effective action. In order to respond adequately to those questions, the Commission would also have to determine what constituted a disaster, the scope of the concept of protection and who exactly were the persons concerned.

33. The key concepts should be examined in the light of *lex lata* and, if necessary, from a *lex ferenda* perspective. What lessons could be drawn from the preliminary report? With regard to the concept of disaster, the

Special Rapporteur indicated that it was not a legal term and that there was no generally accepted legal definition of the term in international law. He also indicated that two approaches were discernible in practice: either the complete omission of a definition, or the provision of what purported to be an all-encompassing definition. At the end of paragraph 46, he proposed a helpful definition that could serve as a sound basis for reflection. According to paragraphs 47 and 48, the *ratione loci* or spatial scope was not a decisive criterion. On the other hand, the seriousness of the disaster was a relevant criterion and disasters could be classified on the basis of a number of criteria (natural or man-made, duration, single or complex emergency). He supported those statements and shared the Special Rapporteur's view that a broad approach covering all types of disasters should be adopted. The only proposed exclusion concerned armed conflicts, which was acceptable in the light of the special legal regime applicable in that area, although some speakers had rightly suggested during the debate that a measure of caution should be exercised in that regard.

34. The concept of protection of persons had three components: the persons to be protected, the persons who should provide protection and the tools to be used. He was in favour of adopting a holistic approach. The concept of a victim should be defined in the context of the fundamental rights and interests of victims that must be protected. The question arose whether the term should be defined in terms of a single meaning or whether a distinction should be made between "direct victims" and "indirect victims" involving the application of a different legal regime. In practice, however, such questions were of purely theoretical interest, since the identity of the victims was clear when an earthquake or volcanic eruption actually occurred.

35. With regard to protection, the report stated that the concept needed to be explored in greater depth. While disaster victims did not constitute a separate legal category, their distinct factual situation created specific needs that called for an adequate response. While he agreed with that reasoning, he nonetheless submitted *a contrario* that steps could be taken to define a specific legal category of victims. Moreover, he shared the Special Rapporteur's view that the principle of humanity constituted the fundamental tenet of international humanitarian law and international human rights law applicable in the event of disasters and hence underpinned all humanitarian action. He also agreed that the concept of protection should be all-encompassing, covering response, relief and assistance. While the distinction drawn between protection *stricto sensu*, which seemed to denote a rights-based approach, and protection *lato sensu*, which would embrace other concepts, was of some interest, he found it somewhat unhelpful to become engrossed in such subtle distinctions.

36. The concept of protection of persons was not new in international law and reflected a particular relationship between the victims of a disaster and the rights and obligations attached thereto (para. 52). The protection regimes involved were international humanitarian law, international human rights law and international law relating to refugees and displaced persons. Together with the principles

of sovereignty and non-intervention, they constituted the basis of protection of persons in the event of disasters. There was, in his view, some tension between humanitarian principles on the one hand, and the principles of sovereignty and non-intervention on the other. The Commission would have to address the question of how to deal with the power struggle between the two categories and whether it was necessary to strike a balance between them. His opinion regarding that question of legal policy was that sovereignty and non-intervention should not be allowed to thwart efforts to achieve the best possible protection for disaster victims and that the Commission should send out a message along those lines. With regard to the question of whether property and the environment should be taken into account, he was in favour of addressing those issues, since it would be somewhat artificial to divest victims of their material and environmental context; the degree of detail with which such matters should be addressed would depend on the circumstances of each case.

37. With regard to rights and obligations and their consequences, in particular the fundamental question of whether a right to humanitarian assistance existed, the Special Rapporteur noted that there was some measure of doubt or uncertainty in contemporary international law because no legal instrument recognized the right in question *expressis verbis* (para. 54). In his view, the Commission should proceed without vacillating in the direction of progressive development of the law in that area. With regard to the famous question of the responsibility or duty to protect, he shared the views expressed by the Special Rapporteur in paragraph 55 and considered that an in-depth study should be undertaken to clarify the ins and outs of the question.

38. Turning to the scope of the topic *ratione personae*, he expressed the view that all actors should be taken into account. With regard to the scope *ratione temporis*, he considered that all phases should be taken into consideration and the questions raised in paragraph 57 should be discussed. His first impression was that the Commission could draw on its work concerning the prevention of transboundary harm from hazardous activities that were not prohibited by international law.²⁰⁵ The Special Rapporteur's reservation regarding the need to take account of rehabilitation activities was at first glance acceptable. However, he felt that more reflection was required because the need to reason in terms of covering the entire process, from the occurrence of a disaster to the reparation of the consequences, seemed to point in the opposite direction.

39. Lastly, with regard to the final form of the Commission's work, logic demanded that the question should be decided at the outset, although he admitted that the Commission had almost invariably run into difficulties when it adopted such an approach. At first glance, he would opt for a binding legal instrument, given the importance and seriousness of the topic. The Commission should, in any case, work towards developing draft articles without worrying too much about the final decision regarding form, although such an approach might appear somewhat illogical. The Special Rapporteur seemed to have a preference

for guidelines, since, in his view, States found them more acceptable. While that argument had some merit, the Commission should endeavour to assess the acceptability of the outcome of its work. He fully shared the Special Rapporteur's conclusions (paras. 61–66) and agreed that it was essential to adopt a rights-based approach that would inform the operational mechanisms of protection.

40. Ms. XUE joined other members of the Commission in paying tribute to the Special Rapporteur for his illuminating report and in complimenting the Secretariat on its well-documented study. The preliminary report provided a most helpful and comprehensive overview of the current state of the law and practice in the area of protection of persons in the event of disasters, and raised pertinent and thought-provoking questions. With regard to the general approach to the topic, she agreed with the Special Rapporteur that the Commission's decision to opt for the term "protection" reflected a clear shift of emphasis from an operation-oriented approach to a rights-based approach, which placed the victim at the centre of the legal debate. The Special Rapporteur was right when he noted that such an approach dealt with situations not simply in terms of human needs but also in terms of society's obligation to provide protection and assistance (para. 12 of the report). Such a policy declaration had two legal corollaries: the obligation to protect at the national level, on the one hand, and the obligation to assist, implying solidarity, at the international level.

41. Responding to the questions on which the Special Rapporteur had sought guidance from the members of the Commission, she noted first that, in terms of *ratione materiae*, the existing legal instruments listed in the Secretariat's memorandum seemed to cover all types of natural disasters. From a technical point of view, however, the definition of prevention, relief and assistance varied greatly from one treaty to another, depending on the object and purpose of the treaty, so that the concept of a disaster was defined on a case-by-case basis. Disasters could fall into certain categories, but the most clear-cut and convenient distinction was that between natural and human-caused disasters. If one wished to focus on the protection of persons, it seemed appropriate to define the concept of a disaster as broadly as possible to ensure the widest possible protection. However, caution should be exercised in applying such a general approach. More often than not, human-caused disasters stemmed from industrial activities; as such highly hazardous activities could cause large-scale damage, there were already national laws or treaties in place, in particular the two instruments adopted under the auspices of the International Atomic Energy Agency after the Chernobyl nuclear disaster in 1986 concerning the early notification of a nuclear accident and emergency assistance (Convention on early notification of a nuclear accident and Convention on assistance in the case of a nuclear accident or radiological emergency).

42. Having participated in the negotiations regarding those instruments, she had come to appreciate the complexity of the legal issues involved and was aware of the need to handle the protection of victims of such disasters with professionalism and to apply special standards. While international rules and regulations on emergency assistance and disaster relief for accidents of that kind

²⁰⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 148–170.

required further development, natural disasters had proved in recent years to be even more problematic in terms of rescue operations and emergency response, and legal regulation was urgently required, particularly to ensure appropriate coordination of national and international rescue efforts. Of course, it was not always easy to draw a clear-cut distinction between natural and human-caused disasters, since in some cases natural disasters were partly due to long-term mismanagement of natural resources. It would be helpful, however, if the Commission were to adopt a progressive approach and tackle natural disasters first; it could define natural disasters flexibly, extending the definition to include grey areas in which natural disasters were partly attributable to human causes.

43. While protection of persons was the top priority in the event of a natural disaster, other factors such as property and the environment should not be ignored. Whether such factors were taken into account largely depended on progress in rescue operations and the specific circumstances of each case. While efforts had focused, in the immediate aftermath of the recent devastating earthquake in the Chinese province of Sichuan, on rescuing victims and providing food, water, medical care, temporary shelter and sanitary facilities to people in the disaster area, daily reports from the region showed that a major effort was also under way to rescue cultural heritage sites and to repair public, industrial and agricultural facilities that were of crucial importance for the local people. Such matters were largely addressed at the local level during the post-disaster phase. While the pre-disaster and post-disaster phases were very important, international legal guidance was most urgently needed for the disaster phase itself. To ensure that the scope of the topic was manageable, the Commission should focus on the disaster proper and on the protection of persons. It went without saying that armed conflicts should be excluded from the scope.

44. Turning to the question of the general principles applicable to the protection of persons in the event of natural disasters, she noted that the Special Rapporteur had enumerated a number of principles drawn from humanitarian law. She shared the view expressed by a quite a number of Commission members that placing the interests of disaster victims at the core of the discussion did not imply that human rights law and humanitarian law provided answers to all the questions raised. She did not agree that there was necessarily some form of tension between the principles of State sovereignty and non-intervention, on the one hand, and international human rights law, on the other. As a general legal principle, State sovereignty should prevail, because when one spoke of rights and obligations pertaining to the protection of persons, it was basically the rights and obligations of States at the national and international level that were being invoked. In the event of a natural disaster, the odds were that uncoordinated relief efforts would fail to reach all victims promptly and effectively in the absence of leadership and coordination by the Government concerned. It followed that the establishment of national relief plans and the enactment of legislation on emergency mechanisms geared to conditions in the affected State should no longer be regarded as a purely domestic matter, but as an international obligation for the protection of human rights. The

principles of State sovereignty and human rights would thus prove mutually reinforcing. The Sichuan earthquake had demonstrated that it was politically essential, legally required and technically necessary for the affected State to bear primary responsibility for the protection of its people. Similarly, the principles of neutrality, impartiality and non-discrimination implied that humanitarian assistance efforts should be directed solely towards providing relief to the population of the receiving State, so that they coincided with the principle of non-intervention. Acting otherwise, for instance conducting political, religious or economic activities, constituted not only interference in the State's internal affairs but also a violation of those basic principles.

45. With regard to the more controversial questions of consent and the right to humanitarian assistance, she said that all States without exception could be expected to emphasize the basic principle of consent, first because disaster relief operations were never conducted in a political vacuum. As eloquently stated by Mr. Vascianie, the State had a legitimate right to accept or refuse humanitarian assistance and to choose the provider in line with its interests. The timely distribution of food to disaster victims was certainly desirable, but without the consent of the Government concerned, who would be held responsible if anything went wrong with the food or the operation itself? Such seemingly trivial practical matters could have a serious social impact during a sensitive period, especially if such action was taken against the will of the State concerned. From a legal point of view, the right "to impose" rather than "to give" humanitarian assistance lacked the necessary character of generality and enforceability. Moreover, if protection was held to be an absolute right and duty and if one could require a State to accept humanitarian assistance, it could be argued as a corollary that a State might be required to provide such assistance. Terms such as "unwilling or unable" and "lawful or unlawful refusal", to cite Mr. Gaja, were subject to arbitrary or subjective interpretation, and a well-intended offer might give rise to an international dispute. She agreed, however, that in exceptional circumstances, where problems arose in channelling humanitarian assistance to a disaster-stricken area, bilateral, regional or multilateral political and diplomatic efforts should be undertaken to find appropriate solutions. Even in disaster situations, however, treating humanitarian intervention as a matter of law would undermine the very foundations of the international legal system.

46. Turning to technical matters, she emphasized that it would be virtually impossible to conduct relief operations on the ground in the event of a disaster without the consent of the affected State. China, which was very grateful to the rescue teams from Japan, the Republic of Korea and the Russian Federation, to mention only a few countries, had undertaken major coordination work to facilitate their task. Hence the consent of the affected State was required not only in its own interest, but also in the interest of the States providing assistance. Nevertheless, it should not be concluded that the requirement of consent was absolute and that all assistance without exception should be delivered in response to a request. It could be offered or arranged, or it could result from implicit consent, such as through the issue of a visa.

47. With regard to the scope of the topic *ratione personae*, she noted that NGOs and volunteers were important actors when it came to ensuring the success of natural disaster relief operations. However, the affected State remained primarily responsible for mobilizing and coordinating relief efforts which did not mean that such actions could be conducted only at the request of the State concerned. Non-State actors had the right to initiate relief activities but they should operate under the jurisdiction and control of the affected State, which should be able to accept or refuse the assistance offered. Once accepted, the activities of non-State actors should be subject to the domestic law of the affected State and comply with the rules of international law. In other words, non-State actors had a clear legal status, whether they acted as “agents of humanity” or “agents of the international community”. When the Commission advocated the principle of solidarity in the present context, it should not base its definition of international humanitarian assistance solely on morality or charity, but rather on a kind of legal obligation consistent with the existing international legal order. It should not design a potentially contentious and confrontational legal mechanism for disaster relief, but lay the basis for a legal framework founded on cooperation and coordination that was conducive to the promotion of international solidarity. Only by adopting such an approach could the Commission best serve the interests of the people in the greatest need of assistance in the event of a disaster. With regard to the final form of the Commission’s work, it was difficult to take any decision before the scope of the topic had been delimited. If its scope was appropriately restricted, in other words if it focused on natural disasters and emergency relief operations and included non-State actors on appropriate terms, the Commission might opt for a draft convention.

48. Ms. JACOBSSON commended the Special Rapporteur on his excellent preliminary report. She was impressed by his approach to the topic, which had resulted in an independent and well-structured first report that clearly mapped out the theoretical and practical problems. The Commission thus had an excellent basis for delimiting the general scope of the topic. She noted that the topic had received strong support in the Sixth Committee, which was perhaps not so surprising since most peoples and States were bound to be concerned when faced either with real natural disasters or with media footage of disaster situations. States and people wished to help and were frustrated when their assistance was turned down, failed to reach the right people or failed to reach any victims at all, as was sometimes the case. The desire to assist stemmed from the spirit of solidarity mentioned by Mr. Petrič and was not necessarily triggered by legal considerations or a perceived right to assistance. The abundance of relief or humanitarian organizations was sometimes more of a hindrance than a help for people in disaster-stricken areas.

49. In a publication entitled *Law and Legal Issues in International Disaster Response: A Desk Study*,²⁰⁶ the IFRC noted: “The right aid is often quite literally trapped behind the wrong aid”. The study had not been undertaken by IFRC to complain about the occasionally

excessive willingness to extend a helping hand to victims, but because it was confronted with serious legal barriers that impeded effective international disaster relief operations. In 2007, after several years of work under the International Disaster Response Law Project, the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance²⁰⁷ had been adopted at the thirtieth International Conference of the Red Cross and Red Crescent by representatives of national Red Cross and Red Crescent Societies and by States, so that the document carried a certain weight. The Guidelines, which dealt with the conditions whereby States could facilitate the access of assisting organizations to legal facilities, particularly those relating to entry and operations, were important because they were both detailed and problem-oriented. They were furthermore a useful source of information for compiling the glossary proposed by Mr. Hmoud.

50. The Commission should be careful not to duplicate these Guidelines. No doubt that was why the Special Rapporteur had suggested in paragraph 62 of his report that a rights-based approach should be adopted, since such an approach was lacking. She drew attention in that connection to the opening address of Ms. Mary Robinson, former United Nations High Commissioner for Human Rights, to the Second Interagency Workshop on Implementing a Human Rights-based Approach in the Context of United Nations Reform.²⁰⁸ A rights-based approach required the following questions to be raised in each case: what was the content of the right? Who were the rights-holders and were they able to claim their rights? And who were the corresponding duty-bearers and were they able to fulfil their obligations?

51. Those questions clearly demonstrated that the protection of persons in the event of disasters was not solely a “charity-based” project and that legal issues were at the heart of the matter. Moreover, the rights-based approach was not limited to a human rights perspective, but also raised the question of the rights and duties of States. The final outcome of the Commission’s work could not be limited to *ad hoc* solutions to practical problems, which—however laudable—were primarily political and diplomatic solutions. The challenge facing the Commission was to present a set of draft guidelines or draft articles that would fit into the system and structure of the law without being purely academic. At the same time, the outcome should demonstrate that the Commission was aware of the problems “on the ground” and sought to achieve concrete results for the protection of persons affected by disasters. The outcome should constitute a useful legal contribution to the enhancement of such protection. The Commission had already engaged in a number of “mini-debates” on the concept of the responsibility to protect, humanitarian intervention and the right to humanitarian assistance. However interesting they might be, she would prefer to focus on the content of the rights and obligations in question rather than on the labels.

²⁰⁷ See footnote 183 above.

²⁰⁸ *Report of the Second Interagency Workshop on Implementing a Human Rights-based Approach in the Context of UN Reform*, Stamford (United States), 5–7 May 2003, pp. 37–40.

²⁰⁶ See footnote 184 above.

52. Turning to the Special Rapporteur's request for the Commission's views regarding the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, she noted with respect to the scope *ratione materiae* that, in the absence of any generally accepted legal definition of the term "disaster" in international law, the Commission would either have to establish its own definition or compile a list of situations to which the draft articles would be applicable. In order to be meaningful, any such definition or list of situations should be based on what had been deemed to constitute a "disaster" by other entities that had been closely involved in adopting measures to prevent and respond to disasters.

53. Several members of the Commission had noted that the 1998 Tampere Convention contained a workable definition of the term "disaster". In her view, it had the additional advantage of being almost identical to the definition contained in the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance adopted by the International Conference of the Red Cross and Red Crescent, the only difference being that the definition in the Guidelines explicitly excluded armed conflicts.

54. She agreed with the Special Rapporteur that a transboundary effect was not a prerequisite for characterizing a situation as a "disaster". However, the legal consequences of a disaster that had a transboundary impact should be analysed and compared with those of a disaster occurring solely within a State's territory. The legal frameworks applicable to the two situations were very different.

55. In the Special Rapporteur's view, the title eventually chosen by the Commission suggested that the scope of the topic was broader, and Ms. Escarameia had confirmed that interpretation. She agreed that such an approach seemed to be the best way of achieving the aim of codification and progressive development of the topic, which was to forge rules for the protection of persons. As the need for protection was equally great in all disaster situations, the Special Rapporteur advocated the adoption of a holistic approach but considered that armed conflicts *per se* should be excluded. While she agreed in principle, she felt that it would be difficult in practice to avoid crossing the threshold between situations of peace and armed conflict. It would not only be difficult to distinguish between the different causes of a war but also to determine and even agree on whether an "armed conflict" existed, especially if it occurred in specific parts of a State's territory. Moreover, the rules of international humanitarian law concerning assistance in international armed conflicts were far more developed than those pertaining to internal conflicts. It followed that while the Commission should refrain from covering situations of armed conflict as such, at the same time it should not rule out the possibility of discussing specific situations in which an armed conflict was part of the problem. She agreed with Mr. Kamto's comment in that regard.

56. With regard to the second component of the scope of the topic *ratione materiae*, the concept of protection, all phases should be addressed, but the starting point should be the disaster itself. The Special Rapporteur stated that the protection of persons was also predicated on such

principles as humanity, impartiality, neutrality and non-discrimination, as well as sovereignty and non-intervention. She shared that view but noted, in addition, that protection was closely linked to aspects of human security, an area that should also be examined. Issues relating to the protection of property and the environment could be discussed, but only if they could be shown to constitute an integral part of the protection of persons.

57. With regard to the scope of the topic *ratione personae*, States were at the core of international law and the protection of persons was their responsibility. It was therefore essential to focus on States. That did not mean that the Commission should disregard the numerous actors who were involved in disaster situations, but that the starting point should be States and their rights and obligations.

58. Turning to the scope of the topic *ratione temporis* and the concept of prevention, she noted that, according to the Special Rapporteur, "the concept of responsibility to prevent [was] also a recognized component in the emerging concept of protection in international humanitarian law". She would go further and say that prevention had always been a core component of both *jus ad bellum* and *jus in bello*. The entire structure of the modern law of warfare was geared towards preventing a situation from deteriorating, for either the combatants or the civilian population (given that, in such circumstances, prevention in the context of *jus ad bellum* would have clearly failed). It was another facet of the principle of proportionality. The Special Rapporteur was therefore to be commended for raising the question of prevention and shedding light on an important aspect of the responsibility to protect. She was unable to share Mr. Wisnumurti's view that responsibility was "a euphemism for humanitarian intervention", particularly if he was referring to military intervention. She submitted that the responsibility to protect was an important concept when it came to adopting preventive measures that would address both the root causes and the direct causes of crises that placed a population at risk. The extent to which a State was also required to take preventive measures in the event of a natural disaster was certainly a question that merited discussion. Still on the issue of the scope *ratione temporis*, it seemed legally necessary for the time element to encompass the pre-disaster and post-disaster phases. She did not mean that the Commission should create a set of new legal rules but that, in terms of working methods, the analysis should also cover the consequences of rights and obligations that could be deemed to exist before and after the disaster occurred.

59. With regard to the final form of the outcome of the Commission's work, it was still too early to take up a firm position. However, it would be unfortunate if the Commission were to add another set of "practical guidelines" to the plethora of soft law instruments already applicable to the subject. It would be preferable, as the Special Rapporteur had put it, to strike an "appropriate balance between *lex lata* and *lex ferenda*", with the final form depending entirely on the future orientation of the Commission's work.

60. Lastly, she felt that Mr. Gaja's proposal to establish a working group might be premature. The Special Rapporteur should first sum up the discussion. If he considered

that a working group might be of some assistance, the Commission could act on the idea. It might also be helpful to invite the IFRC to present its work and conclusions to the Commission and to have an informal discussion on how to ensure that their work was complementary. Later on, other entities such as the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), the United Nations Development Fund for Women (UNIFEM) and the United Nations Children's Fund (UNICEF) might be invited to present their views on particular aspects of people's needs in disaster situations.

61. Mr. PERERA said that the delimitation of the scope of the topic of protection of persons in the event of disasters, as set forth in the Special Rapporteur's preliminary report, was undeniably of crucial importance for a subject that raised a wide range of social, economic and political issues. With regard to the scope of the topic *ratione materiae*, the Special Rapporteur considered that the title eventually agreed upon by the Commission suggested a broad scope encompassing all kinds of disasters. Drawing attention to the difficulties involved in undertaking a strict categorization of disasters, the Special Rapporteur contended that a holistic approach was best suited to the codification and progressive development of the relevant rules. While there was certainly merit in that argument, he submitted that it would nevertheless be desirable for the Commission to consider adopting a two-step approach to the topic, confining its study first to natural disasters and then broadening it to cover man-made disasters. The approach adopted for the topic of aquifers and oil and gas²⁰⁹ could serve as a useful precedent. His experience of the tsunami disaster that had struck Sri Lanka in December 2004 had convinced him of the need to give priority, when considering the topic, to the protection of victims, with a view to developing a legal framework.

62. The Special Rapporteur had rightly excluded armed conflicts from the scope of the topic on the ground that international humanitarian law constituted a *lex specialis* in such situations: the same reasoning was applicable to protection of the environment.

63. In response to the Special Rapporteur's question as to whether the concept of protection should be regarded as a separate concept or whether it encompassed the concepts of response, relief and assistance, he emphasized that the concept of protection would have very little tangible meaning unless it was based primarily on the idea of an immediate response in the form of relief and assistance—distribution of essential goods, materials and services to the victims of disasters. In that connection, he referred to Mr. Brownlie's idea of a problem-based approach and the interesting discussion to which it had given rise.

64. In paragraphs 53 to 55 of his report, the Special Rapporteur raised a number of relevant issues that were both legally complex and politically sensitive. In paragraphs 54 and 55, for instance, he discussed the possible existence of a right to humanitarian assistance. He wished to associate himself, in that regard, with the view

expressed by a number of speakers, particularly Mr. Nolte at an earlier meeting, that human rights constituted only part of the overall legal approach to the topic: what was required was a human-rights-oriented approach rather than an approach based exclusively on human rights.

65. Referring to the debate at the previous meeting during which a number of General Assembly resolutions, particularly resolution 46/182, had been cited, he noted that, according to the principle of subsidiarity, it was the territorial State that played the primary role in the initiation, organization, coordination and implementation of humanitarian assistance in its territory. It followed that international humanitarian assistance should constitute subsidiary action that was never taken unilaterally. According to the Secretariat's study, a broad spectrum of geographically and politically diverse States had espoused that view. The principle of subsidiarity could be supplemented by that of international cooperation, which was clearly recognized as a fundamental principle of international law and was elaborated in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in its resolution 2625 (XXV). While those principles should form the core of a legal framework of general principles for the protection of persons in the event of disasters, establishing the necessary balance between the principle of sovereignty, on the one hand, and victims' right to assistance, on the other, it must nonetheless be conceded that there could be, and had been, situations of an exceptional nature calling for political and diplomatic action outside the general framework of the principles in question. He cited as examples situations in which international assistance was refused or in which there was a complete breakdown of national assistance institutions, mechanisms and procedures. Nevertheless, the general norms and principles to be formulated should address situations that normally arose in the event of disasters.

66. The Special Rapporteur had also raised the question of the appropriateness of extending the concept of the responsibility to protect and the question of its relevance to the topic. In doing so, he had rightly struck a cautious note. The Commission should exercise caution in invoking a concept that was essentially political and without precise legal contours, since it might find its work mired in political controversy. As noted by a number of speakers, the concept had been developed in a political context and was liable to be abused for political aims. He drew attention to the fact that it was mentioned in the 2005 World Summit Outcome document adopted by the General Assembly in its resolution 60/1 in connection with very specific and extreme situations involving flagrant violations of human rights, namely genocide, crimes against humanity and war crimes.

67. With regard to the scope of the topic *ratione personae*, the Special Rapporteur referred to the involvement of a multiplicity of actors and raised the question, with a view to assessing the weight to be accorded to the practice of non-State actors, of whether a right of initiative existed along the lines of that recognized in various international humanitarian right instruments. It was important to emphasize again in that context the primacy

²⁰⁹ See *Yearbook ... 2003*, vol. II (Part Two), chap. IX, *passim*, and especially *Yearbook ... 2007*, vol. II (Part Two), chap. V, paragraphs 160–177.

of the role of the affected State as a general principle and the subsidiary character of all other measures taken under the umbrella of international cooperation and solidarity. The existence of an independent right of initiative was not supported either by the literature or by State practice. The experience of Sri Lanka in the wake of the tsunami, when non-State actors had allegedly engaged in activities extraneous to their relief and rehabilitation mandate, including forced religious conversions, strongly militated against according a "right of initiative" relating to the provision of assistance outside the regulatory framework of the affected State.

68. With regard to the action of non-State actors in the wake of the tsunami in Sri Lanka, he emphasized the critical role played by local NGOs, which had provided immediate relief well before international assistance had arrived.

69. Turning to the scope of the topic *ratione temporis*, he emphasized that the response phase should be given priority and remain the central focus of the study.

70. Lastly, on the question of the final form of the outcome of the Commission's work, he felt that guidelines or draft principles would be a more prudent and realistic option than a convention.

71. Mr. HASSOUNA said that the subject under consideration was highly topical since disasters were a global phenomenon calling for a global response. As the Special Rapporteur had noted, the aim of the preliminary report on the topic was to identify issues and stimulate debate in the Commission in order to provide him with the requisite guidance. The Special Rapporteur proposed adopting a rights-based approach. He noted that different views on the matter had been expressed during the debate: mention had also been made of a problem-based approach, an operation-based approach and an obligation-based approach. All those approaches were valid since they were interrelated and dealt with the issues from different perspectives. A more holistic approach might therefore be appropriate. It was first necessary to define the problems, formulate principles and establish the necessary procedures and institutions. To ensure balance, the rights and obligations of all parties concerned should be recognized. The individual's right to protection, the right of a State whose territory had been devastated to seek assistance, and the rights and obligations of third States and the international community should all be taken into consideration. The aim in all cases should be to protect individuals and the society in which they lived and to preserve the stability of the affected State so that it could surmount the crisis.

72. With regard to sources, situations of armed conflict were often closely related to disasters. Indeed, conflicts often led to disasters and *vice versa*. Although there was a large body of law concerning assistance in conflict situations, there was none applicable to the topic under consideration, so that a set of legal rules governing the protection of persons in the event of disasters would usefully complement existing provisions. Internally displaced persons were entitled to better protection than that which they currently enjoyed, in the absence of legally binding

rules, under the Guiding Principles on Internal Displacement developed by the Representative of the Secretary-General.²¹⁰ That was therefore an area in which the Commission could make a useful contribution. With regard to the legal instruments applicable to disasters, he emphasized the importance, among the abundant bilateral and multilateral treaties, of regional agreements and mechanisms based on solidarity and cooperation between States in the same region. They benefited from geographical proximity and from cultural and other affinities, and they did not, of course, rule out support from the international community. In the Arab States region, an agreement for cooperation in disaster relief operations had been in force since 1990. The Summit of the League of Arab States held in Algeria in March 2005 had decided to create a mechanism for coordination among Arab bodies dealing with natural disasters and emergency situations.²¹¹

73. With regard to the scope of the topic *ratione materiae*, he agreed with the Special Rapporteur that, for the reasons set out in the report, the study should cover all disasters and not just natural disasters. Protection of property and the environment should be covered only when a close relationship with the protection of persons could be demonstrated.

74. The potential existence of a right to humanitarian assistance and the emerging concept of a responsibility to protect had been debated at length at previous meetings, and the same differences of opinion had been discernible in the Commission as in the other main bodies of the United Nations. In the absence of a consensus, the Commission should tackle those issues with great caution on the basis of objective legal criteria and ensuring full respect for the principles set out in the Charter of the United Nations. Emphasis should be placed not only on the rights of the parties, but also on the obligation to cooperate through legal or diplomatic channels, which had often proved to be effective. In any event, he was convinced that the issues fell within the Commission's mandate and that it should deal with them in spite of their political ramifications.

75. With regard to the scope of the topic *ratione personae*, the multiplicity of actors sometimes gave rise to controversy, especially with regard to the role of NGOs, some of which played a positive and constructive role, while others were perceived to be lacking in transparency and accountability. He therefore supported the idea of setting up a specialized United Nations agency that would be mandated to provide humanitarian assistance in the event of disasters and which, by virtue of its neutrality, could become a supreme coordinator of all humanitarian assistance efforts, a role that OCHA often found it difficult to perform for a variety of reasons, including lack of funds.

76. With regard to the scope of the topic *ratione temporis*, while the three phases of prevention, response and

²¹⁰ Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Human Rights Commission resolution 1997/39 (E/CN.4/1998/53/Add.2), annex.

²¹¹ See the letter dated 18 April 2005 from the Permanent Observer of the League of Arab States to the United Nations addressed to the President of the Security Council (S/2005/274), annex, resolution 17/319 of 23 March 2005.

rehabilitation should be covered, precedence should be given to the response phase in order to meet the most urgent needs of victims.

77. With regard to the final form of the outcome of the Commission's work, it would be appropriate to begin with the preparation of draft articles and to proceed, in the light of progress achieved and State reactions, with the drafting of a framework convention on the subject.

The meeting rose at 1 p.m.

2982nd MEETING

Tuesday, 22 July 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Mellescanu, 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.

1. The CHAIRPERSON welcomed Judge Rosalyn Higgins, President of the International Court of Justice, who, following long-established practice, was to address the Commission under the item "Cooperation with other bodies".

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

[Agenda item 8]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (concluded)

2. Mr. OJO congratulated the Special Rapporteur on his comprehensive and illuminating report (A/CN.4/598) on a challenging emerging area of international law and commended the Secretariat for its seminal background work on the topic. The debate on the report had been robust, giving the necessary impetus for the Commission to move forward in its consideration of the topic.

3. No State chose to have a natural disaster take place within its borders. Natural disasters could occur at any time and anywhere, as an abundance of recent examples showed: Hurricane Katrina in New Orleans, the earthquake and tsunami in parts of Asia, the more recent earthquake in Sichuan Province of China, and the cyclone in Myanmar in which over 80,000 lives had been lost. Recent man-made disasters included the Chernobyl nuclear accident in Ukraine, ethnic cleansing in Bosnia and Herzegovina, Rwanda and Darfur, and the disaster waiting to happen in Zimbabwe if the current political crisis was not resolved.

4. He agreed with Ms. Escarameia that a broad approach should be adopted in dealing with both natural and man-made disasters. The latter sometimes overlapped with the former, and drawing a strict dividing line between them would not serve any useful purpose. He found it difficult to agree with Mr. Nolte's suggestion that the scope of the topic should extend to man-made disasters only if they acquired the characteristics of natural disasters. Who would make that determination, and what would be the parameters: the number of lives lost or properties destroyed? He agreed with Mr. Dugard's earlier intervention on that point.

5. Article 2, paragraph 7 of the Charter of the United Nations enshrined the fundamental principle of international law that no State should interfere in the internal affairs of another State. As Mr. Vasciannie had pointed out, the consequence of not adhering to that principle when providing assistance in the event of a disaster could be that a stronger State might overthrow the Government of another State: the victim State must unequivocally consent to such assistance before it was provided. Yet what would happen if citizens of a country were clearly in need of aid and would perish if none was forthcoming, yet the Government refused to allow aid to enter the country? A not dissimilar situation had arisen recently in Myanmar.

6. While excesses could be perpetrated in the name of humanitarian assistance, as in Mr. Brownlie's example of the intervention in relation to Kosovo, in the name of which bridges had been blown up and properties destroyed, the way to prevent such excesses had been ably propounded by Mr. McRae: rules of conduct or guidelines to facilitate cooperation and implementation should be fashioned. In other words, a balance should be struck between the principles of sovereignty and non-intervention on the one hand, and the reality of a disaster on the other. Dwelling too much on the theoretical and conceptual aspects of the topic at the initial stage would unduly limit the Commission's scope for action. It must not shy away from recommending changes in existing principles and norms in order to satisfy the international community's aspirations concerning emerging areas of international law. Providing ground rules for a *modus operandi* for international assistance in the event of a disaster was the way forward. It was incumbent on the Commission to provide the guidance that the Special Rapporteur had requested, rather than taking refuge in the principles of sovereignty and non-intervention.

7. Mr. VÁZQUEZ-BERMÚDEZ thanked the Special Rapporteur for his excellent preliminary report and the Secretariat for its memorandum (A/CN.4/590 and Add.1–3), which contained extensive and useful information and helpful suggestions on aspects of the topic that could be taken up by the Commission.

8. The report set out to provide the Commission with the necessary guidance to enable it to delimit the scope of the topic. It would be immensely useful, however, if, in his analysis of international norms and structures, the Special Rapporteur would consider briefly discussing the coordinating role played by the United Nations and its specialized agencies, particularly through the Under-Secretary-General for Humanitarian Affairs and