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Summary record of the 3056th meeting

Topic:
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for the work of the International Law Commission on the topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)' " be issued as an official document of the Commission.

It was so decided.

The meeting rose at 1 p.m.

3056th MEETING

Thursday, 3 June 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (*continued*) (A/CN.4/620 and Add.1, sect. D, A/CN.4/629, A/CN.4/L.776)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the agenda item on protection of persons in the event of disasters.

2. Mr. PERERA commended the Special Rapporteur on his comprehensive, well-structured third report (A/CN.4/629) which dealt with the key principles of the topic, namely humanity, neutrality and impartiality, and with the overarching concept of human dignity, which was intimately linked to those principles. The Special Rapporteur had also tackled the fundamental question of the primary responsibility of the affected State.

3. When the Sixth Committee had considered the second report,[214] States had expressed satisfaction with the Special Rapporteur's dual-axis approach, which consisted in focusing first on States' rights and obligations *vis-à-vis* each other and then on States' rights and obligations *vis-à-vis* individuals (para. 5 of the third report). Most States had also approved of the Special Rapporteur's emphasis on the rights and needs of affected persons (para. 6).

4. The Special Rapporteur noted that the principles of humanity, neutrality and impartiality were widely used in numerous international instruments, first and foremost in the guiding principles contained in the annex to General Assembly resolution 46/182 of 19 December 1991, on the strengthening of the coordination of humanitarian emergency assistance of the United Nations. According to paragraph 22 of the report, the IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance[215] emphasized that those humanitarian principles must not be used for extraneous purposes. Similarly, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the ICJ had found that humanitarian assistance must be limited to "the purposes hallowed in the practice of the Red Cross" in order to "escape condemnation as an intervention in the internal affairs" of the affected State (para. 243 of the opinion). As paragraph 25 of the report rightly stated, disaster response was conditioned at all stages on those humanitarian principles so as to preserve its legitimacy and effectiveness.

5. With regard to draft article 6, he said that since the Commission had decided to exclude situations of armed conflict from the scope of the draft articles, it should reflect further on the notion of "neutrality".

6. Having traced the origins of the concept of human dignity and its incorporation in human rights instruments, the Special Rapporteur concluded in paragraph 61 that "dignity embodies the evolution beyond a mere contractual understanding of the protection of persons under international law, and points to a true international community, based on the respect of human beings in their dignity". Draft article 7 sought to place the concept of human dignity in the context of efforts to devise a normative framework for the protection of persons in the event of disasters.

7. Part IV of the report dealt with the important matter of the responsibility of the affected State. The principles of sovereignty and non-intervention, both of which were well established in international law, were fundamental to the treatment of the affected State's role and responsibility. The key guiding principles for disaster response were set forth in the annex to General Assembly resolution 46/182, which stated that "[t]he sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, 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" (annex, para. 3).

8. The Special Rapporteur dealt with the matter by indicating that two general consequences flowed from the affected State's primacy in disaster response. The first was that that State bore the ultimate responsibility for protecting disaster victims in its territory and had a central role in facilitating, coordinating and overseeing relief operations in its territory. The second was that humanitarian aid could be supplied only with its consent. The Special Rapporteur was right in saying that this fundamental requirement, a necessary corollary of the principles of sovereignty and non-intervention, was "of a primarily 'external' character", since it governed the affected State's relationships with other international actors in the wake of a disaster (para. 90). Draft article 8 did reflect these "internal" and "external" aspects of the responsibility of the affected State.

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[214] See footnote 178 above.

[215] See footnote 198 above.

9. Another fundamental principle to which several members of the Commission had referred was that of international cooperation and solidarity, as set forth in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations adopted by the General Assembly in its resolution 2625 (XXV).

10. In its further work on the topic, the Commission should remember that the affected State and other actors played vital roles in the overall umbrella of international cooperation and solidarity. Hence, the issues that the Special Rapporteur was intending to cover in forthcoming reports, for example guidelines for foreign actors and the relationship between the affected State and foreign humanitarian personnel, were of crucial importance.

11. In conclusion, he suggested that draft articles 6, 7 and 8 be referred to the Drafting Committee.

12. Sir Michael WOOD congratulated the Special Rapporteur on his interesting and stimulating third report in which he proposed three new draft articles.

13. Draft article 6 (Humanitarian principles in disaster response) had the merit of simplicity—it read: "Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality."

14. But what was meant by "response"? What was the scope of that word? What "response" was the Commission talking about? Did the phrase "shall take place in accordance with" clearly express what it wished to say? An even more substantive question was whether it was meaningful to include such general provisions in the operative part of what was intended to become a legal text. The Special Rapporteur apparently intended his future reports to contain more specific provisions that would elaborate on those general clauses. Rather than elaborating on those principles, however, it would be better to replace them with more precise provisions.

15. The Special Rapporteur stated repeatedly that the "principle of humanity" was a principle of international law. However, the various examples given were taken from non-binding instruments such as resolutions of the General Assembly or the Economic and Social Council, or were context specific. The texts were mostly more precise than the single word "humanity" might suggest, and it was not always clear how far they were intended to constitute a statement of a principle of law or a policy. For example, in the *Corfu Channel* case and in *Military and Paramilitary Activities in and against Nicaragua*, the reference by the ICJ to "elementary considerations of humanity" (*Corfu Channel*, p. 22) was a far cry from a statement of a general principle of "humanity" in international law.

16. Draft article 7 was worded: "For the purposes of the present draft articles, States, competent international organizations and other relevant actors shall respect and protect human dignity." He agreed with the Chairperson that the meaning of that provision was not particularly plain and that the Drafting Committee might wish to replace the words "For the purposes of the present draft articles" with "In implementing these draft articles". Moreover, draft article 7 would read better and be clearer if the phrase "respect and ensure the protection of human dignity" were used instead of "respect and protect human dignity".

17. Draft article 8 was more specific than the other two, but was perhaps too rigid. Although it raised some very important issues of principle, the absolutist terms of the two paragraphs making up the draft article might give a false impression. While he understood that the Special Rapporteur intended to refine those provisions in future reports, he wished to make four specific points about the draft article at the present stage.

18. First, he welcomed the fact that the Special Rapporteur intended to expand on draft article 8 in future reports. Among other things, consideration should be given to recognizing the legal consequences of the responsibility of the affected State, at least by saying that the consent of the affected State should not unreasonably be withheld. Such a statement, which could be found in other international instruments, would be without prejudice to that State's sovereign right to decide whether external assistance was appropriate, but such a decision must be taken in good faith and in light of the affected State's primary responsibility. It was also necessary to recognize that, in some exceptional circumstances, the affected State might be unable to give formal consent within the timescale needed to react to an overwhelming disaster.

19. Secondly, the two paragraphs of draft article 8 dealt with different matters: first, the primary responsibility of the affected State to protect its own population; and secondly, the need to obtain the affected State's consent to what was termed "external assistance". The Drafting Committee might wish to consider whether those two matters should be dealt with in separate provisions: the relationship between the two required careful consideration. In particular, the fact that consent of some sort might be necessary did not imply that the affected State's primary responsibility towards its own population was in any way diminished.

20. Thirdly, the second paragraph of draft article 8 related to "external assistance", a term that was not defined. Was the Commission purporting to impose an international law requirement that NGOs or other private bodies must obtain the affected State's consent? Was it not sufficient to say that they must comply with the affected State's internal law, which in turn must be designed to enable the affected State to fulfil its primary responsibility? Presumably, the phrase "external assistance" was not intended to cover assistance given by foreign private entities or international organizations already present in the affected State.

21. His fourth and final point concerned the draft articles already considered by the Drafting Committee, as well as the three new draft articles now proposed. As they stood, those texts did not make it clear whether the Commission was seeking to lay down rules for States and other bodies with international legal personality, principally international intergovernmental organizations, or whether it was trying to cover private entities as well. Why, for example, did draft article 7 impose an obligation on "States, competent international organizations and other relevant actors"

(whoever "other relevant actors" might be), whereas draft articles 6 and 8 were drafted in a very general way and did not specify who, if anyone, had rights and obligations in that context?

22. In conclusion, he supported the referral of draft articles 6 and 7 to the Drafting Committee but thought it preferable to see what the Special Rapporteur's more detailed proposals were before doing likewise with draft article 8.

23. Mr. DUGARD congratulated the Special Rapporteur on his informative and interesting report. It was also provocative in the sense that it was not neutral: it was heavily weighted in favour of the early precepts of international law, grounded in the principles of sovereignty and consent as the basis for international relations. While he disagreed with the Special Rapporteur's legal philosophy, he welcomed the report as a good basis for a debate that would highlight differing approaches within the international law community.

24. He wondered about the purpose of the report. Was it simply to confirm that the protection of persons in the event of disasters fell within the affected State's domestic jurisdiction? If so, then it was enough to adopt the existing draft articles. Draft article 8 simply reaffirmed Article 2, paragraph 7, of the Charter of the United Nations. Paragraph 74 of the report said that a State affected by a disaster was free "to adopt whatever measures it sees fit" to ensure the protection of affected persons. Draft articles 6 and 7 asserted that States, in exercising their sovereign rights, must respect the rights of the persons affected.

25. He was uncertain why the Commission should embark on such an exercise at all, since the Charter of the United Nations already embodied those principles. Indeed, it went further than the draft articles: under Articles 55 and 56, States were obliged to exercise their rights, in a given domestic sphere, in a non-discriminatory manner and with respect for the human rights of the affected persons. Draft article 1, adopted at the sixty-first session by the Drafting Committee, referred to the rights of the persons concerned (not to their human rights), and draft articles 7 and 8 spoke of the principles of humanity, neutrality and impartiality and of human dignity, but made no mention of the principle of non-discrimination. The Special Rapporteur held that that principle was subsumed under impartiality but, like Mr. Vargas Carreño, he personally believed that non-discrimination should be mentioned expressly, as it had been in the resolution of the IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, to which reference was made in paragraph 22 of the report.

26. It was undoubtedly not the Special Rapporteur's intention simply to reaffirm Article 2, paragraph 7, of the Charter of the United Nations, because in paragraph 75 of the report he said that the sovereign authority of the affected State "remains central to the concept of statehood, but it is by no means absolute". As was clear from paragraphs 15 and 61, *inter alia*, the purpose of the draft articles was to balance the State's rights with the human rights of its citizens, and even with the interests of the international community, in the event of a disaster.

27. In his introductory statement, the Special Rapporteur had indicated that in later reports he would submit draft articles limiting State sovereignty. However, irreparable harm would be done if draft article 8 were accepted as it stood: the requisite limitations should be addressed without delay. The Commission must adopt a set of draft articles that balanced State sovereignty with the international community's interests, on the basis of respect for human rights. Unfortunately, contemporary history showed that not all States responded to natural disasters while taking account of the need to protect human rights. One had only to compare the recent response of the Government of Haiti with that of the Government of Myanmar a few years earlier. After the earthquake, Haiti had immediately appealed for international assistance, aid from the United Nations and other international organizations. Governments had responded in a constructive manner and with no ill effects on the sovereignty of Haiti, as demonstrated by the fact that the Government had prevented an NGO from taking orphans out of its territory without permission. The State's sovereign rights had been safeguarded, even with the intensive involvement of the international community. The reaction of Myanmar had been different, even though the situation there could be described as exceptional in many respects. There were many evil regimes in the world that might find it inconvenient to allow in international emergency assistance, as that would oblige them to open their borders to observers from the international community.

28. The Special Rapporteur had repeatedly emphasized that the affected State had a primary responsibility for handling disasters, and he himself did not dispute that. The State's secondary responsibility should be mentioned as well, however, if only through a reference to the resolution adopted by the Institute of International Law in 2003, cited in paragraph 89 of the report, in which the Institute indicated that the affected State had the duty "to take the necessary measures to prevent the misappropriation of humanitarian assistance and other abuses".[216]

29. The Commission should go much further, however: it should return to the bold approach it had adopted in the draft articles on responsibility of States for internationally wrongful acts[217] and engage in moderate progressive development. Article 8, paragraph 2, should therefore be deleted or at least state that consent should not be unreasonably withheld, as Sir Michael had suggested. Personally, he would prefer to add a paragraph to the effect that the international community as a whole had a secondary responsibility for the protection of persons and the provision of humanitarian assistance in the event of disasters. States must cooperate with the affected State to provide humanitarian assistance in a lawful manner. The Commission could go even further and say that draft article 8, paragraph 1, was without prejudice to the right of the international community as a whole to provide lawful humanitarian assistance to persons affected by a disaster if the affected State lacked the capacity or will to exercise its primary responsibility to furnish such assistance.

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[216] See footnote 187 above.

[217] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

30. Lastly, he wondered what was meant by "affected State". Did that term include a territory over which a State exercised jurisdiction, such as Guantánamo Bay; an occupied territory, such as Western Sahara, northern Cyprus or Palestine; or did it apply also to a State whose troops were present in another country for some other reason, such as in Afghanistan or Iraq? A better definition of "affected State" was necessary.

31. In conclusion, he said he was in favour of referring draft articles 6 and 7 to the Drafting Committee. However, he would like them to be combined into a single article or placed in the preamble rather than in the operative provisions. He was not in favour of the referral of draft article 8.

32. Mr. SABOIA said that the Special Rapporteur's third report was clear and precise, based on thorough research into both the law and practice relating to the topic.

33. Although the three draft articles were short and clear, the analysis preceding them was so substantive that he wished to comment on it in the order in which the issues were tackled. As the Special Rapporteur noted in paragraph 15 of his report, humanitarian assistance must comply with certain requirements in order to balance the interests of the affected State and those of the assisting actors. In view of some of the comments made during the debate, the interests of disaster victims could be added to that list. The principles of humanity, neutrality and impartiality were the source of most of those requirements, which had been developed mainly in the context of international humanitarian law and in the pertinent resolutions and documents of the United Nations, the ICRC and the IFRC.

34. The Special Rapporteur dealt first with the principle of neutrality, stating very clearly its meaning in the context of armed conflict. Transposing that principle to the topic of protection of persons in the event of disasters was a complex task, as shown in paragraphs 27, 28 and 29 of the third report. First, as the Special Rapporteur said in paragraph 27, neutrality neither conferred nor took away legitimacy from any authority, and humanitarian response must not be used to intervene in the domestic affairs of a State. In the passage citing Patrnogic, in paragraph 27 of his report, the Special Rapporteur also explained that "the principle of neutrality may not be interpreted as an action that fails to take account of respect for other fundamental human rights principles"[218] and was clearly subordinate to the principle of respect for the sovereignty of States. The experiences of the ICRC in armed conflicts or post-conflict situations showed that there might be times when the principles involved gave rise to tension and dilemma; however, neutrality could never be interpreted as indifference in the face of serious human rights violations.

35. In paragraph 29 of his report, the Special Rapporteur also recalled that "those responding to disasters should abstain from any act which might be interpreted as interference with the interests of the State. Conversely, the affected State must respect the humanitarian nature of the response activities and 'refrain from subjecting it to conditions that divest it of its material and ideological neutrality' ". That apt statement of the balance that had to be found between the different goals and values at stake added meaning to draft article 6.

36. The principles of impartiality and humanity had been skillfully analysed by the Special Rapporteur, who called humanity the point of articulation between international humanitarian law and human rights law. The Special Rapporteur clearly explained that the principle of impartiality encompassed three distinct principles: non-discrimination, proportionality and impartiality proper.

37. It was important to underline the relevance of the quotations from decisions of the ICJ and the International Tribunal for the Former Yugoslavia with regard to the coexistence of human rights law and international humanitarian law and the need to respect the inherent dignity of the human person. In the light of the recent discussion about the latter issue, he was of the view that while human dignity was a source of human rights, it likewise constituted a value and must, as such, be mentioned in the relevant provisions.

38. Based on such considerations, in paragraph 50 the Special Rapporteur proposed a draft article 6, entitled "Humanitarian principles in disaster response", which was clear and straightforward and which he could support.

39. In paragraph 61 of his third report, the Special Rapporteur concluded that "dignity embodies the evolution beyond a mere contractual understanding of the protection of persons under international law, and points to a true international community". He shared that view and supported draft article 7.

40. In the last chapter of his report, the Special Rapporteur dealt with the responsibility of the affected State and reaffirmed that sovereignty and non-intervention were general principles of international law that must be respected in the context of humanitarian assistance and protection of persons. In paragraph 75, however, he pointed out that sovereignty was not absolute and that when the life, health and the physical integrity of human beings was at stake, areas of law such as international minimum standards, humanitarian law and human rights law demonstrated that principles such as sovereignty were a starting point for analysis, not a conclusion.

41. On the basis of the arguments developed in that chapter, the Special Rapporteur stated that the affected State bore the primary responsibility for protecting disaster victims and for facilitating, coordinating and overseeing relief operations on its territory. In addition, international relief operations required the affected State's consent. He himself endorsed draft article 8, entitled "Primary responsibility of the affected State", which was based on the Special Rapporteur's analysis of those issues.

42. He again thanked the Special Rapporteur for the excellent quality of his work and supported the referral of draft articles 6, 7 and 8 to the Drafting Committee.

[218] J. Patrnogic, "Protection de la personne humaine au cours des catastrophes naturelles", *Annales de droit international médical*, vol. 27 (1977), pp. 16–33, at p. 19.

43. Mr. GAJA congratulated the Special Rapporteur on his clearly-written, well-documented third report, which allowed the Commission to make significant progress in studying the protection of persons in the event of disasters. It would be difficult not to share the Special Rapporteur's desire to enhance the protection of disaster victims. The overall plan of the study was not entirely clear, however, which perhaps explained the criticism voiced on matters that would probably be addressed in subsequent reports.

44. Draft article 8 stated that the affected State had the primary responsibility for the protection of persons and provision of humanitarian assistance in its territory. The main implication of that proposition was that external assistance might be provided only with the affected State's consent. He agreed that such consent had to be given an essential role—it would be unrealistic for the Commission to seek greater cooperation among States without first setting forth that principle. The Commission's task, however, should be to suggest incentives for that consent to be given when international cooperation was likely to improve the protection of disaster victims: it should make external assistance more acceptable. That aspect would probably be addressed by the Special Rapporteur in subsequent reports.

45. The Commission should suggest that an international organization—the United Nations, a regional body or a new specialized agency—be given the role of centralizing the main forms of assistance. That would have two main advantages. First, it would give international assistance a more neutral aspect and hence make it more acceptable. Secondly, it would improve coordination among relief entities—a problem that had again come up in the aftermath of the earthquake in Haiti.

46. When the affected State's primary responsibility was recognized in draft article 8, that State's obligation to provide all the protection it could should likewise be emphasized. As the General Assembly had stated in its resolution 63/141 of 11 December 2008 entitled "International cooperation on humanitarian assistance in the field of natural disasters, from relief to development", quoted in paragraph 77 of the third report, "the affected State has the primary responsibility in the initiation, organization, coordination and implementation of humanitarian assistance within its territory". That obligation of the affected State should be expressed more clearly in draft article 8 which, as it stood, placed more emphasis on the rights of the affected State. While all States had a duty to cooperate, the affected State had a more specific duty which might imply, as indicated in the Bruges resolution of the Institute of International Law, that "affected States are under the obligation not arbitrarily and unjustifiably to reject a *bona fide* offer exclusively intended to provide humanitarian assistance".[219] Mr. Dugard, Mr. Hmoud, and Sir Michael had made a similar point.

47. Draft articles 6 and 7 set out some general principles concerning the way assistance should be supplied. They applied to all the State and non-State actors concerned. As Ms. Xue had suggested, their place in the general context of the draft articles was not very clear. Draft article 6 was remarkably short, as Mr. Saboia had noted, and it would be wise to include in it some of the points made in the report, for example with regard to non-discrimination, as Mr. Dugard and Mr. Vargas Carreño had suggested. The Special Rapporteur's desire to stress the importance of human dignity in draft article 7, which was also very succinct, was legitimate, but it could be read *a contrario* as restricting to a minimum the duty to protect victims' human rights. That duty was incumbent upon all actors, albeit to a differing extent. The draft article should also refer to both human dignity and human rights, as Mr. Vargas Carreño had pointed out.

48. While he had no objection to the referral of the three draft articles to the Drafting Committee, he thought it would be useful for the Drafting Committee also to have a general overview of the project.

49. Mr. PETRIČ commended the Special Rapporteur on his third report, which drew the attention of members of the Commission to previous work, informed them of States' reactions and contained three important new draft articles chiefly based on numerous international documents reflecting State practice.

50. In 2009, after lengthy discussions in plenary, the Commission had taken note of the draft articles provisionally adopted by the Drafting Committee, in which the protection of persons was at the heart of the exercise: that was particularly true of draft articles 1 and 2. As draft article 2 indicated, their purpose was to "facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights".[220] Thus, while the Commission must take account of the principles of State sovereignty and non-interference, at the same time it must not forget that its principal goal was to protect human lives. It was gratifying to see that during the debates in the Sixth Committee, States had not essentially called into question the basic thrust of the draft articles.

51. He very much agreed with the thinking and comments of Mr. Dugard, Mr. Vargas Carreño and Sir Michael. The principles of impartiality, proportionality and neutrality, which might have raised serious difficulties, seemed to be well established in several international texts, including General Assembly resolutions, as the Special Rapporteur had demonstrated in his report. It would therefore be better not to depart from them unless there were very good reasons for doing so. Emphasis should nevertheless be placed on the principle of non-discrimination, since when disasters actually occurred there could be—and already had been—instances of discrimination against various groups. All those principles, including that of human dignity, could be placed in the preamble, but he had no set opinion on the subject.

52. Since the Commission had already discussed the principle of human dignity in the context of the topic of expulsion of aliens, it should follow the same line of reasoning and formulate the same conclusions, namely that

[219] Institute of International Law, *Yearbook*, vol. 70, Part II (see footnote 187 above), p. 275.

[220] A/CN.4/L.758 (see footnote 179 above). See also *Yearbook ... 2009*, vol. I, 3029th meeting, paras. 1–33.

it did not constitute a specific human right, but rather formed the basis of all other rights and of the treatment of disaster victims.

53. He was pleased to note that, in his introductory statement, the Special Rapporteur had explained that in the draft articles following draft article 8, he intended to strike a balance between the rights and the duties of affected States. That seemed to be of crucial importance if the Commission wished to hold to the course set in draft articles 1 and 2, namely the emphasis on the protection of persons.

54. There was no doubt that the affected State's interests, especially its sovereignty and integrity and the principle of non-interference, must be fully respected when natural disasters occurred. However, in 2010 the term "sovereignty" did not have the same meaning as half a century earlier. It now covered not only the right, but also the duty of a State to ensure its population's security and well-being. That change in mindset, and therefore in international law, especially since the Second World War, had lent a new dimension to the principle of sovereignty. The protection of human rights under international law had ushered in a new era: it was now understood that States could not do as they pleased with their citizens—the individual and the protection of his or her rights had become *lex maxima*.

55. If the Commission retained draft article 8 without establishing a balance in the subsequent articles, that draft article would be unacceptable. Its fate therefore hung on finding the requisite balance between safeguarding States' interests, including the principle of their undisputed primary responsibility, and securing the rights and needs of disaster victims, to whom rapid and effective assistance must be given.

56. In most cases, obtaining the affected State's consent should not pose a problem. The affected State and foreign actors would act in accordance with their duty to cooperate, as set forth in draft article 5, and would jointly endeavour to protect victims, meet their needs and respect their rights. Difficulties would arise if the affected State was unable or unwilling to shoulder its primary responsibility to protect persons and provide effective humanitarian assistance. In such cases, vulnerable individuals would be left without protection, for no one would venture into the territory of an affected State without its consent, above all if international law required such consent. That was why draft article 8 had to be counterbalanced by later draft articles stipulating the affected State's duties and the criteria according to which it could refuse international assistance. It appeared that the Special Rapporteur intended to establish that balance in the next draft articles which he would present to the Commission. He therefore suggested that draft article 8 should be adopted provisionally and then reconsidered in light of the content of future draft articles.

57. In conclusion, he recommended the referral of the three draft articles contained in the third report to the Drafting Committee.

58. Mr. SINGH thanked the Special Rapporteur for his third report and his detailed introductory statement. In the report, the Special Rapporteur recalled the views of the Commission and the Sixth Committee with regard to his second report[221] and the fact that his approach had been supported by States. He then identified "the principles that inspire the protection of persons in the event of disaster, in its aspect related to persons in need of protection" (para. 14 of the third report). He noted that disaster response, in particular humanitarian assistance, must comply with certain requirements in order to balance the interests of the affected State and of the assisting actors, and that the requirements for specific activities undertaken as part of the response to disasters might be found in the humanitarian principles of humanity, neutrality and impartiality. In draft article 6, he therefore proposed that "Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality." He noted that they originated in international humanitarian law and in the fundamental principles of the Red Cross[222] and that they were now widely used and accepted in a number of international instruments in the context of disaster response, including in General Assembly resolution 46/182 on the strengthening of the coordination of humanitarian emergency assistance of the United Nations.

59. In paragraph 22 of his report, the Special Rapporteur recalled that paragraph 2 of guideline 4 of the IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, which contained references to the three principles of humanity, neutrality and impartiality, required that assisting actors should ensure that their disaster relief and initial recovery assistance was provided in accordance with those principles. Specifically, such actors should ensure that:

> *a*) Aid priorities are calculated on the basis of need alone;
>
> *b*) Aid is provided to disaster-affected persons without any adverse distinction … ;
>
> *c*) It is provided without seeking to further a particular political or religious standpoint, intervene in the internal affairs of the affected State, or obtain commercial gain from charitable assistance; and
>
> *d*) It is not used as a means of gathering sensitive information of a political, economic or military nature that was irrelevant to disaster relief or initial recovery assistance.[223]

60. As noted in paragraph 11 of the report, it was widely agreed by States that armed conflicts should not be covered by the Commission's draft articles. He therefore agreed with Commission members who had stated that the reference to the principle of neutrality in draft article 6 did not appear to be relevant and that it should be replaced by a reference to non-discrimination. Furthermore, it would be useful to emphasize in that article that the provision of humanitarian assistance should not be used to intervene in the domestic affairs of a State.

61. With regard to draft article 7, he shared the views expressed by Commission members to the effect that, since human dignity was a source of rights and underlay the entire set of draft articles on the topic, it would be more appropriate to deal with it in the preamble—a task that could be entrusted to the Drafting Committee.

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[221] See footnote 178 above.

[222] See footnote 185 above.

[223] See footnote 198 above.

62. Paragraph 1 of draft article 8 on the primary responsibility of the affected State indicated that "[t]he affected State has the primary responsibility for the protection of persons and provision of humanitarian assistance on its territory. The State retains the right, under its national law, to direct, control, coordinate and supervise such assistance within its territory." Paragraph 2 provided that "[e]xternal assistance may be provided only with the consent of the affected State". As mentioned in paragraph 77 of the report, the General Assembly had many times reaffirmed the primacy of the affected State in disaster response. In resolution 46/182, it had held that

> [e]ach State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory (annex, para. 4).

The General Assembly had also recognized the relevance of the concepts of sovereign equality and territorial sovereignty in the context of disaster response, and in the guiding principles annexed to resolution 46/182, cited in paragraph 69 of the Special Rapporteur's third report, it held that:

> The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, 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 (annex, para. 3).

Consequently, while emphasizing the principles of solidarity and cooperation with a view to encouraging the provision of assistance to affected persons and meeting basic human needs in emergency situations resulting from a natural disaster, the draft articles should also recognize the sovereignty of the affected State; its responsibility towards its nationals; its right to decide whether it needed international assistance, since it was best placed to assess the needs of the situation and its own capacity to respond in an effective and timely manner; and, if it accepted international assistance, its right to direct, coordinate and supervise such assistance within its territory. Given the Special Rapporteur's view that it was necessary to strike a balance between those two basic requirements, the Commission was looking forward with great interest to his proposals on the subject. As Mr. Gaja had suggested, the draft articles should require States to consent to humanitarian intervention when external assistance was likely to improve the protection of disaster victims and not to delay such consent unreasonably.

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

64. Mr. WISNUMURTI said that the Special Rapporteur had very helpfully summarized the background of the Commission's work on the topic and had analysed the views expressed by Member States during the debate in the Sixth Committee. The in-depth research he had carried out on various international legal instruments and the international case law supporting the three draft articles was also very useful. The Special Rapporteur had addressed the principles of humanity, neutrality and impartiality that formed the basis of the three important articles that deserved serious consideration. The draft articles reflected the debate in the Commission and in the Drafting Committee. As noted in paragraph 2 of the report, the Drafting Committee had provisionally adopted draft article 5 on the duty to cooperate on the understanding that the Special Rapporteur would subsequently propose an article on the primary responsibility of the affected State. The Special Rapporteur had also been consistent with his own conclusion, supported by the members of the Commission, that the concept of "responsibility to protect" did not fall into the ambit of the work on the topic. It was nevertheless regrettable that the principles of sovereignty and non-intervention or non-interference in the domestic affairs of another State had not been reflected in the proposed draft articles, even though they were discussed extensively in paragraphs 64 to 75 of the report. While draft article 8, paragraph 2, stipulating that external assistance might be provided only with the consent of the affected State, could be interpreted as embodying the principles of sovereignty and non-intervention, that was not enough: those principles, in his view, should constitute the basis for developing the regime for the protection of persons in the event of disasters. Nonetheless, the Special Rapporteur had presented a valuable analysis of the principles of humanity, neutrality and impartiality, which he considered to be the core principles of humanitarian assistance, including in the event of natural disasters. The three principles had been set forth in various documents adopted, *inter alia*, by the General Assembly, the ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the ICRC and the IFRC.

65. More specifically, with regard to the principle of neutrality, he agreed with the statement made in paragraph 27 of the report that neutrality neither conferred nor took away legitimacy from any authority and that humanitarian response should not be used to interfere in the domestic affairs of a State. The opinion of the author cited in the same paragraph[224] also confirmed that the principle of neutrality was clearly subordinate to the principle of respect for the sovereignty of States. The Special Rapporteur had indicated in paragraph 31 of his report that the principle of impartiality encompassed three distinct principles, namely non-discrimination, proportionality and impartiality proper. He himself had no difficulty with the principle of non-discrimination as set forth in the Charter of the United Nations and as recognized in various international treaties and instruments, which had acquired the status of a fundamental rule of international human rights law, and he had no problem with the principle of impartiality either. However, he did have reservations concerning the principle of proportionality, particularly if it was interpreted narrowly. There were cases when an affected State did not have the resources needed to meet the requirement that the response must be proportionate to the degree of suffering and urgency. Hence, it was of primary importance for the principle of proportionality to be assessed on a case-by-case basis, taking into account the reality on the ground. The scope of the principle should therefore be defined and explained adequately in the commentary. He also agreed that, as stated in paragraph 37 of the report, the principle of humanity was the cornerstone of the protection of persons in international law, since it served as the point of articulation between international

[224] Patrnogic, *loc. cit.* (footnote 218 above).

humanitarian law and international human rights law. The principle had been applied by international and regional courts. Given those observations, he had no problem with draft article 6 on humanitarian principles in disaster response.

66. As noted in paragraph 51 of the Special Rapporteur's report, the principle of humanity in international humanitarian law was intimately linked to the notion of dignity. When the Commission had considered the fifth report on the expulsion of aliens at the beginning of the current session, it had discussed, *inter alia*, the question of human dignity and had recognized the importance of that principle as the source of human rights. In the chapter of his report on human dignity (paras. 51–62), the Special Rapporteur had developed that notion by referring to various international instruments, including the Charter of the United Nations, the Universal Declaration of Human Rights[225] and other international and regional human rights instruments, judicial decisions, *opinio juris* and instruments intended to guide humanitarian relief operations. He therefore had no difficulty in endorsing draft article 7 on human dignity, as proposed by the Special Rapporteur in paragraph 62 of his report.

67. Given that, in 2009, the Drafting Committee had provisionally adopted draft article 5 on the duty to cooperate subject to the understanding that the Special Rapporteur would propose provisions on the primary responsibility of the affected State, he noted with satisfaction that the last chapter was devoted to that subject: it reviewed the principles of sovereignty and non-intervention and the primary responsibility of the affected State. As indicated in paragraph 65, State sovereignty was rooted in the fundamental notion of sovereign equality and was regarded as a fundamental principle in the international order. Its existence and validity had been recognized by States in numerous international instruments. In that connection, the Special Rapporteur referred to the principle of sovereignty embodied in the Charter of the United Nations and recognized by international courts. The ICJ had stated that State sovereignty was also part of customary international law. It was generally held that all offers of humanitarian assistance in response to a disaster must respect the sovereignty, independence and territorial integrity of the affected State. The principle of non-intervention in the domestic affairs of the affected State was also recognized as a principle of customary international law that should guide all international relief efforts. At the same time, it was important to recognize that the principles of sovereignty and non-intervention were the main source of the principle according to which the affected State had the primary responsibility for relief operations and the protection of persons in the event of disasters on its territory. That principle was recognized in General Assembly resolutions and in international and regional instruments, as well as in various international codes of conduct and guidelines for disaster relief. Draft article 8 on the primary responsibility of the affected State seemed to reflect the Commission's understanding of the relevant principles and the practice in the area of disaster relief. However, as he had indicated previously, those provisions were incomplete: in his view, they lacked a draft article on the two essential principles of sovereignty and non-intervention on which disaster relief and the principle of the primary responsibility of the affected State were founded. Draft article 8, paragraph 2, which seemed to reflect those principles, was far from adequate, and he believed that the principles in question needed to be addressed in separate draft articles. It was important to stress that those principles must not diminish the obligation of the affected State to protect persons in the event of disasters. There was no doubt that sovereignty and non-intervention were cardinal principles of no lesser importance than the principles of humanity, neutrality and impartiality. In that connection, he disagreed with Mr. Dugard, who thought that the principle of sovereignty was an outdated concept or legal principle. In his own view, that principle, which was enshrined in the Charter of the United Nations, remained one of the cardinal principles of international law, respected by the international community, although admittedly it was not always considered an absolute principle.

68. In conclusion, and subject to the observations he had just made, he was in favour of referring the draft articles to the Drafting Committee.

69. Mr. COMISSÁRIO AFONSO said that the Special Rapporteur had discussed in great detail the three principles of humanity, neutrality and impartiality which, in his words, "inspire[d] the protection of persons" (para. 14). He himself agreed, in particular, with the idea that the principle of impartiality encompassed three distinct dimensions: non-discrimination, proportionality and impartiality proper. However, the question of whether it was appropriate to apply the principle of proportionality in the context of emergency relief seemed a legitimate one. There were concerns in that regard on two grounds. First, it was more common to speak of the principle of proportionality in the context of the use of force or in relation to countermeasures, given that respect for that principle was required in order for an act not to be qualified as unlawful. In the context of emergency relief, it appeared that what was meant by "proportionality" was a response that was commensurate with the needs on the ground. It would be useful for the Special Rapporteur to address that issue, clearly differentiating the two aspects of the principle and placing each in proper perspective, even though the issue did not directly affect draft article 6. Secondly, the term "proportionality" was somewhat confusing, because it was hard to imagine how a response to a disaster could ever be proportionate to the needs and suffering of the persons affected, materially, psychologically, morally or otherwise. Disasters inflicted terrible disruption in the lives of those affected. Whether viewed from a needs- or rights-based perspective, disaster responses were more mitigation than cure and could not give victims back their normal lives. It sometimes took years to heal the wounds caused by a disaster, and it was accordingly difficult to speak of proportionality in that respect. Perhaps the scope of the principle for the purposes of the entire set of draft articles could be explained in a draft article on the use of terms or in the commentary, as Mr. Wisnumurti had suggested. He himself accordingly suggested that draft article 6 be formulated along the lines of "Disaster relief shall be carried out in accordance with the principles of humanity, neutrality and impartiality", wording that the Drafting Committee could finalize. The principle of human dignity, dealt with

[225] See footnote 22 above.

very well by the Special Rapporteur, could be combined with the principles set out in draft article 6. As to draft article 7, it might read: "In the protection of persons in the event of disasters, States, international organizations and other actors shall respect and observe"—or "ensure", as Sir Michael had suggested—"human dignity".

70. He concurred with the Special Rapporteur's analysis in the last chapter, where he addressed the responsibility of the affected State. He nevertheless fully agreed with the Chairperson who, speaking as a member of the Commission, had drawn attention to the need to restate the principles of sovereignty and non-intervention before referring to the three humanitarian principles. The restatement could be made side by side with the draft article on the duty to cooperate, which would be followed by the current draft article 8. It was crucial for cooperation to take place in the context of full respect for the principles of sovereignty and non-intervention. Experience showed that there was no real contradiction between bona fide external assistance and the observance of those principles. Tensions arose only in the event of a breach or attempted breach of those principles and failure to respect other principles such as impartiality and neutrality. What was not always understood was that assistance provided in circumstances that negated those principles was ineffective and could not produce the desired results. He hoped that the Special Rapporteur, in his wisdom, would take the necessary steps to harmonize the draft articles accordingly. On the whole, he agreed with the wording of draft article 8 but thought that paragraph 2 should read: "External assistance shall be provided with the consent of the affected State."

71. In conclusion, he was in favour of referring the three draft articles to the Drafting Committee.

72. Mr. FOMBA said that, with regard to the scope and substance of the topic, paragraph 3 of the report indicated that members of the Commission had supported the Special Rapporteur's conclusion that the concept of the "responsibility to protect" would not play a role in the Commission's work on the topic. The concept clearly raised fundamental issues, however. Taking the principles of sovereignty and non-interference to their logical conclusions, if a State could not or did not wish to provide appropriate protection and assistance to victims in the event of a disaster, what could or should other States do? Did international law encompass such concepts as rejection of assistance or inability to assist persons in distress or danger, or the individual or collective duty to assist such persons? What might or must be the legal impact of such concepts? In other words, it was necessary to address squarely the daunting and thorny issue of a "right" or "duty" of humanitarian interference. While he did not necessarily subscribe to the same interpretation of the "responsibility to protect" as did the Commission, he respected the consensus position that had been adopted. It would be interesting to see how the subsequent work on the topic evolved with regard to the definition of the role of the affected State, as mentioned in paragraph 101, and the right to reject assistance, an issue raised in paragraph 93: that would give an idea of how far the Commission could or should go. Even though refusal or inability to go much further would somewhat diminish the relevance of the topic, it was better to adopt a realistic attitude and to draw a distinction between what would be desirable in the absolute and what States would find objectively feasible and reasonably acceptable. He endorsed the dual-axis and rights-based approaches outlined by the Special Rapporteur in paragraphs 5 and 6 of the report. As far as terminology was concerned, he queried the distinction between the expressions "humanitarian response" and "humanitarian assistance", given the statement in paragraph 16 that "assistance" was used to indicate only the "minimum package of relief commodities". The reference in paragraph 18 to the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) was useful.

73. With regard to draft article 6, he could accept the three principles cited therein with no particular difficulties. At first glance, the wording seemed clear, given that the meaning and scope of each principle would have to be clarified in the commentary. Mr. Hmoud had proposed that the Commission envisage three possibilities: to amend draft article 6 in order to demonstrate clearly that the three principles should be the basis; to define the three principles in the preamble; or to draft three separate draft articles. The important thing was to specify the scope of the principles, and he was inclined, *a priori*, to favour the third possibility. He would also like to know whether the terms "response" and "assistance" were interchangeable in the title of draft article 6.

74. As to draft article 7 on human dignity, what was true for the expulsion of aliens was equally true, if not more so, for the protection of persons in the event of disasters: the normative threshold must not be lower than for the former. With regard to wording, the obligation to respect and to protect human dignity was clearly formulated, and the scope *ratione personae* was defined in a comprehensive and balanced fashion. During the discussion, Mr. Hmoud, for one, had said that the content of the obligation set forth in draft article 7 should be spelled out more clearly, and Mr. Vargas Carreño had proposed that it should be supplemented by an obligation to respect fundamental human rights or that a separate provision along those lines should be drafted. Those proposals merited closer examination. He himself would favour formulating a dual obligation to respect both human dignity and human rights, on the assumption that the first was the source of the second.

75. With regard to draft article 8, he said that there was an obvious link between the primary responsibility of the affected State and the principles of sovereignty and non-interference, given that the first was the logical outcome of the second two. There seemed to be a contradiction in the relationship between the end of paragraph 76, on the one hand, and paragraphs 82 and 88, on the other. During the discussion, Mr. Vargas Carreño had commented that paragraph 2 of the draft article gave the impression that it was necessary to obtain the formal consent of the affected State, whereas that was not always the case in practice—a point that would have to be taken into account if that assertion proved well founded. Mr. Hmoud had pointed out that primary responsibility did not mean exclusive responsibility and that it also entailed a duty to cooperate, an interpretation that he himself thought was heading in the right direction. In that connection, he endorsed the important comments made by Mr. Gaja and Mr. Petrič.

76. In conclusion, he proposed that articles 6, 7 and 8 be referred to the Drafting Committee.

77. Mr. HASSOUNA said he appreciated the fact that the Special Rapporteur had agreed to expand the three initially proposed draft articles to five so as to make a better distinction between the concepts they covered, even if that had created some confusion in the Sixth Committee, where some Member States had commented on the original draft articles while others had commented on the new ones. Since many disasters had ravaged the world recently, it was a particularly opportune moment to consider the question of the protection of persons in the event of disasters. It would be useful to include in the commentary information on the international community's response to those disasters on the basis of the principle of cooperation.

78. A provision must be devoted to the three major humanitarian principles of intervention in the event of a disaster—humanity, neutrality and impartiality—since they were mentioned frequently in many instruments, including regional ones, governing emergency situations. It would also be useful to include the principle of independence in draft article 6, as had been done in the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), or at least to discuss that principle in the commentary. The principle of neutrality was particularly important in situations of disaster coupled with armed conflict, but when there was no armed conflict, the principle might overlap with those of national sovereignty, non-interference and impartiality. The highly important principle of non-discrimination also warranted inclusion, as had been suggested.

79. The principle of human dignity was the ultimate foundation of human rights law. It was mentioned in the Charter of the United Nations, in all the universal human rights instruments and in most regional instruments. Draft article 7 should be reformulated, however, in order to clarify its scope and its relationship to the human rights embodied in international treaties.

80. Lastly, it must be borne in mind that the above-mentioned principles served merely to "inspire the protection of persons in the event of disaster", to borrow the words of the Special Rapporteur (para. 14). It was regrettable that the Special Rapporteur had chosen not to address their legal implications and ramifications in disaster situations, as that would have helped to underscore further pertinence to the current study.

81. Draft article 8 also set forth an essential rule—that of respect for sovereignty and for the principle of non-interference. In the text annexed to General Assembly resolution 46/182, it was clearly stated that humanitarian assistance must be provided with the consent of the affected State and in principle on the basis of an appeal by it. Two things had to be stipulated, however: first, that there must be no non-humanitarian assistance from donors, and secondly, that the consent of the affected State must be explicit, and not simply inferred from circumstances. As for the primary responsibility of the affected State to provide assistance and protection to disaster victims, that notion was generally recognized and enunciated in most international and regional instruments. In accordance with draft article 8, the affected State played the primary role in directing, controlling, coordinating and supervising humanitarian assistance within its territory. However, it was also called on to play that role effectively with respect to victims, meaning the population. The affected State could, if it gave its consent, receive external assistance in the form of cooperation. That had already been mentioned in draft article 5, but in terms that were overly general and that failed to specify whether the duty to cooperate applied to affected or assisting States and what the extent of such cooperation should be. Mention should also be made of certain new and important aspects of cooperation in disaster response, such as cooperation with early warning mechanisms. Those elements needed to be expanded on in future reports on the topic. For now, he agreed to the referral of the draft articles to the Drafting Committee so that it could incorporate the comments and suggestions made.

82. The CHAIRPERSON said that at the next plenary meeting, the Special Rapporteur would sum up the debate on his third report on the protection of persons in the event of disasters. She invited the Special Rapporteur on the topic of the effects of armed conflicts on treaties to sum up the debate on his initial report.

Effects of armed conflicts on treaties (*continued*) (A/CN.4/622 and Add.1, A/CN.4/627 and Add.1)

[Agenda item 5]

First report of the Special Rapporteur (*continued*)

83. Mr. CAFLISCH (Special Rapporteur) said that he welcomed the critical comments and suggestions made during the debate on the topic, which seemed particularly resistant to codification or even to the progressive development of the law. In future work on the topic, he would divide the text into different parts, as had been requested, and expand his research in the area of practice.

84. As might have been predicted, draft article 1 had given rise to much controversy: first, as to whether it should cover treaties to which international organizations were parties along with one or more States. He was convinced that the issue of the fate of those treaties was very complex, that there were many eventualities to take into account and that any practice—if it even existed—would be difficult to identify. It was not enough to say that international organizations did not wage war and that the treaties they concluded thus continued to apply in the event of armed conflict. The most prudent course would be to undertake further study of the issue, as had been suggested by Belarus.[226]

85. At present, the scope of draft article 1 did not include inter-State treaties to which international organizations were parties. Nor did it include major legislative treaties, such as the United Nations Convention on the Law of the Sea, to which the European Union had become

[226] *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 44.

a party. Attention must therefore be given to those treaties as well, if necessary in a draft article dealing with the effects of armed conflicts on treaties to which international organizations were parties. However, that might be avoided by drawing a distinction between treaties *concerning* international organizations and those to which such organizations *were parties*. The former were covered by the current version of the draft article. Only the second category—specifically, general multilateral treaties of a legislative nature, such as the United Nations Convention on the Law of the Sea—posed a problem. It seemed self-evident that the participation of the European Union in that multilateral treaty should not be allowed to "pollute" relations among States parties in terms of their bilateral dealings. One solution would be to add to draft article 1, or to include among the "without prejudice" clauses, a provision that would read: "This set of draft articles is without prejudice to the rules of international law that apply to the treaty relations of international organizations in the event of an armed conflict."

86. With regard to draft article 2, he said that controversy had arisen over the inclusion of non-international armed conflicts and the definition in subparagraph (*b*) of the very term "armed conflict". The inclusion of internal conflicts was certainly problematic, in part because their effects on treaties could be different than those of international conflicts. The question should not be reopened, however, since it had been decided on first reading to include them and since most of the members were in favour of doing so. On the other hand, the definition of "armed conflict" adopted on first reading had not been agreed on unanimously, and many alternative solutions had been proposed—*inter alia*, a definition based on common article 2 of the Geneva Conventions for the protection of war victims and article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). He himself had proposed using the definition utilized in the *Tadić* case, although without the last part of the sentence, which referred to conflicts that did not involve any States. The majority of Commission members supported that proposal and the retention of the adjective "protracted", which was necessary in order to preclude an unduly broad interpretation. That left the question of whether to refer explicitly to occupation. His view was that occupation was an integral part of armed conflicts and that it was sufficient to mention it in the commentary. Lastly, the issue of State succession had also been raised in the context of draft article 2. While that issue might not be pertinent to the draft articles, however, it would be interesting to find out, in order to mention it in the commentary, perhaps, what had happened following the conflict between Morocco and the Frente Polisario (Frente Popular para la Liberación de Saguía el-Hamra y de Río de Oro) with the treaties concluded by Spain to which Western Sahara had succeeded.

87. Certain members had requested that draft article 3 be completely redrafted as a positive formulation to the effect that, in principle, treaties continued to operate in the event of armed conflict. That would imply the identification, in draft articles 4 and 5 and in the corresponding list in the annex, of those that ceased to operate. He stressed the need for agreement between the title and content of the draft article. The Latin expression *ipso facto* could very well be replaced by its non-Latin equivalent, "by that very fact", but it had been agreed that the word "presumption" should be avoided, since the draft article did not deal with a presumption. Another question, by no means insignificant, that had been raised in relation to draft article 3 was about the various conflict scenarios and parties to the conflict that were covered, namely: (*a*) armed conflicts between two or more States parties to a treaty; (*b*) armed conflicts in which States parties to a treaty were allies; (*c*) conflicts in which only one State party to a treaty was involved; and (*d*) internal armed conflicts. The last two scenarios were similar but not identical. The various scenarios should be dealt with in the commentary, unless they were included in the text of the article itself.

88. As far as draft article 4 was concerned, he was in favour of reinstating a reference to "the intention of the parties to the treaty as derived from the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties". However, some members had pointed out that articles 31 and 32 were aimed not at establishing the intention of the parties but rather at determining its subject matter. It had therefore been proposed to retain the wording adopted on first reading. Another problem was the reference to "the subject matter of the treaty" among the indicia listed in subparagraph (*b*). In fact, the subject matter of the treaty was dealt with in subparagraph (*a*), in that it was determined through interpretation, and in draft article 5, and that was certainly ample treatment. The reference to subject matter in subparagraph (*b*), at least, should therefore be deleted.

89. Many changes had been proposed for draft article 5. It had not been deemed necessary to merge it with draft article 4, nor had it been felt that the treaties covered by draft article 5 should include those relating to international humanitarian law, human rights and international criminal justice or the Charter of the United Nations. That was probably because their inclusion would mean making a distinction between the treaties mentioned in the article itself that would almost certainly continue in operation in the event of a conflict and those contained in the list, whose chances of survival were less certain. Another proposal had been to deal with the modification of a treaty. Assuming that modifications were permitted in the situations in question, they could certainly be made, in keeping with the Latin saying *de majore ad minorem*, and in accordance with draft article 6. Lastly, it seemed desirable to clarify the indicia in draft articles 4 and 5, as well as the links between draft articles 3, 4, 5 and 6 and the list. That would be done in the commentary. With regard to the list, the majority of the members preferred annexing it to draft article 5, rather than consigning it to the commentary. Some additions to that list had been proposed, some of which had sparked controversy: for example, treaties that embodied rules of *jus cogens*. The peremptory rules of international law remained, however, as customary rules with special rank that did not depend on the fate of the treaties that contained them. There had been no objection to the inclusion of treaties establishing an international organization or of those relating to international criminal justice, provided that the bodies concerned applied international law. Lastly, it was not desirable, for obvious reasons, to establish a hierarchy of treaties or to split treaties into various categories. In

addition, draft article 10 provided that treaties were separable and that different parts of treaties could survive—or not survive—for different reasons.

90. With regard to draft article 6, he said he had no objection to referring to the "rules of international law", rather than to the 1969 Vienna Convention in paragraph 1. Nor did he object to the deletion of the phrase "during an armed conflict" in paragraph 2.

91. Draft article 7 recalled that a treaty could contain express provisions on its continued operation, suspension or termination in situations of armed conflict. Such provisions took precedence over those of the draft articles, which were not part of *jus cogens* and were therefore of a residual character. It seemed logical to place draft article 7 immediately after draft article 3. The adverb "express" could certainly be deleted.

92. Draft article 8 concerning notification was an important provision, but one that was still incomplete. Thus it did not set any time limit for notification or objection. Account should also be taken of the fact that notification was not always necessary or possible. Paragraph 1 implied that States not engaged in a conflict but parties to a treaty did not have the right of notification, since extending that right to them was not desirable and the problems that might arise for States not engaged in a conflict could easily be resolved through the means provided for in articles 60 to 62 of the 1969 Vienna Convention. The new paragraph 5, concerning the continuation of obligations with regard to the peaceful settlement of disputes despite the incidence of an armed conflict, had had a mixed reception, but he remained in favour of retaining it, since provisions on dispute settlement contained in treaties between States remained applicable pursuant to subparagraph (*k*) of the list annexed to draft article 5. He thought that the general obligation of peaceful settlement of disputes through the means indicated in the Charter of the United Nations, provided for in the new paragraph 4, also continued to operate, but that was not a generally shared view. Paragraph 4 could be deleted if paragraph 5 was maintained.

93. Draft article 9 was not indispensable, in that its content, derived from article 43 of the 1969 Vienna Convention, appeared patently self-evident. It might be useful to keep it, however, in the interests of alignment with the Convention.

94. Draft articles 10 and 11 were derived from articles 44 and 45, respectively, of the Vienna Convention. Draft article 10, on separability of treaty provisions, was of considerable importance, since without it, the partial survival of a treaty in the event of a conflict would be impossible. Draft article 11 reflected a modicum of good faith that contracting States were expected to show each other, despite the occurrence of an armed conflict. Since it could be difficult for a State to determine, at the outset of an armed conflict, what the effect of that conflict might be on the treaties it had concluded, it would be useful to specify in the commentary that article 11 would apply insofar as the effects of the conflict could be gauged definitively. That meant that draft article 10 would not apply in situations where the length and duration of a conflict had altered the conflict's effects on the treaty, which could not have been foreseen by the State upon giving its express or tacit acquiescence in accordance with draft article 10.

95. Lastly, he had chosen to subsume into draft article 12 the clause contained in draft article 18, since the two provisions dealt with the resumption of treaty relations subsequent to an armed conflict. Draft article 18 addressed a case in which, on the basis of an agreement concluded after the conflict, States revived treaties that had been terminated or suspended owing to an armed conflict. In the case of terminated treaties, that amounted to novation of the treaty. Given that it was a purely voluntary process, draft article 18 was not indispensable. Draft article 12, for its part, was aimed only at treaties (or parts of treaties) that had been suspended as a consequence of an armed conflict and whose operation was resumed, not by virtue of a new agreement, but by the disappearance of the conditions that had prevailed at the time of suspension (hence the reference to draft article 4). The proposal to merge the two scenarios in draft article 12 had received wide approval, subject to certain changes pertaining to form.

96. In conclusion, he recommended that draft articles 1 to 12 be referred to the Drafting Committee.

97. The CHAIRPERSON said she took it that, in keeping with the Special Rapporteur's recommendation, the Commission wished to refer draft articles 1 to 12 to the Drafting Committee.

It was so decided.

The meeting rose at 1.05 p.m.

3057th MEETING

Friday, 4 June 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Murase, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (*continued*) (A/CN.4/620 and Add.1, sect. D, A/CN.4/629, A/CN.4/L.776)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the third report on protection of persons in the event of disasters (A/CN.4/629).