

Document:-  
**A/CN.4/3017**

**Summary record of the 3017th meeting**

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

Extract from the Yearbook of the International Law Commission:-  
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80. The Special Rapporteur had stated that solidarity and cooperation were the principles underlying the protection of persons in the event of disasters. It therefore was unclear why he should propose a draft article on the latter but not on the former. Apart from solidarity, there were other principles that should be included in the draft articles, such as the dignity and human rights of persons in need of protection and non-discrimination in the protection of individuals.

81. As to draft article 3 (Duty to cooperate), the expression “as appropriate” should not apply to all of subparagraph (a), given that States always had the obligation to cooperate with the United Nations pursuant to Article 56 of the Charter of the United Nations, to which the Special Rapporteur frequently referred. It was regrettable that the expression “non-governmental organizations” had been omitted, replaced by the euphemism “civil society”, in subparagraph (c). She therefore proposed that an additional subparagraph should be inserted between current subparagraphs (b) and (c) in order to designate, not NGOs in general, but rather “relevant humanitarian non-governmental organizations”—an expression used in numerous documents in the field, including General Assembly resolution 63/139 of 11 December 2008 (Strengthening of the coordination of emergency humanitarian assistance of the United Nations). It would also be good to mention cooperation with the least developed countries, as suggested by Mr. Saboia.

82. With regard to terminology, the draft article should refer to States “or other territorial entities”, as the Institute of International Law had in its 2003 resolution. As to the future work of the Commission on the topic, it was useful to keep in mind that, according to the topical summary of the discussion in the Sixth Committee, “[s]everal delegations were of the view that the concept of responsibility to protect was relevant to the topic” (A/CN.4/606, para. 87).

83. Lastly, she was in favour of referring articles 1 to 3 to the Drafting Committee after due account had been taken of the suggestions made.

*The meeting rose at 1 p.m.*

### 3017th MEETING

*Wednesday, 8 July 2009, at 10.05 a.m.*

*Chairperson:* Mr. Ernest PETRIČ

*Present:* Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

### Protection of persons in the event of disasters (*continued*) (A/CN.4/606 and Add.1, sect. F, A/CN.4/615, A/CN.4/L.758)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON warmly welcomed Ms. Margareta Wahlström, Assistant Secretary-General for Disaster Risk Reduction and Special Representative of the Secretary-General for the Implementation of the Hyogo Framework for Action, who was attending the meeting as an observer. He then invited the Commission to resume its consideration of the second report on the protection of persons in the event of disasters (A/CN.4/615).

2. Mr. GAJA commended the Special Rapporteur on his second report on the protection of persons in the event of disasters and said that his ability to elicit responses from the main institutional actors had provided the Commission with a wealth of material for consideration. As it was not yet clear what kind of principles and rules the Commission intended to formulate on the subject, it was difficult to express more than tentative views on the matters dealt with in the report.

3. The rights-based approach, which had been advocated by several members of the Commission in 2008 and supported by some States in the Sixth Committee, would seem to necessitate the formulation of a number of obligations for States and other entities, in particular for the State on whose territory the disaster occurred, i.e. the affected State, because rights had their counterpart in obligations. The resolution on humanitarian assistance adopted in 2003 by the Institute of International Law<sup>205</sup> could to some extent be used as a model.

4. While there was certainly consensus within the Commission that States and other entities should cooperate in disaster relief, it was unclear what specific international obligations cooperation would entail (cooperation about what, to what extent and with whom), and it was far from obvious what consequences would flow from a failure by States, especially the affected State, to comply with their obligation to protect.

5. It would be difficult for the Commission to outline precise obligations under international law for States other than the affected State and for entities other than States. A number of States and NGOs might be willing to provide assistance, but they could well be reluctant to accept that they were under an obligation to do so. In fact, willing helpers were not usually lacking; what was often needed was the efficient coordination of the disaster response. The role of the affected State was crucial at that juncture. After a disaster, although assistance was available, it was sometimes the affected State that hindered protected persons from exercising their right to receive assistance. The affected State was certainly entitled to ensure the coordination of relief efforts and it might have very good reasons to refuse certain forms of assistance, but according to the Bruges resolution, “[a]ffected States are under the

<sup>205</sup> *Ibid.*, pp. 265 *et seq.*

obligation not arbitrarily and unjustifiably to reject a *bona fide* offer exclusively intended to provide humanitarian assistance or to refuse access to the victims”.<sup>206</sup> For that reason, the affected State would not be entirely free to create obstacles to the flow of international assistance. If the Commission agreed with that statement, at least in principle, the key question then would be what would happen if the affected State failed to comply with that obligation. The above-mentioned resolution had been adopted in 2003 and, since then, events had proved that such non-compliance was a major concern. Although a right of protected persons to humanitarian assistance seemed to imply some form of intervention on the part of States other than the affected State, a consensus within the Commission or elsewhere on that concept of humanitarian assistance was improbable. In that connection, he recalled the impassioned plea made by Mr. Vasciannie in 2008.<sup>207</sup>

6. The Commission was unlikely to enhance the protection of persons in the event of disasters by setting forth rights and obligations, unless it addressed the important question of how to facilitate the flow of international assistance with the consent of the affected State. Therefore, the Commission would have to investigate some of the causes of affected States’ unwillingness to accept international assistance. In some cases, that unwillingness was exacerbated by the worry that foreign States would interfere unduly in the conduct of internal affairs and that NGOs might pursue policies inconsistent with those of the affected State.

7. One option for the Commission would be to look for more efficient and neutral ways of coordinating international assistance. Although it was an unusual approach for the Commission, any consideration of that question should include institutional aspects. The Commission could, for instance, suggest a stronger role for the United Nations, or a United Nations agency, in promoting and coordinating all international assistance, whether from public or private sources, and in facilitating the flow of assistance that would be acceptable to the affected State. The idea would be to promote a dialogue between the affected State and the United Nations, or one of its specialized agencies, thus obviating the need for that State to deal with a multiplicity of entities or States. Despite all the work already being done within the Organization, as described in the informal paper containing the observations of OCHA,<sup>208</sup> assistance to an affected State would be facilitated if a single international organization were to collect data, list needs and negotiate the means of delivering assistance acceptable to the affected State. If the issue of an affected State’s reluctance to accept assistance were ignored, there was a risk that the Commission would merely make a series of statements, like those expressed by the Institute of International Law, which would probably have no positive impact.

8. He would be reluctant to start drafting principles relating to the protection of persons before more specific

obligations and their implementation had been discussed in depth. The Special Rapporteur had been wise not to go too far in his analysis in the current year. There was no need to rush to the Drafting Committee. It would be better to see what other principles and rules needed to be stated, before defining the principle of cooperation.

9. Hence it would be preferable to refer to the Drafting Committee only the provisions relating to the scope of the draft articles, in other words draft articles 1 and 2, since the definition of “disaster” necessarily affected the scope of the topic.

10. The Special Rapporteur had made a wide survey of existing definitions, and his second report contained two proposals which might offer a useful basis for discussion in the Drafting Committee. He personally would prefer a short version of draft article 1, for example: “The present draft articles apply to the protection of persons in the event of disasters.” The related definition of disasters could indeed encompass material and environmental loss affecting persons, irrespective of the cause. In that respect, he agreed with Ms. Escarameia that it was important not to dwell on causes, because they were often hard to define and might complicate the decision as to whether the draft articles were applicable. He was unable to suggest a more succinct version of draft article 2 and would even add the words “an event or chain of events” at the beginning of the definition, because the significant or widespread loss and the disruption of the functioning of society were the consequences of the disaster rather than elements of it. He tended to agree with the suggestion made by Mr. Murase with regard to the characterization of the loss, and with the comments of Mr. Saboia to the effect that imminent harm should be sufficient and that reference to the disruption of society might be unnecessary.

11. Mr. McRAE thanked the Special Rapporteur for his comprehensive introduction of his second report and for his explanation of the rights-based approach that he had adopted. He agreed with the Special Rapporteur that the most practical manner of proceeding would be to deal first with disaster and post-disaster situations and State actors and to leave prevention and non-State actors until a later stage.

12. As the Special Rapporteur had recognized, it was also important to focus on needs. In his own informal discussions in Canada with disaster-relief providers, the general view had been that the needs, rather than the rights, of individuals should be the starting point of any consideration of the topic, although they did not see needs and rights as mutually exclusive.

13. The comments on the rights-based approach in the second report were helpful, and the two-track method of identifying State-to-State obligations and of looking at the relationship between the State and the real beneficiary of those obligations, the individuals who were the victims of the disaster, was a useful analytical approach. He was, however, unsure that the jurisprudence cited supported the Special Rapporteur’s view of that distinction. In the *LaGrand* case, the ICJ had distinguished between the rights and obligations of States in relation to one another and the rights of the detained person. The Special

<sup>206</sup> *Ibid.*, p. 275.

<sup>207</sup> *Yearbook ... 2008*, vol. I, 2980th meeting, pp. 148–149, paras. 26–31.

<sup>208</sup> ILC(LX)POPD/INFORMAL/1(distribution limited to the members of the Commission).

Rapporteur had construed that as, on the one hand, a distinction between the rights and obligations of States in relation to one another and, on the other hand, the obligations owed by a State to the individual concerned; in paragraph 23 of his report, he said that this was the approach that he was going to follow.

14. However, he had also referred to the practice of the Dispute Settlement Body of the WTO in the case of *United States—Sections 301–310 of the Trade Act of 1974*, in which the panel had reasoned that the obligations owed by States to each other under WTO agreements were designed to facilitate the economic activity of individual economic operators and that the rules therefore functioned for the benefit of individuals. In paragraph 27 of his report, the Special Rapporteur said that that was the approach that he was going to adopt.

15. However, there was a significant difference between those two cases. In the *LaGrand* case, the Court had taken the view that the individual had rights and that the State had obligations to the individual in respect of those rights. In *United States—Sections 301–310 of the Trade Act of 1974*, the individual economic operators derived no rights from State-to-State rights under WTO agreements. Although they benefited from the opportunity of gaining access to the market through the rules of WTO agreements, they had no rights in the sense that a detained person had the rights referred to in the *LaGrand* case.

16. He therefore wondered which of the two models the Special Rapporteur was really following. When the Special Rapporteur referred in draft article 1 to the “rights of persons”, he was clearly following the *LaGrand* model, which postulated that States’ obligations did not just benefit individuals in practice but bestowed rights on them. However, an instrument setting out the rights of persons affected by disasters might not provide the pragmatic approach required by the topic. On the other hand, draft articles setting out what States could, should or must do in the event of disasters, which were predicated on State practice in that area, would be a very useful outcome. The primary focus of the topic should therefore be the rights and obligations of States; articulating the rights of individuals would complicate matters.

17. The Special Rapporteur’s discussion in his second report of the two axes—State-to-State and State-to-individual—might perhaps be a way of focusing primarily on State-to-State obligations. But, in that case, the inclusion of the reference to the rights of persons in draft article 1 was a problem, because if any mention were made of the rights of persons and of the obligations of States towards individuals, which was the reverse side of the coin of the rights of individuals, it would be necessary to articulate what those rights were. Therefore, there was still a need to discuss the full implications of a rights-based approach and whether it should be applied.

18. However, it might not be necessary to touch on the question of rights in draft article 1. Its wording indicated, first, that the draft articles applied to the protection of persons in the event of disasters; second, that the objective was to ensure the realization of the rights of persons in such an event; and, third, that the aim was to provide an

adequate and effective response. As it stood, it was concerned not only with scope—the protection of persons in the event of disasters—but also with objectives—realizing rights and providing an adequate and effective response. For that reason, draft article 1 mixed together preambular language, or language that belonged in an article about objectives, and wording about the scope of the draft articles. The result was confusing.

19. Mr. McRae would suggest splitting draft article 1 into two articles. One would refer to scope, and he would be in favour of the succinct wording proposed by Mr. Gaja. A separate article would deal with objectives, namely providing a framework to ensure an adequate and objective response in the event of disasters. Some rethinking of the wording of draft article 1 was therefore needed in order to separate the two distinct issues.

20. He agreed that a definition of “disaster” was important. The Special Rapporteur’s analysis of the different approaches to such a definition was instructive. While he concurred with Ms. Escarameia that, in principle, an effort should be made to ensure that the draft articles did not overlap with the provisions of international humanitarian law, it might not be possible to do so simply by excluding armed conflict from the definition of disasters. One question that arose was whether the exclusion as worded applied only to armed conflict while it was occurring, or also applied to the consequences of armed conflict or the disruption that existed in a society after the conflict had ended. Moreover, wording that excluded armed conflict was better placed in an article on scope than in an article on definition, although Mr. Gaja had contended that both articles 1 and 2 related to scope. Like Mr. Saboia, he thought that the lack of any reference to causation in draft article 2 made it so broad that it could be taken to refer to a political or economic crisis. As that was clearly not what the Special Rapporteur had in mind, some kind of limiting factor, such as causation, ought to be introduced.

21. The Special Rapporteur’s analysis of cooperation was very helpful, but there was a disconnect between the analysis and draft article 3. Of course, a duty to cooperate existed in a number of areas, but more evidence of the nature of a duty to cooperate was required when it came to the protection of persons in the event of disasters. If States had a duty to cooperate, he wondered if the same could be said of international organizations or NGOs, even if the qualifying phrase “as appropriate” was added. The question was whether the draft article should be worded “shall cooperate”, which suggested that such an obligation existed, or whether some sort of differentiation should be made between circumstances where quite clearly there ought to be cooperation, for example, between States and the affected State, and circumstances where a recommendation would be more appropriate, as in the case of cooperation with international organizations and NGOs, where the word “should” and not “shall” would be more apposite.

22. It was also unclear why draft article 3 began with the phrase “[f]or the purposes of these draft articles”. Since the obligation to cooperate would arise in the event of a disaster, the opening phrase should be “In the event of a disaster, States shall or should cooperate”. Furthermore

he was not sure that the term “civil society” had acquired a meaning so widely accepted that it should be used in the draft articles. As, in that context, the term actually referred to local or international NGOs, it might be wiser to employ the adjective suggested by Ms. Escarameia, and refer to “relevant non-governmental organizations”. But a reference to NGOs raised the question of the relationship with non-State actors, the consideration of which was to be postponed until a later stage. If Mr. Murase’s suggestion that the Commission should advocate drawing up an acceptable list of NGOs were followed, the Commission would then face the whole question of how the draft articles should deal with non-State actors. For that reason, a provision stating that States should cooperate with relevant NGOs was perhaps as far as the Commission could go at the current stage.

23. In his opinion, the draft articles should be sent to the Drafting Committee only after some revision. The Special Rapporteur should reflect further on the distinction between scope and objectives in draft article 1, on a limiting factor in draft article 2, on the scope of the terms “serious”, “significant” and “widespread”, on the scope of the duty to cooperate and on whether such cooperation could merely be recommended. Those were matters which should not be left to the Drafting Committee.

24. The protection of persons in the event of disasters was a very difficult topic and new terrain for the Commission. He congratulated the Special Rapporteur on making the Commission think about the complicated issues it raised and on the excellent job he had done in engaging bodies directly involved in disaster relief and response, such as the ICRC and OCHA. In an area of such great complexity, it might be helpful for the Commission to get a clearer picture of what actions States took in response to a disaster. On reading the observations of OCHA, he had begun to think that the Commission required diagrams and flow charts to understand the whole process.

25. Ms. Xue thanked the Special Rapporteur for his second report on the protection of persons in the event of disasters and welcomed his commendable efforts in reaching out to the relevant international organizations to hear about their experiences in disaster relief activities.

26. She noted that the Special Rapporteur had chosen a rights-based approach as the basis of the draft articles, an approach on which the Commission had held a heated debate at its previous session.<sup>209</sup> When the Commission had decided to embark on the topic, the purpose had been to ensure optimal protection of individual victims of a disaster: in other words, the “*raison d’être*” of the legal exercise was to provide international legal guarantees for the protection of persons. If the rights-based approach was to serve as the legal basis of the draft articles, however, three basic questions must be answered: which individual rights were to be protected in the event of a disaster, who should be obliged to guarantee such protection and how protection of the rights could be ensured at the international level.

<sup>209</sup> The topic was included in the long-term programme of work of the Commission at its fifty-eighth session (*Yearbook ... 2006*, vol. II (Part Two), p. 185, para. 257), based on a proposal by the Secretariat reproduced in annex III of the report of the Commission.

27. The first question was the most crucial. Although armed conflicts had been excluded from the scope of the topic, they presented problems similar to those raised by disasters in terms of the continuous normal functioning of law and order. A disaster was a sudden occurrence that plunged normal social life into chaos. Under such special circumstances, individual rights and freedoms were bound to be affected. If protecting individual rights was the purpose of the draft articles, then it must be made clear precisely which rights were to be protected. It could not be assumed that human rights law and humanitarian law would continue to apply across the board in the event of a disaster, and any sweeping claims about rights would render the whole project pointless.

28. Under human rights law, derogations from certain individual rights were permitted in emergency situations. While such derogations were not necessarily applicable in all respects to disaster situations, it was unquestionable that certain individual human rights and freedoms could not be fully realized in the event of a disaster. The Special Rapporteur suggested in paragraph 17 of his report that rights and needs were to enter the equation, complementing each other when appropriate. In practice, however, that approach would tend to give rise to disputes, either between the Government and individuals or between the disaster-stricken country and outside actors.

29. If the intent of a rights-based approach was to give individuals legal standing (*locus standi*) to claim protection from their Government or to request international assistance, in opposition to the principle of non-interference, that was unlikely to meet the individual needs of persons and would complicate disaster relief operations. In a disaster, individual interests, collective interests and public order concerns were frequently interwoven. With limited resources available at both the domestic and international levels, those interests often had to be weighed and balanced. The rights-based approach did not seem to provide a solution to those important problems.

30. In paragraphs 20 to 25 of his second report, the Special Rapporteur referred to a series of cases of the ICJ to illustrate the Court’s jurisprudence on the protection of human rights in international law. She fully endorsed the points made but did not quite grasp the notion of the two axes as explained in paragraphs 19 to 27. Actual experience in dealing with natural disasters had shown that it was the State first and foremost that had the right and obligation to protect persons under its jurisdiction and control. The principle of sovereignty was the essential principle, and it was the affected State whose responsibility to protect was of prime importance. The guidelines and manuals on disaster relief developed by international organizations or NGOs had a direct bearing on State action. The notion of two axes should therefore be intrinsically linked with the rights and obligations of the State.

31. In short, the realization of the individual rights of persons in the event of disasters primarily depended on the implementation of the obligations of States. When a disaster reached such a scale that the affected State, with all the capacity and resources it had available, could not cope by itself, international solidarity should come into play. Solidarity was not compulsory in nature, either for

the recipient State or for the assisting actors. However, the rights-based approach implied that the recipient State must accept international assistance with a view to meeting the needs of persons. If the protection of rights was held to be an absolute duty, the corollary was that international aid must be provided whenever requested. That position was obviously not based on State practice.

32. Turning to the three draft articles, she noted that draft article 1 comprised three elements: the purpose of the draft articles was to ensure the realization of the rights of persons in a disaster; States must provide an adequate and effective response; and States must meet the needs of persons in all phases of a disaster. Unless the kinds of “rights” that it was essential to protect in the event of a disaster and the “needs” that deserved particular attention during disaster relief operations were specified, those terms could be given a fairly broad interpretation and be rendered impossible to implement by States, small or big, weak or strong. In the 2008 earthquake in Wenchuan, Sichuan Province, despite all the efforts to mobilize rescue forces to save people’s lives, provide food, clean water and medical care, arrange temporary shelter and quickly resume the operation of schools, there were still certain individual rights and freedoms that had had to be restricted for the sake of safety or the maintenance of public order and the prevention of epidemics. Draft article 1 failed to state the conditions under which the objective of protection was envisaged, whether that was the sole primary objective in the event of a disaster and how it was linked with the whole range of disaster relief operations.

33. Regarding draft article 2, concerning the definition of disaster, she agreed with the position that a strict separation between natural and man-made disasters was not necessary, since scientific studies had shown that human activities had contributed to varying degrees to the causes of some natural disasters. While causality was certainly a matter of concern, as Mr. Saboia had pointed out, the Special Rapporteur was wise not to touch on that issue at the current stage.

34. Draft article 2 identified two elements of a definition but overlooked many other factors that might come into play. The first element was “a serious disruption of the functioning of society”; the second was “significant, widespread ... loss”. If the protection of persons and international assistance were contemplated solely under such circumstances, however, that would imply that the draft articles were designed to address only certain types of disasters rather than disasters in general. When a disaster occurred, the functioning of society might not necessarily break down, but human casualties might still result. Sometimes harmful effects might be widespread, but at other times they might be limited to one geographical area. The two elements had been set out without indicating their rationale and their logical link to the rights-based approach.

35. She was puzzled to see that in draft article 3 the Special Rapporteur had immediately addressed the issue of international solidarity and cooperation. In obliging States to cooperate with other States, international organizations and civil society, the draft article implied that a State must favourably consider accepting international

assistance. If the topic was to be approached from a human rights perspective, however, the question of the sovereign rights and obligations of a State in the protection of persons must be addressed, together with the issue of what international principles a State should observe in exercising such rights and obligations. In his preliminary report,<sup>210</sup> the Special Rapporteur had mentioned the principles of humanity, impartiality, non-discrimination, sovereignty and non-interference, which should be appropriately reflected in the draft articles. International assistance, valuable and important as it was in the event of a disaster, should serve as a supplement to, rather than a substitute for, the affected State’s own efforts. In that respect, the special needs and interests of developing countries affected by disaster deserved attention in the draft articles. The improper imposition of international assistance might constitute a form of interference under certain circumstances.

36. In conclusion, since she still had serious reservations about the main content of the draft articles, she thought that it was premature to refer them to the Drafting Committee.

37. Mr. MELESCANU congratulated the Special Rapporteur on the quality of his report and the draft articles it contained and his helpful introductory statement. He noted that a number of questions had to be answered when beginning work on a topic: the need for regulation in that field; the level—national, regional or international—at which regulation should occur; the basic principles on which any new rules were to be based; and the role of United Nations and other international institutions in the field in question.

38. In answer to the first question, there was, in fact, a real need for regulation in the field. A formal argument was that the Commission had decided to include the topic in its programme of work, meaning that it considered it to be a subject that needed to be addressed. A substantive argument was that the world had of late been increasingly affected by serious and even dramatic disasters, and there was a need to define the regime of the affected State regarding the extent of its rights and obligations towards its citizens and its duty to cooperate with other States.

39. Referring to Ms. Xue’s comments about the rights-based approach, he saw it as a kind of stratagem on the part of the Special Rapporteur to provide a basis for the duty of the affected State to cooperate. The key problem was that it was almost impossible to codify an obligation on the part of States to accept assistance offered in the event of a disaster. The rights-based approach was an instrument for circumventing such difficulties, a clever solution to the insoluble problem of the rights and obligations of the affected State, and one to which he was not categorically opposed. Ms. Xue’s questions about which individual rights were involved, who guaranteed them, and so forth, were valid ones, but the Commission could not abandon the rights-based approach, since it must find a solution to that key problem of regulation, or the exercise would have little merit.

<sup>210</sup> *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598, p. 153, para. 52.

40. As to the level at which the problem should be addressed, he agreed with Ms. Xue and others that the primary responsibility in the event of a disaster rested with the affected State. The State was obliged to take all necessary measures to protect its citizens: to adopt legislation, create institutions and offer the necessary funding for relief organizations or national structures. At the European level, there were special agencies for handling natural disasters; they had a legal basis and the instruments and funding necessary for doing so. Perhaps the possibility could be envisaged at a later stage of elaborating guidelines for States on how to deal with disasters. Disasters could also usefully be addressed at the regional level. Natural disasters had a specific impact depending on whether they struck developing countries or least developed countries, and a mechanism at the regional level could therefore be a good solution.

41. He agreed that the Commission had to decide on the basic principles on which the new rules were to be elaborated. Draft article 3 would not be ready to be referred to the Drafting Committee until a clear picture had been gained of all the principles to be included. At present, there was only one, and that left the draft unbalanced. Draft articles 1 and 2, however, could be referred to the Drafting Committee, on the understanding that it would have to address not only drafting changes but also substantive matters.

42. The approach adopted in draft article 1, with the phrase “in all phases of a disaster”, was a good one. Although delegations in the Sixth Committee had insisted that the Commission should concentrate on the disaster proper and the post-disaster phase, he did not think it should expressly exclude the pre-disaster phase, which in some instances could be crucial. With earthquakes, for example, any prior information about the measures that were to be taken could be of great value to the countries concerned. It was therefore safe to use a general formula, referring to all phases of the disaster, on the understanding that it would be refined later, taking into account the positions expressed.

43. Regarding draft article 2, the Commission had been careful not to limit the definition of a disaster to natural disasters. It was agreed that some causes of disaster were natural, others were man-made, and in most cases a combination of the two provoked a disaster. Armed conflicts, especially internal ones, produced disasters that were a clear combination of man-made activities and natural conditions. Hence he supported Ms. Escameia’s proposal to delete the phrase “excluding armed conflict” and to add a “without prejudice” clause with respect to the application of international humanitarian law in armed conflict.

44. Regarding draft article 3, he welcomed the reference to the duty to cooperate and to the competent international organizations, in particular the United Nations and the IFRC. The Commission had a duty to state very clearly that there were specialized, competent institutions that were not only capable of channelling support in disaster situations, but sometimes also more acceptable than States in that regard. Accordingly, the words “as appropriate” should be deleted, and the duty to cooperate, bilaterally or through competent international organizations, should

be unqualified. The reference to civil society was ambiguous; it was not clear whether international or national civil society was meant. He also opposed the idea of naming NGOs, listing the “good guys” and the “bad guys”. The Commission should simply elaborate on the duty to cooperate with reference to States and specialized or competent international organizations.

45. Mr. DUGARD congratulated the Special Rapporteur on his intelligent approach to a particularly complex topic that called for the appraisal of an integration of several branches of international law, namely, environmental, human rights, humanitarian and institutional law.

46. With regard to draft article 1, he agreed that the Commission should adopt a rights-based approach. For that reason, he endorsed the text proposed by the Special Rapporteur, which stressed the rights of the person.

47. However, he had serious difficulties with draft article 2, in which brevity appeared to be achieved at the expense of clarity. He preferred the definition of disaster contained in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations and would favour including in draft article 2 the final phrase of that definition, which read “whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long-term processes” [art. 1, para. 6].

48. The main difficulty with draft article 2 concerned the problem of armed conflict and the numerous questions to which it gave rise, such as whether the Commission intended to include in its set of draft articles a provision defining armed conflict in order to specify what was being excluded, and, if so, whether the Special Rapporteur intended to take into account the *Tadić* decision and the decisions of the various international criminal tribunals, which would appear necessary.

49. In order to illustrate the problem, it would be helpful to consider the question of the definition of disaster in the context of real situations, such as those in Darfur, Gaza, Sri Lanka and Zimbabwe, all of which, in his view, constituted disasters. They would certainly be considered as such under the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, but it was doubtful whether they would be included in the definition proposed in draft article 2, since it expressly excluded armed conflict and would therefore seem to exclude Gaza and Sri Lanka. On the other hand, it could be argued that those were post-conflict situations, leading to the question of whether, for the Commission’s purposes, they qualified as disasters. A further question was how the Commission would deal with the siege of a territory—as opposed to an armed conflict—such as the one that had taken place in Gaza, or with the situation in Darfur, where armed conflict was occurring in some areas but not in others. In his opinion, the Commission should address post-conflict situations in its draft articles, even if it did not address disasters caused by an ongoing conflict.

50. The situation in Zimbabwe, which had resulted not from armed conflict but certainly from human activity,

was a stark illustration of an issue the Commission would have to confront directly, namely, how to reconcile the rights of persons in a disaster with the principle of non-intervention. For all those reasons, he had difficulty with the very brief definition of the term “disaster” proposed by the Special Rapporteur.

51. With regard to draft article 3, he agreed that cooperation was an important principle that should be reaffirmed at the beginning of the draft articles, but he had doubts regarding the institutions referred to in the draft article. For instance, it was unclear under what category the Commission should place the ICRC, which was not covered by the reference in subparagraph (b) to the IFRC. That left the category of “competent international organizations”, referred to in subparagraph (a), unless that phrase meant only intergovernmental organizations and did not include such hybrid institutions as the ICRC. The reference to “civil society” in subparagraph (c) also posed a problem, since the term had no legal meaning and raised doubts as to what kind of civil society organizations were intended. For those reasons, it might be preferable simply to delete subparagraphs (b) and (c) and to indicate that States should cooperate as appropriate with competent intergovernmental and NGOs, with an emphasis on the word “competent”. In his view, the scope and content of draft article 3 required further consideration. Although he was somewhat undecided about draft articles 2 and 3, it was possible that the kinds of criticisms he had made could be remedied by the Drafting Committee. He would therefore agree to referring draft articles 2 and 3 to the Drafting Committee on the understanding that it would have the mandate to expand draft article 2, if necessary, and to reshape draft article 3.

52. The CHAIRPERSON, speaking as a member of the Commission, said that the current topic dealt with an interconnection between very sensitive issues, including sovereignty, human rights, cooperation, solidarity and intervention. As a result, the Commission’s future work on the topic would likely entail many difficult substantive issues. Its current work had got off to an ambitious start, given that the Special Rapporteur had already proposed three draft articles. Although a consensus would have to be reached on the matter, his general impression was that the draft articles were ready to be referred to the Drafting Committee.

53. Before addressing the draft articles as such, he wished to make some general remarks. First, he urged members not to lose sight of the Commission’s main point of departure, which was the protection of the victims of a disaster. Victims—not States—were to be protected, and States were actors in that endeavour, including through international cooperation and solidarity. The protection of persons in the event of disasters responded to a general need that must be met, irrespective of the country involved; he would be strongly opposed to categorizing some groups or countries as needing more assistance than others. The same applied to the post-disaster phase, although perhaps not to the pre-disaster phase, where assistance should be provided as a matter of priority to countries less organized and less capable of dealing with a disaster if it occurred.

54. Second, while there was no doubt that the affected State had the primary responsibility for responding to a disaster, the Commission should bear in mind that there were many instances in which affected States failed to do so. Whether it was due to a lack of capacity, unforeseen obstacles or concerns for sovereignty, or to mismanagement, corruption or even misuse by providers of assistance, help did not always reach those who needed it. That fact had also been one of the Commission’s original points of departure, and he urged members to continue to keep it in mind.

55. When a disaster occurred, the affected State was the main actor; it was the first to respond and had the basic duty to provide assistance to victims. That duty was a reflection of its sovereignty, which was not only a right but also an obligation. A State’s sovereignty carried with it the obligation to protect the welfare, security and survival of the people in its territory. It followed that in the event of disaster, the affected State’s role was to act, to coordinate and to guide, but cooperation was also necessary in many cases. He fully endorsed the Special Rapporteur’s conclusion that cooperation was an established principle of international law.

56. Concerning the human rights issue, he firmly supported the rights-based approach. It was true that nearly all constitutions provided that the enjoyment of human rights could be limited in special situations for reasons of public security and public order, and he considered that this was true in disaster situations. Almost all rights, except the right to life, could be derogated from, but the point of departure should be respect for human rights in general. The Commission should not in its future work on the topic attempt to determine which human rights were relevant and which were not.

57. As to responsibility to protect, he concurred with the Special Rapporteur’s decision to exclude the concept from the draft articles. The responsibility of the affected State to respond in the event of a disaster should not be confused with the notion of responsibility to protect, which implied the idea of humanitarian intervention. Mixing the two would complicate the Commission’s work and lead to insurmountable problems.

58. In terms of specific comments on the second report, he was encouraged by the Special Rapporteur’s account of the way in which the preliminary report had been received by Governments in the Sixth Committee, since he had anticipated that States would have more reservations about the sensitive topic. He welcomed the efforts of the Special Rapporteur to establish contact with representatives of the relevant agencies of the United Nations system and other intergovernmental and non-governmental organizations. The analysis of human rights as a key aspect of disaster response, contained in the manual on *International Law and Standards Applicable in Natural Disaster Situations*,<sup>211</sup> to which reference was made in paragraph 14 of the report, could serve as a useful guide for the Commission’s discussion concerning the human rights to be protected in the draft articles.

<sup>211</sup> *International Law and Standards Applicable in Natural Disaster Situations*, Rome, International Development Law Organization, 2009.

59. He supported the Special Rapporteur's rights-based approach to the topic's scope *ratione materiae*, finding it to be the best possible solution, and the holistic approach to rights and needs, since rights were legal concepts that reflected needs. Accordingly, he supported the points made in paragraphs 17 and 18 of the report, in particular, that the Commission should leave a risk-informed paradigm for later debates.

60. He endorsed the dual approach to the nature of the protection of persons in the event of disasters, which was expressed in terms of two main axes, noting that the most important of the two concerned States in relation to one another. The second axis, that of States in relation to persons in need of protection, should be addressed only after the Commission had clarified the former. The participation of civil society in protecting persons in the event of a disaster was also part of the topic, but the main issue before the Commission was to determine the responsibilities of States in the event of a disaster: first those of the affected State and subsequently those of other States.

61. He shared the Special Rapporteur's view that the Commission should initially limit itself to the disaster proper and the post-disaster phases, and deal with the pre-disaster phase at a later stage, bearing in mind the need to help all States strengthen their disaster preparedness.

62. With regard to draft article 1, he had a problem with the reference to "all phases of a disaster" and with the unspecified nature of "the rights of persons", but felt that those matters could be resolved in the Drafting Committee.

63. As to draft article 2, he wished to emphasize that the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, on which the proposed definition had been based, had been adopted in the specific context of telecommunications. For the Commission's purposes, a more general definition of disaster was needed. He agreed that the definition should not refer to causation and should exclude armed conflicts. He favoured the approach of placing the protection of persons at the centre of the Commission's efforts on the topic, at least at the current stage, without prejudice to later stages. Initially, property and environmental losses should be dealt with only in the context of the protection of persons. He would even go so far as to say that, *prima facie*, there was no reason to make specific mention in the draft of the need to protect property *per se* in the event of a disaster.

64. While he could generally agree with the proposed text of draft article 2, it seemed somewhat illogical to state that disaster was a disruption of functioning, when it was the other way around: first came the disaster and then the disruption. Furthermore, the degree of dysfunction of society should be understood as a profound dysfunction, involving more than mere economic or political difficulty.

65. The Special Rapporteur's rationale for affirming that cooperation was a legal principle was persuasive, and he had nothing to add to it except to reiterate that if States were legally bound to cooperate in the event of a disaster, then they were all the more firmly bound to act when they

were affected by a disaster. In such circumstances, to act also meant, if necessary, to open their borders and accept aid from other countries, in keeping with certain regulations that remained under their control. On the other hand, he had doubts about whether one could speak of solidarity as a legal principle, as was indicated in paragraph 57 of the report.

66. With regard to the text of draft article 3, while he had no objection to States cooperating with civil society, it was going too far to imply that they were required to do so, even if qualified by the phrase "as appropriate". It was correct phrasing to say that States "shall" cooperate among themselves and with international organizations, and perhaps they "should" also cooperate with the IFRC. But to make it a principle that they must cooperate with NGOs was to go too far.

*The meeting rose at 11.45 a.m.*

### 3018th MEETING

*Thursday, 9 July 2009, at 10 a.m.*

*Chairperson:* Mr. Ernest PETRIČ

*Present:* Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

#### **Protection of persons in the event of disasters (*continued*) (A/CN.4/606 and Add.1, sect. F, A/CN.4/615, A/CN.4/L.758)**

[Agenda item 8]

#### SECOND REPORT OF THE SPECIAL RAPporteur (*continued*)

1. The Chairperson invited the members of the Commission to continue their consideration of the Special Rapporteur's second report on the protection of persons in the event of disasters (A/CN.615).

2. Mr. Wisnumurti thanked the Special Rapporteur for his analytical review of States' positions and for summarizing the understanding which had emerged on some limitations of the scope *ratione materiae* and *ratione temporis*, as mentioned in paragraphs 6 and 7 of his report.

3. In the chapter of his report on defining the scope of the topic, the Special Rapporteur addressed three aspects of the topic's scope, namely *ratione materiae*, *ratione personae* and *ratione temporis*. With regard to its scope *ratione materiae*, he understood why the Special Rapporteur had adopted the proposal of the IFRC that the rights-based approach should be complemented by a