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Summary record of the 3018th meeting

Topic:
Protection of persons in the event of disasters

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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

consideration of needs. That holistic approach to the topic was not only necessary but also logical; after all, when a disaster occurred, the ultimate objective of the right of persons to protection was to meet their needs.

4. In paragraph 19 of his report, the Special Rapporteur referred to the dual nature of the protection of persons in the event of a disaster, namely the rights and obligations of States in relation to one another and the rights and obligations of States in relation to persons in need of protection. It was indeed essential to understand the dual nature of protection when apportioning the rights and obligations of the parties concerned. But ultimately, as he had indicated in his own statement the previous year, the affected State bore primary responsibility for the protection of persons in its territory, or under its jurisdiction or control, during a disaster. Consequently, as prescribed, for example, in General Assembly resolution 46/182 of 19 December 1991, entitled “Strengthening the coordination of humanitarian emergency assistance of the United Nations”, humanitarian assistance must be provided “with the consent of the affected country and in principle on the basis of an appeal by the affected country” (Annex, para. 3). The principles of sovereignty and non-interference should not, however, be invoked unreasonably or illegitimately at the expense of international cooperation aimed at protecting persons in real need of urgent relief. Those factors must guide the Commission’s understanding of the rights-based approach and thus of the rights of the affected persons. That was why he begged to differ with the opinion expressed by the Special Rapporteur in paragraph 27 of his report; on the contrary, it was necessary to define the rights and obligations of States in relation to persons in need before determining the rights and obligations of States in relation to one another.

5. With regard to limitations *ratione personae*, the Special Rapporteur observed in paragraph 28 of his report that it was common for numerous State and non-State actors to participate in post-disaster relief. Since the IFRC had already made a substantial contribution to the domestic legal regime applicable to several of those actors, the Special Rapporteur was right to propose that the Commission should consider the role of non-State actors at a later stage. He could follow the Special Rapporteur’s logic of limiting the scope *ratione temporis* to the disaster proper and the post-disaster phase for the time being and to consider pre-disaster preparedness at a later stage, but that did not mean that it was less important. Pre-disaster preparedness encompassed a wide range of issues and activities which the Commission could not contemplate at the current stage of its deliberations.

6. He found it difficult to approve draft article 1 as proposed by the Special Rapporteur in paragraph 30 of his report, since it covered three different issues, namely, the protection of persons in the event of disasters, the scope proper; the obligation of States to ensure the realization of the rights of persons; and the obligation of States to provide an adequate and effective response to their needs in all phases of a disaster. Lumping the three elements together in one draft article might make it cumbersome. Another, perhaps more substantive difficulty was that the draft article addressed only the obligations of States *vis-à-vis* persons affected by a disaster and not the rights of the

affected States. To overcome that problem, the Commission could adopt Mr. Gaja’s suggestion that draft article 1 should retain only the first part of the existing text, which read “The present draft articles apply to the protection of persons in the event of disasters”. Separate provisions would then be required on the rights and obligations of the affected States in relation to persons in need of protection, as envisaged in the second and third elements of the existing text of draft article 1. In order to define “disaster”, the Special Rapporteur had reviewed various possible wording contained in international instruments before concluding that an article of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations was a good point of departure. In that connection, he was grateful that the Special Rapporteur had excluded the causes of a disaster from the definition. The previous year, he himself had mentioned the example of a disaster which had struck the region of Sidoarjo, in East Java, Indonesia. The Indonesian and foreign scientists and experts studying the mudflow still disagreed as to its probable cause and whether it was a natural phenomenon connected with the earthquakes that had occurred in different parts of Java, or whether it was a man-made disaster resulting from faulty drilling activities for which a private company was responsible.

7. After a thorough review and analysis of definitions from various sources, the Special Rapporteur had proposed draft article 2 in paragraph 45 of his report. While he concurred with the Special Rapporteur that the threshold for determining the existence of a disaster should be the degree of dysfunction of the society in which it occurred, the phrase “a serious disruption of the functioning of society” in the Special Rapporteur’s definition referred only to the impact of a disaster; the disaster was the event which had caused that disruption. The draft article should therefore establish a causal link between the event and the harm resulting from it. He proposed that draft article 2 should be amended to read: “‘Disaster’ means an event [or a situation of great distress], excluding armed conflict, causing a serious disruption of the functioning of society and inflicting significant, widespread human, material or environmental loss.”

8. He appreciated the Special Rapporteur’s reference to paragraph 10 (b) of the report of the Secretary-General on implementing the responsibility to protect²¹², which reaffirmed that responsibility to protect applied only to the four crimes specified in the 2005 World Summit Outcome document,²¹³ namely genocide, war crimes, ethnic cleansing and crimes against humanity. Responsibility to protect should not be extended to disasters and therefore should not be included in the topic.

9. With regard to solidarity and cooperation, although the duty to cooperate was a well-established principle of international law, like other members of the Commission he wondered whether the same could be said of solidarity. That said, paragraph 63 of the report was extremely important because it made it clear that cooperation in no way diminished a sovereign State’s prerogatives within the limits of international law.

²¹² A/63/677.

²¹³ See footnote 180 above.

10. Having completed his review of the principle of cooperation, the Special Rapporteur had proposed a draft article 3. The text, including the phrase “as appropriate”, was acceptable, except for the reference to “civil society” in subparagraph (c). The term “civil society” was a political notion which had different meanings for different people. It would be preferable to replace it with “competent non-governmental organizations”, as had been suggested by some members, including Mr. Dugard. Mr. Murase’s proposal, that a list of competent and credible NGOs should be compiled, also deserved support.

11. In conclusion, he thought that the draft articles were not ripe for referral to the Drafting Committee and that the Special Rapporteur should revise them in the light of the comments and suggestions of Commission members.

12. Ms. JACOBSSON said that her comments would focus on the three draft articles proposed by the Special Rapporteur. The definition of the scope in draft article 1 was directly related to the discussion of a rights-based versus a needs-based approach. The Special Rapporteur had opened the door to a combination of both. She regretted that she did not have a wide enough knowledge in that field to fully comprehend the concept of a needs-based approach. It was therefore difficult to accept or reject it, particularly since the IFRC considered it relevant. In her opinion, however, the Commission should start from a rights-based approach, and she agreed with Mr. Petrič’s statement the previous day that rights should not be qualified. That meant that human rights must form the framework of the Commission’s work, including any provisions on derogations. In that respect the debate, which concerned a matter or principle, was very similar to the Commission’s deliberations on “fundamental rights” (see the 3002nd to 3006th meetings above) in the context of Mr. Kamto’s fifth report (A/CN.4/611). For the sake of consistency, it would be advisable to adopt the same solution in both cases.

13. As far as draft article 2 was concerned, it was difficult to decide on a final definition of the term “disaster” at such an early stage, although a provisional working definition might be useful. The debate so far could be summarized by saying that some thought the definition too broad, while others thought it too narrow. The previous year, she had agreed in principle with the Special Rapporteur that armed conflicts should be excluded, but she strongly suspected that it might prove difficult to define a threshold between an armed conflict and a peacetime situation and to determine, let alone agree on, whether an armed conflict existed, especially if the conflict was confined to certain parts of a State’s territory. She concluded that the aim should be not to cover situations of armed conflict *per se*; at the same time, the Commission should not rule out altogether the examination of specific situations. For that reason, Ms. Escameia’s idea of a “without prejudice” clause was excellent.

14. As for the working method, although consideration could first be given to the problems that arose in the acute phase of the disaster—the “disaster proper”—thought must likewise be given to the pre- and post-disaster phases. For the time being, the Commission could opt for a tentative definition. It was important to establish some kind of flow chart to identify the issues that needed to be

addressed and to define the temporal scope of the topic. The examples provided by Mr. Petrič the previous day had been illustrative. In fact, it was not easy to say when one phase ended and another began, as was very clear from General Assembly resolution 63/141 of 11 December 2008, entitled “International cooperation on humanitarian assistance in the field of natural disasters, from relief to development”.

15. Draft article 3 was perhaps the most intellectually challenging, partly because it spelled out the legal basis for the draft articles and partly because it attempted to identify the actors. In his report, the Special Rapporteur maintained that there was a general duty to cooperate under international law. That duty had certainly become stronger and clearer over the years, but if it was as clear-cut as some members had asserted, she wondered why it was necessary to specify, as the Special Rapporteur had done in draft article 3, that States must cooperate “[f]or the purposes of the present draft articles”. The unfortunate fact was that the duty to cooperate, as reflected in the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 2007), had to be developed, made explicit and fleshed out. It was the task of the Commission to help promote and strengthen international cooperation, even if it was the primary responsibility of the affected State to deal with a disaster situation. Thought should therefore be given to the kind of cooperation envisaged in the context of the protection of persons. Draft article 3 provided for three levels of cooperation, which should be spelled out in a more transparent manner. The first, that of inter-State cooperation, was obvious, and it was the Commission’s task to say what that obligation would imply in the event of a disaster. At the second level, an obligation to cooperate with the IFRC and the ICRC already existed, and she was curious to know why the latter organization had not been mentioned in draft article 3. It must be emphasized that States’ obligation to cooperate with the ICRC encompassed post-conflict situations and might also apply to disasters. That showed how difficult it was to distinguish clearly between the various phases of a disaster. The third level was that of cooperation with NGOs.

16. She therefore proposed that draft article 3 should be recast to read:

“In order to achieve the fullest possible protection of persons in the event of disasters, States shall cooperate among themselves.

“1. States have a duty to cooperate with:

“(a) competent international organizations, in particular the United Nations; and

“(b) the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross.

“2. Furthermore States shall, as appropriate, cooperate and facilitate the work of relevant humanitarian non-governmental organizations.”

17. In conclusion, she thought that draft articles 1 and 3, but not draft article 2, could be referred to the Drafting Committee.

18. Mr. NOLTE said that he had one general remark and a few specific comments to make. The general remark concerned the definition of the topic. The Special Rapporteur thought that an explicit reference to the spirit, or philosophy, underlying the whole project should be incorporated in the draft article defining the scope of the topic. Like Mr. Gaja and Mr. McRae, he doubted the advisability of addressing the question of whether the project rested on a rights-based or a needs-based approach in the definition of scope. Admittedly, the intention of clearly indicating the spirit informing the project was a good one, but it made the definition of scope less precise and open to conflicting interpretations. He therefore endorsed Mr. Gaja's proposal to limit the definition of scope in draft article 1 to the first part of the sentence, in other words: "The present draft articles apply to the protection of persons in the event of disasters." Like Mr. McRae, he thought that the spirit or purpose of the draft articles should be dealt with elsewhere, either in a preamble or in a separate article.

19. That proposal was, of course, of a rather technical nature. The main substantive issue was the terms in which the spirit or purpose of the draft articles should be formulated. All the previous speakers had considered that attention should focus on the persons affected by a disaster and that their well-being was the main purpose of the undertaking. Some members seemed to take it for granted that a rights-based approach was the best way of achieving that purpose, but he was among those who urged caution. The Special Rapporteur had explained in paragraph 16 of his report that he had decided to propose a rights-based approach in the same spirit as that which had prevailed in the 1980s, when a similar approach had emerged with regard to development policy. However, the analogy was not obvious. In the 1980s it might have been necessary to emphasize that the ultimate purpose of development was the realization of the human rights of individuals and not merely the development of the State as an abstract entity. Hence, the purpose of a rights-based approach to development had been to focus on the individual as the ultimate beneficiary of development policy. In the field of disaster relief, however, there was no doubt that the focus of all efforts was the individual. The question was rather that of identifying the best legal technique for achieving that purpose. A rights-based approach indeed strengthened the focus on the individual and had the advantage of setting aside the notion that disaster relief was a matter of charity. But such an approach entailed a serious disadvantage in that it was limited by the extent of the rights themselves and was therefore open to challenges as to the extent of rights protection. Human rights could be severely curtailed in emergencies, and human rights obligations essentially bound only the affected State rather than all States. He was not suggesting that human rights were irrelevant in the context. They were important as a means of strengthening the position of individual disaster victims and of identifying their needs, but the project should have a broader basis, namely the needs of the persons concerned. Those needs might go well beyond their rights, and disaster relief should not be hampered by disputes about the extent of rights. Even in disasters which did not acquire

an international dimension because the affected State had the means to cope with the situation, one did not generally speak of rights but of needs. For that and other reasons, he proposed that the emphasis of the second part of draft article 1 should be reversed, so that it would then read, either as part of a preamble or as a separate article: "In order for States to provide an adequate and effective response to the needs of persons in a disaster, including to ensure the realization of the rights of persons in such an event". That wording would not discard human rights as a key element of disaster relief, but it would place them in the wider context of the needs of individuals. Such an approach, based on two pillars but with a stress on meeting needs, would strengthen rather than weaken the spirit or purpose of disaster relief efforts.

20. Caution was needed when defining the term "disaster". While it was indisputable and obvious that it was often impossible to distinguish clearly between a natural and a man-made disaster, it was equally true that such a distinction was immaterial from the perspective of individuals and their rights. But that should not lead the Commission to sweeping conclusions. Not every grave crisis was a disaster. As Mr. McRae had said, the current world economic crisis was not a disaster, even though it might produce catastrophic effects in some regions. He was less certain than Mr. Dugard that the situation in Zimbabwe was a disaster in the technical sense that the Commission was trying to define. While he was less familiar than Mr. Dugard with the situation in that country and although he had the impression that the Zimbabwean population was in need of relief, to characterize that situation as a disaster was tantamount to saying that political mismanagement and human rights violations constituted a disaster. He was not persuaded that this would be of any benefit to the victims of certain human rights violations and was therefore in favour of setting a threshold like that proposed by the Special Rapporteur, in other words a "serious disruption" of the functioning of society. Such a threshold was particularly important if it was impossible to exclude disasters by reference to their cause.

21. Regardless of whether the Commission adopted a rights-based, needs-based or combined approach, it was of course most important to determine the obligations and competences of the affected State. That was a matter which would have to be examined in future reports and at future sessions, although, as Mr. Gaja had proposed, it might already be possible to address possible causes of States' unwillingness to cooperate and to stress institutional aspects, especially the role of the United Nations and the duty of States to give it "every assistance" (Article 2, paragraph 5, of the Charter of the United Nations). Ms. Escameia was therefore right to postulate a duty on the part of Member States to assist the United Nations. On the other hand, given the very clear statement by the Secretary-General, it might be unwise to rely on the responsibility to protect as a possible source of obligations for Member States. That did not, however, mean that there were no other sources of rights and obligations for third States in the event of a disaster. For example, if a State simply disregarded a famine which led to the death of many people in part of its territory, such disregard might not amount to genocide in the technical sense, but it might well be a violation of a *jus cogens* human

rights norm, which in turn would allow and oblige third States to hold the State concerned responsible, or would at least make it a duty of that State to accept help. He agreed with Ms. Escameia that the Commission should not exclude armed conflicts from the scope of the topic, but that it should formulate a “without prejudice” clause with respect to the rules relating to armed conflict. He supported the Special Rapporteur’s idea of identifying two main axes — although there might be more — namely the relationship between States, on the one hand, and, on the other, the relationship between States and other subjects of international law, in particular persons and NGOs, and of clarifying the framework for them in the course of the Commission’s work on the topic. As for the duty to cooperate, he agreed with Mr. Gaja that the principle should be dealt with in conjunction with the other substantive principles with which it was connected. He did not deny the existence of States’ duty to cooperate, but it was just one of their fundamental duties. It was too early to refer draft article 3, but not draft articles 1 and 2, to the Drafting Committee.

22. The CHAIRPERSON, speaking as a member of the Commission, noted that Mr. Nolte had raised the issue of a famine which was ignored by the State in whose territory it raged. Since failure to assist the afflicted was an offence under many constitutions and criminal codes around the world, the Commission could take that practice as its basis for formulating a general principle of law.

23. Mr. OJO said that the adoption of a rights-based approach to the topic of the protection of persons in the event of disasters, with a view to its codification, was problematic. In his report, the Special Rapporteur discussed the dual axes of the topic, namely, the rights and obligations of States in relation to one another, and the rights and obligations of States in relation to persons in need of protection. He also gave an extensive review of treaty practice and the practice of judicial authorities with regard to the dual protection of States and persons under international law, looking at a range of subjects as diverse as genocide, consular relations and the WTO General Agreement on Tariffs and Trade (GATT) (paras. 19–27 of the report). Furthermore, he carefully analysed the sources of international law on the protection of persons in the event of disasters, notably international humanitarian law, human rights law and international legal rules concerning refugees, displaced persons and disasters. His findings therefore amply justified his preference for including dual protection within the scope of the topic.

24. With regard to the definition of the term “disaster”, the Special Rapporteur should be congratulated on his thorough examination of international instruments and judicial practice in that area. In the initial and concluding paragraphs of the section of the report on that matter, the Special Rapporteur paid glowing tribute to the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations which, he said, provided the “best guidance” in defining the term (para. 44 of the report). He nonetheless pointed out that the Convention had certain limitations in that it regarded a disaster to pose a “widespread threat to human life, health, property or the environment” (art. 1, para. 6). The Special Rapporteur rightly observed that “[a] possible

alternative would be to consider language that requires the existence of actual losses in the definition of disaster” (para. 34 of the report). That statement highlighted the main indicia of the topic under consideration, whose very title assumed the actual existence of a disaster by referring to the protection of persons “in the event of” disasters.

25. The Special Rapporteur then distanced himself from other aspects of the definition set forth in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations by avoiding any reference to causal elements of disasters such as accident, nature or human activity, arguing that, on the one hand, it was singularly difficult to establish a clear causal relation and, on the other, such a test would not imply a substantive contribution to the definition of the term. He therefore drew heavily on other instruments and judicial decisions, but in doing so, failed to include in draft article 2 some key elements of the notion of a disaster. It was necessary to protect victims of disaster under international law when such an event assumed an international dimension because local capacity and resources were overwhelmed. That crucial element was to be found in at least three of the instruments examined by the Special Rapporteur. A disaster should be the business of the international community if it was of such magnitude that it was beyond the human, material, technical and other resources of local State or non-State actors. The affected State would then have a duty to request an international response. As the Secretariat had indicated in its memorandum on protection of persons in the event of disasters, there was “greater recognition of a positive duty on affected States to request assistance, at least where the domestic response capacity is overwhelmed by a disaster”.²¹⁴

26. Draft article 2 should be amended either by making the qualifying phrase “excluding armed conflict” the subject of another paragraph, or by placing it at the end of the definition proper. Draft article 2 could then read: “Disaster means a serious disruption of the functioning of a community or society causing significant, widespread human, material or environmental loss which overwhelms local response capacity but excluding the effect of armed conflict.” Lastly, he commended the Special Rapporteur for his detailed elucidation of the fundamental principles of cooperation and solidarity in international relations, twin principles which formed irreducible requirements in an increasingly interdependent world, especially in the area of disaster response and management. He therefore supported draft article 3 as ably crafted by the Special Rapporteur.

27. Mr. FOMBA said that the Special Rapporteur had clearly laid the groundwork for the debate with his thorough research and detailed analysis of the issues at stake. The three draft articles he proposed constituted an excellent working basis. With regard to the general approach to the subject, it was first necessary to examine the right to humanitarian assistance and its implications from both the legal and the practical perspective. Secondly, it was necessary to consider the primary responsibility of the affected State and, in doing so, to spell out the State’s duties, especially when it could not or would not take

²¹⁴ A/CN.4/590 and Add.1–3 (see footnote 181 above), para. 57.

action itself. Thirdly, it was vital to tackle the right of third parties to assist the affected State with emphasis on the conditions making external action lawful and the limits of such action. Fourthly, the general duty to cooperate with the affected State at various operational phases should be investigated, in particular from the perspective of furnishing assistance to developing States. Fifthly, it was crucial to ponder the issue of a State's duty to take what measures were needed to facilitate assistance. Lastly, an affected State's obligation not to refuse assistance in certain cases and the appropriate ways and means of ensuring that States honoured that obligation should also be discussed.

28. With regard to the proposed draft articles, he agreed that the current wording of draft article 1 (Scope) dealt with two linked but different elements, namely scope on the one hand and the aim or purpose of operations on the other. It therefore seemed wiser and more logical to separate the two aspects, which was why he agreed with Mr. Gaja's proposed reformulation. Alternatively, the draft article could be worded: "These draft articles apply to the protection of fundamental human rights and the meeting of basic human needs in the event of disasters." That language would be more coherent. With regard to draft article 2 (Definition of disaster), it was illusory to aspire to a perfect and universally acceptable definition. Some attempts had, however, been made and the Special Rapporteur had decided to pick the least bad among them. As for the current wording, he personally agreed with Mr. Gaja that since disruption was not in itself an intrinsic element of a disaster but rather the consequence of it, the wording of the definition should be revised. While armed conflicts were indisputably among the causes of situations of emergency and disaster, it was also true that specific provisions of international humanitarian law applied to armed conflicts. A number of Commission members seemed to support the idea of following the example of the 2003 resolution on humanitarian assistance of the Institute of International Law²¹⁵ and replacing the phrase "excluding armed conflict" by a "without prejudice" clause. Draft article 3 (Duty to cooperate) was an essential provision, but its wording still seemed to give rise to some questions. A proposal had been made to replace the expression "[f]or the purposes of the present draft articles" with "in the event of disasters"; the latter phrase was acceptable because it was clearer and more direct. In the view of some Commission members, such as Ms. Escarameia, the expression "as appropriate" obscured or contradicted the clearly established "automatic" competence of the United Nations. He did not agree with that view, at least at first glance. Moreover, there did not appear to be agreement on the categories of actors to be mentioned in subparagraphs (a) and (b) of draft article 3. That was perhaps a matter of principle which should be decided at the outset. In conclusion, he was in favour of sending draft articles 1 and 2 to the Drafting Committee. It was perhaps premature to send draft article 3 to the Drafting Committee for at least two reasons: the current level of disagreement about its contents and the need to know if other complementary provisions were planned, especially on procedures for implementing the current version of draft article 3, like those included in the 2003 resolution of the Institute of International Law.

²¹⁵ See footnote 204 above.

29. Mr. CAFLISCH said that Switzerland, like other countries, had a standing civil protection corps, which was frequently asked to step in when disasters—often natural disasters—happened abroad. Obviously, Switzerland acted only with the agreement of the State concerned in order to help it and above all its population, but despite the agreement and solidarity underpinning such relief operations, difficulties did sometimes arise and hamper the smooth handling of operations. One of the main purposes of the Commission's work should be to determine the conditions for providing international humanitarian assistance in the event of disasters, especially the conditions governing international humanitarian action at the inter-State level. He looked forward to seeing what those specific conditions would be.

30. Although the Special Rapporteur was probably right to invite the Commission to concentrate, at least initially, on the disaster proper and the post-disaster phase, the preventive aspect should not be forgotten. As recent events had shown, some disasters could have been avoided and their consequences mitigated by adequate precautions, which were not always taken and could not always be taken. That was also an area where solidarity should come into play to enable those countries which so wished to set up the requisite early warning systems. It would certainly be advisable for the Commission to keep that question on its agenda, even if, as the Special Rapporteur pointed out in paragraph 18 of his report, the United Nations, through the ISDR, was working to increase awareness of the importance of disaster reduction.

31. He had no particular comments to make about the scope of the draft articles as defined in draft article 1, except to note that the text seemed somewhat complicated—but the Drafting Committee would probably simplify it. As for draft article 2 (Definition of disaster) that term had to cover two elements: first, a sudden unforeseen (but not necessarily unforeseeable) natural or man-made event and, secondly, an event which had a substantial adverse impact on the life, well-being and property of the population, or a large segment of it. Those elements excluded armed conflict, as did the proposed text of draft article 2, and rightly so. That article also suggested another element, that of a "serious disruption of the functioning of society", but it was questionable whether that was the case in every disaster; in any event, it appeared that the idea was expressed in very general terms. He therefore preferred the language quoted in paragraphs 39 to 41 of the report. As Ms. Jacobsson had suggested, the ICRC should perhaps be included in draft article 3 (Duty to cooperate). While the ICRC acted mainly in the context of armed conflicts, that did not mean that it offered no assistance in the event of disasters or "mixed" situations. As other members of the Commission had said, that provision should not refer to "civil society" without further clarification.

32. Sir Michael WOOD drew attention to the complexity of the topic and said that he did not yet see clearly what direction the Commission was taking. That should not be understood in any way as criticism of the Special Rapporteur or of the Secretariat, who had made a considerable and admirable effort to clarify matters. There was a wealth of existing materials and a great deal of experience

and expertise in the area of disaster relief. Since the subject was an eminently practical one, the Special Rapporteur should be congratulated for collaborating closely with those working in the field. Since that was a crucial means of ensuring that the Commission's work was useful, he should be encouraged to pursue that avenue. The central challenge was that of ascertaining if it would be helpful to draw up legal principles at the level of generality appropriate for work by the Commission; that was still an open question. However, since the topic had been placed on the Commission's agenda with the approval of the Sixth Committee, the Commission had to do its best to produce something useful.

33. One of the central points was what could be said about the obligations of the affected State. He wondered how far, and in what circumstances, the affected State had a duty to cooperate with those offering aid. Was the affected State, under extreme circumstances, legally obliged to accept the assistance offered by others and, if so, in what sense was that a legal obligation? It was not certain that the Commission should try to answer those questions directly, or that they should be put in such blunt terms. In any event, for the reasons given by the Secretary-General, by the Special Rapporteur in his second report and by many Commission members, it was inadvisable to invoke the notion of responsibility to protect. That was still a fragile notion with a limited field of potential application. It would not help future debates on the responsibility to protect, or the Commission's work, if an attempt were made to extend the notion to disasters across the board.

34. The expression "rights-based approach" was not a legal term. The Special Rapporteur explained in his preliminary report that the rights-based approach "deals with situations not simply in terms of human needs, but in terms of society's obligation to respond to the inalienable rights of individuals, empowers them to demand justice as a right, not as a charity, and gives communities a moral basis from which to claim international assistance when needed".²¹⁶ That suggested a philosophical or moral approach. It might be a shorthand way of suggesting that the topic should be approached from the point of view of the rights of individual victims of a disaster, rather than from the perspective of the rights and obligations of the concerned States. The Special Rapporteur elaborated on the implications of a rights-based approach in his second report, where he stated that it was a "useful departing position that carries the all-important baggage of rights-based language" (para. 17). He would welcome further explanation from the Special Rapporteur as to what, in concrete terms, would be the consequences, for that project, of such an approach.

35. Pending such clarifications, his own tentative answer to the question was that, at least initially, the focus should be on the rights and obligations of States—the affected State and other States—in the event of disasters. Rather than starting from some abstract position, it would be preferable to encourage and facilitate the practical actions that States, particularly affected States, needed to take in

the face of disasters in order to provide "an adequate and effective response" to the needs of persons, to quote draft article 1. To turn the exercise into another restatement of the individual human rights of a particular class of persons—in that case the victims—might distract the Commission from its real objective of ensuring that the needs of the victims were met to the greatest extent possible. For those reasons, the phrase "the realization of the rights of persons in such an event" should be omitted from draft article 1. Moreover, since, as other members had pointed out, draft article 1 combined two separate thoughts, the scope of the draft articles and the purpose of the exercise, it would be preferable to reformulate draft article 1 so that it focused on scope, as Mr. Gaja had suggested. It could simply state that the articles applied to the protection of persons in the event of disasters.

36. He agreed with most of the comments which had been made about draft article 2 (Definition of disaster). He did not see how it would be possible to avoid a rather more elaborate text. There were many precedents on which the Commission could draw. It was necessary and important to exclude armed conflicts, but the wording required further study. A "without prejudice" clause would not necessarily be sufficient, but it would be difficult to be more precise without a better idea of the substance of the draft articles. Perhaps it merited a separate article. Depending on the substance of the project, the Commission might wish to say that the provisions of the draft articles did not apply to the extent that matters were governed by international humanitarian law.

37. As for draft article 3 (Duty to cooperate), he agreed that the duty to cooperate did not mean a great deal when stated in an abstract way, as it was in the draft article.

38. The first comment he might make in that regard was that in the section of the second report on solidarity and cooperation (paras. 50–70), reference was made to solidarity as if it were a separate principle and different from the principle of cooperation. It was even called an "international legal principle". Elsewhere in the report the terms "solidarity" and "cooperation" seemed to be used interchangeably. Yet the term "solidarity" did not appear in the draft article itself, which was right, because it was not a concept of international law, but one of morality or ethics. It was difficult to see what a notion or a "principle" of solidarity could, as a matter of law, add to cooperation, at least in the context of the current topic. In the passage from the 1990 report of the Secretary-General on humanitarian assistance to victims of natural disasters and similar emergency situations cited in the Special Rapporteur's second report, it was said that "[t]he concept of international solidarity ... understood as a feeling of responsibility ... has its roots in the ethical principles of the Charter [of the United Nations]".²¹⁷ That did not suggest a legal principle.

39. Secondly, the Special Rapporteur's second report stated that the principle of cooperation applied "both among nations and among individual human beings" (para. 50). The duty to cooperate might indeed be "well established as a principle of international law" as was

²¹⁶ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598, p. 146, para. 12.

²¹⁷ A/45/587, para. 5.

stated further on (para. 52). What was not clear, however, in the current state of international law or in the context of the topic under consideration, was what particular action, if any, was required of any particular State. The manner in which the duty to cooperate was stated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations²¹⁸, which was cited in the second report, was so general that it was difficult to determine its content. The picture might be different with regard to specific obligations to cooperate that States might agree to under particular instruments, such as those mentioned in paragraph 55 of the second report. But even in the case of those specific instruments, it would be interesting to know what effect a general duty to cooperate had had in practice. The reference to the instruments relating to a new international economic order (para. 57) hardly suggested practical outcomes. Not every statement in a General Assembly resolution constituted an “international legal principle” (*ibid.*).

40. Of course, international cooperation was very important in the field of disaster relief. There was probably no field in which it was more evident or where it more reflected the demands of public opinion. It was undoubtedly necessary to do everything possible to encourage and facilitate such cooperation. But the fact that something was important and should be encouraged did not mean that it was a legal obligation at the international level.

41. Some points required clarification before draft article 3 was referred to the Drafting Committee. Was the Commission proposing a text containing a duty *de lege ferenda*, or was it reformulating a duty to cooperate which already existed as a matter of law in the field of disaster relief? In either case, the content of the duty had to be clear. Was it to be a general principle rather than a rule, or did it have concrete application in particular circumstances? If it was a duty, whether general or more specific, who were the beneficiaries of the duty? Was it to be enforceable and, if so, at whose instigation?

42. He agreed with other members of the Commission that it was premature to refer the three draft articles to the Drafting Committee without further consideration. To do so would risk introducing an element of inflexibility into future work. Draft articles 1 and 2 could be referred to the Drafting Committee if general agreement could be reached on the changes that should be made to them, but the position was different with regard to draft article 3, which went to the heart of the topic. It was too early to go down a particular route without a clear idea of the eventual destination.

43. Mr. VASCIANNIE said that he was not sure what was meant by a rights-based approach. Perhaps it was a way of saying that, from a philosophical viewpoint, in disaster situations, particular attention must be paid to the needs and concerns of the affected persons. On that reading, rights and needs were essentially synonymous and it was a matter of placing the individual at the centre of

the analysis. If that was what was intended, that approach was broadly acceptable, but it provided only an overall orientation and did not say how, in the context of an actual disaster, that emphasis on the individual was to be translated into reality. It was still necessary to examine the interplay of specific agreed rules to ascertain what actions were acceptable or unacceptable, having regard to various other considerations such as available resources, States' views, conflicting individual interests and the role of public and private entities.

44. If a rights-based approach was essentially a reminder that individuals had legal rights even when disaster struck, that, too, might be acceptable. In the context of a disaster, international law required respect for the principles of humanity, neutrality and impartiality in the treatment of victims. It also insisted on the continued recognition of some basic human rights, such as the right to life, even if derogations from some human rights were allowed in times of disaster.

45. But the issue of a rights-based approach did not end there. The emphasis on legal rights of individuals in the context of a disaster made it necessary to locate where the corollary legal duties must lie, and to determine whether they rested with individuals, the affected State or other States. If the rights of individuals faced with a disaster were not respected, what did international law then require or allow? He, too, sought an answer to those points which had been perceptively raised by Mr. Gaja.

46. More generally, it was to be feared that without a clear conception of the meaning and implications of the rights-based approach, it would very quickly become apparent that it meant that in cases where an affected State could not satisfy the needs of individuals affected by a disaster, other States would claim the right or duty to intervene on behalf of the victims. That question had been considered, but not resolved, at the previous session. Mr. Nolte and the Chairperson, speaking as a member of the Commission, had seemed to support the idea that other States had the right to supply humanitarian assistance. It therefore seemed an opportune moment to briefly repeat some of the objections to the notion of “forcible” humanitarian assistance (when the affected State refused that assistance). First of all, forcing an affected State to accept assistance was contrary to the principles of sovereignty and non-intervention, which were core values of the Charter of the United Nations and of international law in general. Secondly, General Assembly resolution 46/182 (Strengthening of the coordination of humanitarian emergency assistance of the United Nations) stated that humanitarian assistance should be provided with the consent of the affected country and, in principle, on the basis of an appeal by the affected country. Thirdly, the position of the majority of States was unequivocal: most rejected the idea of humanitarian intervention in the event of disasters, as could be seen from the 2008 memorandum of the Secretariat on protection of persons in the event of disasters.²¹⁹ Fourthly, as noted in paragraph 8 of the Special Rapporteur's second report, some delegations in the Sixth Committee, including China, India and Japan, had expressed

²¹⁸ General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1.

²¹⁹ A/CN.4/590 and Add.1-3 (see footnote 181 above), paras. 20-23.

doubts about the relevance of a responsibility to protect in that area of the law. It would not be easy to argue that a putative right to use military force to protect victims of gross human rights violations was transferable to a right to use military force to require a State to accept help in a cholera epidemic or other disaster. Fifthly, there were other policy reasons why forcible humanitarian intervention should be viewed with scepticism: the risk of abuse, the risk that double standards would be applied and the problem of identifying the appropriate intervention threshold for giving help to States that did not want it. Hence there was no basis in *opinio juris*, or State practice, and it was not a good idea *de lege ferenda*.

47. He therefore encouraged the Special Rapporteur to look again at the concept of a rights-based approach and to clarify the meaning and implications of that approach in the context of disaster relief. Generally speaking, the Special Rapporteur wished to give support to individuals and to give effect to the ideas of solidarity and cooperation, ideas which played a prominent, albeit somewhat uncertain, role in the second report. He personally shared the view that one way of giving effect to those ideas was to channel disaster relief through the United Nations system, on the basis of the affected State's consent, a point already made by Mr. Gaja.

48. With regard to the scope of the topic *ratione temporis*, the Special Rapporteur's proposal that it should be limited to the disaster proper and the post-disaster phase, without prejudice to the possibility of examining the pre-disaster phase at a later stage, was acceptable.

49. As Mr. Gaja, Mr. Wisnumurti and Mr. Nolte had pointed out, it might be sufficient for draft article 1 (Scope) to state that the draft articles applied to the protection of persons in the event of disasters. The rest of the phrase ("to ensure the realization of the rights of persons in such an event") would be more suitably placed in a preamble, as it stated the *raison d'être* of the future instrument and the means by which its basic objectives could be met.

50. With respect to draft article 2 (Definition of disaster), the Special Rapporteur, having perceptively raised a number of important questions, had expressed his preference for the definition in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, of which he recapitulated the main elements. He personally approved of that approach, in particular the idea that the disasters in question did not need to be confined to natural events. He also agreed with the idea that armed conflicts should be excluded from the definition and hoped that Ms. Escarameia's suggestion regarding a "without prejudice" clause would be examined in greater detail. But he had a number of queries. First, he was not entirely sure that a disaster was in itself a serious disruption of the functioning of society; it was rather the cause of such a disruption. Secondly, he wondered whether, as it was worded, the definition was not over-inclusive: there could be a serious disruption of the functioning of society not caused by a disaster. More importantly, in view of the significant implications that could stem from the classification, or otherwise, of an event as a disaster, it might be wise to explore those implications before establishing a final definition.

51. Draft article 3 (Duty to cooperate) indicated that States must cooperate among themselves and, as appropriate, with the IFRC (but not the ICRC) and with civil society. That was too vague. Furthermore, as Mr. McRae and other members had pointed out, if the affected State did not cooperate with other States, it would be in breach of draft article 3. But what was stated was a duty to cooperate with an undefined category of States ("among themselves"), with no discretion allowed to the affected State, even through an "as appropriate" escape clause. As another member had said, the problem with the expression "civil society" was that it could mean just about anything.

52. He encouraged the Special Rapporteur to consider referring draft articles 1 to 3 to the Drafting Committee later, following his next report. Failing that, he himself could support referral of draft articles 1 and 2 to the Drafting Committee and would ask the Special Rapporteur to tease out the implications of a rights-based approach, particularly in respect of the question of whether there was a right of intervention to ensure the acceptance of assistance in times of disaster.

53. Mr. NOLTE said that he wished to dispel a misunderstanding with regard to an opinion which Mr. Vasciannie had attributed to him. In one of his statements on the topic at the previous session, he had said that, in principle, he had no problem regarding the right to humanitarian assistance as implicit in international human rights law, and that he regarded it as an individual right that was exercised collectively.²²⁰ That said, that right should be enforceable in the same manner as other human rights, in other words, without the unauthorized use of force. Thus conceived, such a right would not challenge the principles of sovereignty and non-intervention. The concept of the responsibility to protect should be understood in the light of that classical interpretation of the law; it remained primarily a political and moral concept that had not altered the law relating to the use of force. It would not be appropriate for the Commission to propose changes in that area.

54. Mr. VASCIANNIE said that if that meant that Mr. Nolte did not approve of using force to supply humanitarian assistance, he would be pleased to note that he was not among the group of members whom he had mentioned.

55. The CHAIRPERSON, speaking as a member of the Commission, said that he had never supported the idea of military intervention in the event of a humanitarian disaster. Essentially he had made two points in that connection. First, the purpose of the project was to protect victims of a disaster and the leading actor bearing primary responsibility for that protection was the affected State. Secondly, if the affected State did not, or could not, protect persons, international assistance was useful and welcome, but, when formulating the draft articles, care would have to be taken to define the rules and limits of that cooperation.

56. Ms. Xue said that an extremely interesting point of the debate had been reached, where a clear distinction would have to be drawn between humanitarian assistance and humanitarian intervention, because it was the latter which posed a problem.

²²⁰ *Yearbook ... 2008*, vol. I, 2980th meeting, p. 147, para. 18.

57. Mr. VASCIANNIE, noting that the Chairperson had mentioned the primary responsibility of the affected State, said that to him that expression often connoted exclusive responsibility. It was therefore necessary to emphasize that other States also had a responsibility to determine what was to be done if the affected State did not accept humanitarian assistance. Since the latter could not be imposed by force, the notion of consent was essential.

58. Mr. NOLTE said that, once recourse to unilateral armed force had been ruled out—a matter on which most, if not all, Commission members agreed—there were still other possibilities, which the Commission had dealt with in its articles on State responsibility for internationally wrongful acts.²²¹

59. Mr. OJO said that he wished to revert to a point he had made at the previous session and to which Mr. Vasciannie had referred. The problem was one of knowing where to draw the line between a State's capacity to cope with a disaster and the moment when it really needed help. If a State did not need assistance, no third State could intervene. But should nothing be done if a State decided, in the name of its sovereignty and the principle of non-intervention, to refuse all assistance even though the disaster was so great that its people were dying? It was plainly vital to determine at what point the State required assistance.

60. Mr. HMOUD said that it was up to the State to decide whether or not it required assistance, but its international responsibility might be incurred, a factor which might encourage it to accept the assistance offered without there being any question of military intervention.

61. Mr. SABOIA said that the issue was very difficult because it involved the very fine dividing line between the legal and the political spheres, as Mr. Ojo had noted. He agreed with Mr. Vasciannie and several other members about the need to respect the sovereignty of States and prohibit the use of force. He was opposed to the application in disaster situations of the emergent principle of the responsibility to protect and to a broad interpretation of humanitarian assistance without the consent of the affected State. There were, however, borderline situations to which the international community could not remain indifferent and where, as had been seen recently, political and diplomatic pressure could be exerted to persuade a State to take account of its population's needs, although there had never been any question of calling upon the Security Council to intervene in order to oblige that State to accept assistance. The fact that State responsibility could be incurred was not sufficient when people were dying and the situation posed a threat to international peace. It was then a question of what action to take, because even if the use of force should be avoided at all costs and authorized only as a last resort, doing nothing would be unacceptable.

62. Mr. WISNUMURTI feared that the Commission was venturing into troubled waters and that the debate was becoming unproductive. He considered that humanitarian intervention must not be imposed and that, basically, it

was just a synonym for the responsibility to protect, for which guidelines already existed. The debate on that point should therefore be ended, and attention should be directed to the question of humanitarian assistance, which was a matter where, in his opinion, the decision lay with the affected State.

63. Ms. ESCARAMEIA said that she was extremely surprised by the turn taken by the debate, because certainly no one had ever said that military intervention could be justified in any circumstances. It was very interesting to note that those who did not want States to have any obligation to accept humanitarian assistance always claimed that the others had said that such a duty would mean that military intervention would be authorized. But once again, no one had ever contended that the obligation for a State to accept humanitarian assistance was tantamount to authorizing another State to take military action to impose that humanitarian assistance. What had been said was that a State had a duty to accept the assistance that it could not provide itself and, if it refused, its responsibility and that of its leaders might be incurred. The fact that a State might be held responsible clearly did not mean that it was going to be subjected to military intervention. There were various degrees of responsibility and there were courts to decide such matters. Even in the absence of the requisite courts, the State was, at least in theory, responsible and that was also true when the means of implementing that responsibility were lacking. Furthermore, States could not intervene militarily in other States; the Security Council alone was empowered to do so if it deemed the situation to be a threat to peace and security. The same argument held good for the responsibility to protect, which did not necessarily imply military intervention. If the responsibility to protect merited more careful analysis, it was because it was an area that was rapidly evolving and because, in some disaster situations, breaches of the responsibility to protect might amount to crimes.

64. Mr. NIEHAUS congratulated the Special Rapporteur on his excellent report and said that there was every justification for adopting a rights-based approach to the topic. As the Special Rapporteur had noted in his preliminary report, the Secretary-General had indicated that "the rights-based approach ... describes situations not simply in terms of human needs, ... but in terms of society's obligation to respond to the inalienable rights of individuals. It empowers people to demand justice as a right, not as a charity, and gives communities a moral basis from which to claim international assistance where needed". He had highlighted the affected State's obligation to protect persons and the need for international cooperation in disaster situations. Another important point with regard to the protection that the Commission was seeking to give to persons in those situations was that the same rules applied irrespective of whether the disaster was natural or man-made. The Special Rapporteur had rightly refrained from drawing futile distinctions in that regard.

65. The three aspects of scope which he had examined—*ratione materiae*, *ratione personae* and *ratione temporis*—would facilitate the study, treatment and understanding of the subject. With regard to scope *ratione temporis*, paragraph 29 of the report explained that, during the debate in the Sixth Committee, a number of delegates

²²¹ See footnote 10 above.

had suggested that work on the topic should be limited to the disaster proper and the post-disaster phase. That did not seem logical because all three phases—before, during and after the disaster—formed a whole and were all very important.

66. The three proposed draft articles were clear and could be referred to the Drafting Committee although, like many other members of the Commission, he had qualms about the reference to “civil society” in draft article 3, paragraph (c). For the sake of clarity, it would be wiser to replace that term with another more appropriate expression. The Drafting Committee could take care of the matter. Some of the comments or criticisms concerning the draft articles seemed in fact to relate more to a question of method, more precisely the presentation of reports to the Commission. In general, because of the complexity of the topics examined, reports contained only a few draft articles, which obviously could not cover all issues. If they were perused too rapidly, there might seem to be some gaps, whereas in reality, one could discern a methodical exposition by the Special Rapporteur, who obviously intended to deal with those points in subsequent draft articles devoted to the various aspects in question. That said, pinpointing those omissions might have a beneficial effect on the final product, provided that one did not lose sight of the overall picture and allowed the Special Rapporteur to present the fruit of his analyses in subsequent articles.

67. Mr. HMOUD thanked the Special Rapporteur for his second report, which contained three draft articles on scope, the definition of disaster and the duty to cooperate. The Special Rapporteur presented solid legal arguments in support of his approach to the topic and the choices he had made in the first three draft articles. In doing so, he had made sure that the legal premise underlying the draft articles existed in international law and had refrained from putting forward certain principles that would not secure the general acceptance needed to make the draft articles an effective instrument for dealing with natural disasters.

68. There were, however, other issues that needed to be examined in the context of the Commission’s current or future work on the topic. The rights-based approach and the dual nature of that approach were matters not yet settled within the Commission and would be extensively debated by States and stakeholders in disaster-relief efforts.

69. With regard to the definition of “disaster” in draft article 2, he wondered whether that would be the only term included in that draft article or whether other definitions would be added. Draft articles formulated by the Commission usually incorporated an article on definitions, and draft article 2 presumably fell into that category. If that were the case, it should be revisited at a later date in order to include some further terms, because it was also necessary to define “protection”. As he had said the previous year in his statement on the preliminary report, the meaning of that concept in the regime related to disasters was unclear and the term could not be applied by analogy with human rights law, international humanitarian law or refugee law because it was understood differently in those legal regimes and had a particular meaning in disaster situations.

70. The responsibility to protect and its relationship with the topic had been debated in 2008 by the Commission and by the Sixth Committee during the sixty-third session of the General Assembly. It seemed counter-productive to dwell on the question of whether it was necessary to extend the concept to disaster situations, given the difference between the legal premise underpinning intervention in the event of international crimes and that underlying rights and obligations with respect to disaster relief. In that connection, the Secretary-General in his report to the General Assembly²²² had rightly pointed out that the application of the responsibility to protect to situations other than international crimes would “stretch the concept beyond recognition or operational utility”.

71. As for the outcome of the Commission’s work on the topic and its legal value, there had plainly been differences of opinion in the Sixth Committee on the legal force of the final draft articles (see paragraph 5 of the report). It would therefore be advisable, as the Special Rapporteur suggested, to defer the decision on that matter to a later stage when the framework of the draft articles, their content and their goals had been set. The Special Rapporteur stressed that the Commission’s work should complement existing legal regimes for disasters. That was a welcome suggestion. But it should be remembered that the Commission was engaged in drawing up general principles of law that would apply to all disaster situations. Consequently, that work would be legally binding and certain aspects of it would not complement, but rather overlap, existing legal regimes or instruments. It would therefore be essential to ensure that it did not conflict with them.

72. With regard to the scope *ratione materiae* of the draft articles, the Special Rapporteur stated in his report that he would adopt a rights-based approach to the topic. That approach had legal merit as the draft articles concerned the rights and obligations of various actors in disaster situations. The bottom line was whether it would be advisable to adopt a practical approach that identified the problems facing relief and assistance efforts on the ground and established norms to cope with those problems, an approach that he himself had supported the previous year. In that regard, the Special Rapporteur was right to accept the suggestion of the IFRC that the rights-based approach should be complemented by considering the relevance of needs in the protection of persons. The emphasis would therefore be placed on strengthening the means of coping with disasters, rather than on considering a conceptual premise. A practical approach would also ensure that risk management in disaster situations would ultimately be examined in the context of the topic; that was a matter that could be left for the moment to other bodies, but should be taken into consideration in the Commission’s work.

73. As far as the dual nature of protection was concerned, there was no reason not to include in the draft articles a set of rights of direct benefit to the protected individual. Although the Special Rapporteur provided a lengthy exposition of the legal basis for that approach and analysed judicial decisions relating in particular to consular protection, it would be counterproductive and futile

²²² A/63/677, para. 10 (b).

to dwell on controversial issues such as whether an individual could be a subject of international law, since at the current stage the Commission was considering only the rights and obligations of States *inter se*. At a later stage, it would be possible to ascertain whether direct benefits to the protected individual would stem from the individual rights regime, from the duties of the State where the disaster occurred (the State which was primarily responsible for the protection of its citizens), or from the duties of other States. The inter-State regime of legal rights and obligations might form the basis of benefits for the protected person, if a list of such rights and obligations were exhaustive. In the section on scope *ratione materiae*, the Special Rapporteur had not specified the rights that States and non-State actors had with regard to one another. In the section on scope *ratione personae*, he stated that he would focus on the relationship between States without prejudice to specific provisions applicable to non-State actors which might be introduced at a later stage. Yet in draft article 3 he referred to cooperation between States and non-State actors. Hence the relationship with non-State actors, which was already covered in the draft articles, should be mentioned as part of the scope *ratione materiae* and *ratione personae*.

74. With regard to scope *ratione temporis*, for the reasons set out in the second report, it was preferable to concentrate at the current stage on the disaster proper and post-disaster phase and possibly to consider prevention and preparedness later on. It was important to have a set of rules that could be readily implemented, bearing in mind that, especially in natural or complex disasters, a rule on prevention might be hard to apply.

75. It was troubling that draft article 1 on scope sought to ensure the realization of the rights of persons in the event of disasters. First, the realization of individual rights could never be ensured; a State could aim or intend to protect such rights, but it could not ensure them. Secondly, since the Commission was not yet dealing with the rights of individuals in the event of a disaster, it was premature to define the scope in terms of individual rights. Thirdly, since the aim of investigating the rights and obligations of various actors should result in the individual receiving better protection in disaster situations, it was illogical to limit the purpose of the draft articles to the rights of the individuals. He therefore proposed that the draft article should be amended to read: "The draft articles apply to the protection of persons in the event of disasters, by providing adequate and effective response to the needs arising in all phases of the disaster."

76. With regard to the definition of the term "disaster", his first comment was that the exclusion of armed conflict seemed appropriate, since international humanitarian law was the *lex specialis* governing such situations. The definition proposed in draft article 2 left room for the application of the regime of the draft articles if a disaster other than an armed conflict occurred during such a conflict. Final draft articles concerning the relationship with other principles of law could cover the relationship with international humanitarian law where it did not cover other disasters occurring during armed conflicts. Secondly, the Special Rapporteur defined disaster in terms not of causes but of consequences, namely the serious disruption of the

functioning of society. In order to avoid too broad a definition, a list could be drawn up of events that would not be regarded as disasters for the purposes of the draft articles. In addition, for the sake of precision, a reference should be made to the causes of the disaster, at least in the commentary, if not in the draft article itself. In any case, the causal relationship between the origin of the disaster and the ensuing harm should also be brought out in the commentary and it should be made clear that the causation could be direct or indirect. Thirdly, the element of environmental harm should appear in the definition of a disaster, but that did not mean that the text under consideration should deal with environmental protection, as that matter was subject to other rules of international law. Lastly, it seemed warranted to define disasters in terms of the harm incurred rather than the threat of harm. Unless it could be demonstrated that a threat to human life, property and the environment existed independently of the actual loss, the definition should cover only actual loss.

77. On the subject of solidarity and cooperation, he fully supported the inclusion of the principle of cooperation in the draft articles. The Special Rapporteur had shown that the notion of cooperation was firmly rooted in international law. However, emphasizing the principle of solidarity as underlying the duty of cooperation would be controversial and might lead to the rejection of the notion of cooperation by those who did not accept the idea of solidarity or third generation human rights. Reference to the provisions of various international instruments such as Article 1, paragraph 3, of the Charter of the United Nations and General Assembly resolutions that were generally accepted would suffice as the legal basis for cooperation. But it was still necessary to specify who would be subject to that duty. There were good reasons to require a State where a disaster occurred to cooperate with other States, subject to certain conditions, including respect for the principle of non-intervention, or with intergovernmental organizations whose role in international disasters had been recognized by the international community. Once again, certain conditions had to be met in order to ensure that the affected State would not be subjected to interference in its essential functions as a State. Cooperation with other States and intergovernmental organizations should not, however, be seen only from one perspective. A State where a disaster happened was entitled to receive cooperation from other States and intergovernmental organizations on certain conditions, including the ability of those entities to cooperate and furnish assistance. With regard to cooperation with civil society, the essential role played by Red Cross and Red Crescent Societies in disasters should be recognized. But it was one thing to recognize that role and another to oblige a State to cooperate with its national Red Cross and Red Crescent Societies, an obligation that did not exist in international law and had not garnered enough general support to become a rule. The same applied to humanitarian NGOs. For various legal and other reasons, some States would object to being placed under an obligation to cooperate with NGOs. Any reference to cooperation with NGOs should therefore be couched in non-binding language.

78. In conclusion, he was in favour of referring the draft articles to the Drafting Committee with the amendments

he had proposed, especially those concerning scope and cooperation. As for the definition of “disaster”, he hoped that the Special Rapporteur would respond on the matter of causation and the suggestion of an exclusion list. He hoped that the Drafting Committee would accept his proposal to add a definition of the term “protection” in draft article 2.

The meeting rose at 1.05 p.m.

3019th MEETING

Friday, 10 July 2009 at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, 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 (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the second report on the topic of the protection of persons in the event of disasters (A/CN.4/615).

2. Mr. VARGAS-CARREÑO said that being one of the last to speak on a topic made it easier to identify the main issues of debate, as well as the points on which there were differences and the possible ways of overcoming them, especially in the case of the current topic, on which there had been a lively exchange and numerous substantive and persuasive interventions. There had been general agreement on a number of points, one of which was that everyone appreciated the excellent quality of the Special Rapporteur’s second report, especially given the difficulty and complexity of the subject matter involved. There was also general agreement that, despite the complexity of the topic, it was important, timely and appropriate for it to be taken up by the Commission. Personally, he would like to see the General Assembly, through a resolution, formally adopt a declaration on the principles on the topic, which would represent a major contribution by the Commission to the current body of international law.

3. Both the preliminary²²³ and second reports of the Special Rapporteur had helped to define the task before the

Commission in terms of what it should and should not address in its current set of draft articles. With regard to what it should address, there was certainly still much to be done and the Commission would gradually narrow the scope of its work. As to what not to address, on the basis of the two reports presented by the Special Rapporteur and the subsequent debates, the Commission could begin trimming down or eliminating certain issues. For example, it had become clear that the responsibility to protect without the consent of the affected State did not constitute an accepted principle under current international law.

4. Despite divergent views on certain points, most Commission members seemed to agree that the first three draft articles should address the scope of the topic, the definition of disaster and the duty to cooperate, respectively.

5. With regard to draft article 1, he could accept Mr. Gaja’s proposed wording, which simply stated that the draft articles applied to the protection of persons in the event of disasters. However, either as a continuation of that article or in a subsequent article, there should be an indication to the effect that in order to provide protection, States must ensure the realization of the rights of persons and provide an adequate and effective response in the event of a disaster. It was also important to include, either in draft article 1 or in a subsequent article, a provision stating that protection of persons must be provided at all phases of a disaster, including the pre-disaster, disaster proper and post-disaster phases, the latter being, generally speaking, the most important.

6. With regard to draft article 2, he could accept the Special Rapporteur’s proposed definition of disaster, provided that the phrase “excluding armed conflict” was deleted. In that connection, he considered reasonable the arguments put forward by Ms. Escarameia and other members favouring the inclusion of armed conflicts in some cases. Certainly the armed conflicts cited as examples by Mr. Dugard had left tremendous disasters in their wake. Nor was there any doubt that situations such as those that had occurred in Central America during the 1980s or those currently occurring in Darfur and Gaza constituted disasters that were the result of armed conflict. While there was no question that it was primarily the rules of international humanitarian law, in particular the 1949 Geneva Conventions and their Additional Protocols, that applied in situations of armed conflict, it was also true that those rules did not cover other aspects of disasters, which were precisely the ones that would be covered by the Commission’s draft articles. That was especially true in the post-disaster phase, where the rules of international humanitarian law were clearly inadequate.

7. Lastly, with regard to draft article 3, it would be useful to include a general introductory provision reiterating the obligation of States to cooperate among themselves, without prejudice to subsequent articles that might further specify and develop that obligation. Among the proposals made with regard to draft article 3 that related to the other bodies with which the State must cooperate, he favoured the proposal of Ms. Jacobsson to add a specific reference to the ICRC in subparagraph (b) and to replace the term “civil society” with a reference to competent NGOs in subparagraph (c).

²²³ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598.