

Chapter IX

PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

A. Introduction

214. The Commission, at its fifty-ninth session (2007), decided to include the topic “Protection of persons in the event of disasters” in its programme of work and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur.⁵⁹⁴ At the same session, the Commission requested the Secretariat to prepare a background study, initially limited to natural disasters, on the topic.⁵⁹⁵

B. Consideration of the topic at the present session

215. At the present session, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/598), tracing the evolution of the protection of persons in the event of disasters, identifying the sources of the law on the topic, as well as previous efforts towards codification and development of the law in the area, presenting in broad outline the various aspects of the general scope with a view to identifying the main legal questions to be covered and advancing tentative conclusions without prejudice to the outcome of the discussion that the report aimed to trigger in the Commission. The Commission also had before it a memorandum by the Secretariat, focusing primarily on natural disasters (A/CN.4/590 and Add.1–3) and providing an overview of existing legal instruments and texts applicable to a variety of aspects of disaster prevention and relief assistance, as well as of the protection of persons in the event of disasters.

216. The Commission considered the preliminary report from its 2978th to 2982nd meetings, on 15 to 18 and 22 July 2008, respectively.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS PRELIMINARY REPORT

217. In his introduction of the report, the Special Rapporteur underlined its preliminary character, and the importance of reading it together with the comprehensive memorandum by the Secretariat. The report was intended to flesh out certain basic assumptions that could inform and stimulate the debate in the Commission, in particular

⁵⁹⁴ At its 2929th meeting, on 1 June 2007, see *Yearbook ... 2007*, vol. II (Part Two), p. 98, para. 375. The General Assembly, in paragraph 7 of resolution 62/66 of 6 December 2007, took note of the Commission’s decision to include the topic “Protection of persons in the event of disasters” in its programme of work. The topic was included in the long-term programme of work of the Commission, during its fifty-eighth session (2006), *Yearbook ... 2006*, vol. II (Part Two), p. 186, para. 260, on the basis of a proposal by the Secretariat, *ibid.*, annex III. See also paragraph 7 of General Assembly resolution 61/34 of 4 December 2006, which took note of the inclusion of the topic in the long-term programme of work.

⁵⁹⁵ *Yearbook ... 2007*, vol. II (Part Two), p. 101, para. 386.

on the scope of the topic and how the topic should be approached.

218. In connection with the general scope of the topic, the Special Rapporteur recalled that although the title of the topic was broad, no official records existed to throw any light as to the reasons why the Commission decided to stress aspects concerning “protection of persons” rather than “relief” or “assistance”, the basic aspect emphasized in the original proposal by the Secretariat in the Working Group on the long-term programme of work. In his view, the “protection of persons” had connotations of a broader concept. Moreover, the focus on the individual as a victim of a disaster implied that certain rights accrued to that individual, suggesting the need for a rights-based approach which would inform the operational mechanisms of protection. Although the concept of protection did not entail that persons affected by disasters as such constituted a separate legal category, victims of such disasters were confronted with a distinct factual situation with specific needs that required addressing. In addition to the victims, there would also be a need to take into account a multiplicity of actors involved in disaster situations.

219. The Special Rapporteur also noted that the concept of disaster, which was not a legal term, and how it was classified bore on the scope of the topic. In the appreciation of the term, it was important to understand that it was not simply the occurrence of the disaster as such that was the point of material concern, but the whole range of aspects involved: cause,⁵⁹⁶ duration⁵⁹⁷ and context.⁵⁹⁸ Accordingly, a number of consequences ensued from taking a broad approach to protection.

220. First, it would imply the consideration of all disasters, whether natural or man-made. Secondly, it would mean the consideration of the issues revolving around the various phases of a disaster, namely the pre-, in- and post-disaster phases, which corresponded to, but were not necessarily coextensive with, concepts of prevention and

⁵⁹⁶ According to cause, disasters were generally divided into two categories: natural disasters (e.g. earthquakes, tsunamis and volcanic eruptions) and man-made disasters (e.g. oil spills, nuclear accidents and armed conflict).

⁵⁹⁷ In terms of duration, disasters may have sudden onset (e.g. hurricanes) or slow onset (creeping) (e.g. droughts, food shortages and crop failures).

⁵⁹⁸ Contextually, disasters may occur in a single or complex emergency. Within the United Nations, a complex emergency was generally defined as a humanitarian crisis in a country, region or society in which there is total or considerable breakdown of authority resulting from internal or external conflict and which requires an international response that goes beyond the mandate or capacity of any single agency and/or the ongoing United Nations country programme.

mitigation; response; and rehabilitation.⁵⁹⁹ In the view of the Special Rapporteur, it was important to take a holistic approach. In fashioning rules for the protection of persons in a process of codification and progressive development, the need for protection was equally compelling in all situations, taking into account their complexity. Moreover, it was not always easy to maintain distinctions between different causes and contexts or as regards duration. However, the Special Rapporteur readily accepted that such a holistic approach would not encompass armed conflict *per se* within the scope of the topic.

221. Thirdly, there would be need to consider the concept of protection, in particular whether it should be seen as distinct from response, relief and assistance or as encompassing all of them. In his view, the concept was all encompassing as to cover specific aspects of response, relief and assistance. Although protection would *lato sensu* be all encompassing, *stricto sensu*, with a rights-based approach, there would be a certain specificity to rights ensuing therefrom that would have to be elaborated. The difference between protection *lato sensu* and protection *stricto sensu* was hermeneutical, with the latter focusing on the rights involved.

222. Fourthly, the broad approach involved the need to have an appreciation of the tensions underlying the relationship between protection and the principles of sovereignty and non-intervention, as well as an understanding of the conceptual framework underpinning protection. From the standpoint of the victims of disasters, the existence of a right to humanitarian assistance would require particular focus. On the one hand, the ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case had said that “[t]here can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law”.⁶⁰⁰ Yet, on the other hand, there was a tension in practice

⁵⁹⁹ The concept of response restricted itself temporally to the disaster phase. Relief was a broader concept which, like assistance, encompassed the pre-disaster stage as well as the stage beyond immediate response. Assistance was intended to denote the availability and distribution of the goods, materials and services essential to the survival of the population. Rehabilitation activities were properly linked to the response phase which addresses the immediate needs of individuals affected by a disaster. Rehabilitation deals with post-recovery activities but should be distinguished from development activities, which can be described in terms of support to and implementation of autonomous development policies.

⁶⁰⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at p. 124. The Court went on to say: “The characteristics of such aid were indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross, that

‘The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours—in its international and national capacity—to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples’

and that

‘It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress.’” (*ibid.*, pp. 124–125).

with the traditional approach to principles of sovereignty and non-intervention. Moreover, there was a need to give careful attention to the relationship between the topic and emerging notions, such as the responsibility to protect, which, in respect of disasters, suggested a responsibility to prevent, respond and assist and rehabilitate. The Special Rapporteur underscored that the appropriateness of extending the concept of responsibility to protect and its relevance to the present topic required careful reflection; even if it were to be recognized in the context of protection and assistance of persons in the event of disasters, its implications were unclear.⁶⁰¹

223. As regards the sources of the law that the Commission needed to consider in order to elaborate basic standards of treatment applicable to the victim under the topic, the Special Rapporteur noted that the protection of persons was not new in international law. There was a particular relationship between the concept of protection of persons affected by disasters and the rights and obligations attached thereto and the regimes, which bear on protection, in international humanitarian law, international human rights law and international law relating to refugees and internally displaced persons. Such regimes, based on a basic premise of protecting the human person under any circumstances, and underscoring the essential universality of humanitarian principles, would be complementary. Moreover, in developing the necessary framework for the topic, it would be useful to consider such principles as humanity, impartiality, neutrality and non-discrimination, as well as the principles of sovereignty and non-intervention.

224. The existing and recent focus on the development of rules had been on the operational aspects, as exemplified by the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.⁶⁰² There was a distinct corpus of law relating to international disaster response and relief which was applicable. Although there was no universal comprehensive instrument, a number of multilateral treaties existed, including at the regional and subregional levels. Also relevant was national legislation. There was also a significant number of bilateral treaties dealing with cooperation and assistance. In addition, this corpus of law was informed by a considerable amount of soft law instruments applicable to humanitarian assistance activities in the event of disasters, notably decisions of organs of the United Nations and other international organizations, as well as non-governmental organizations (NGOs).

225. The Special Rapporteur noted that the Commission was confronted with a challenging task of contemporary relevance, as recent disasters have shown, and it will have the opportunity to consider the sources available while also remaining steadfast to its mandate under the statute, namely the codification and progressive development of

⁶⁰¹ In particular, it was not clear the extent to which the responsibility created rights for third parties, the content of such rights, how they would be triggered or whether it was individual or collective.

⁶⁰² Adopted at the thirtieth International Red Cross and Red Crescent Conference, 26–30 November 2007; see International Federation of Red Cross and Red Crescent Societies, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, Geneva, 2008.

international law on the subject. The work was innovative in character and it would be important to recognize that the final draft would have to be as pragmatic as possible to respond to real needs. In addition to State actors, such work would require consultations with international organizations, NGOs and commercial entities.

2. SUMMARY OF THE DEBATE

226. Members of the Commission welcomed the fact that the preliminary report had identified the core and complex issues that would need to be addressed in the discussion of the scope of the topic, thus also allaying concerns that may have existed as to the usefulness of the Commission taking up the topic. Recent tsunamis, hurricanes, cyclones, earthquakes and flash floods in various parts of the world vividly demonstrated the timeliness of the consideration of the subject and the magnitude of the problems to be addressed. Members were also appreciative of the memorandum of the Secretariat.

(a) *A rights-based approach to the topic*

227. Several members agreed with a rights-based approach in the consideration of the topic as suggested by the Special Rapporteur. It was noted that such an approach was important since it attached paramount value to human needs, with the attendant consequences that gave rise to obligations and responsibilities of society towards individuals. Such an approach, solidly grounded in positive law, would draw upon, in particular, international humanitarian law, international human rights law, international refugee law and the law relating to internally displaced persons, without necessarily replicating such law.

228. Nevertheless, in the view of some members, a general understanding of what was meant by a rights-based approach for the purposes of the topic was considered necessary. According to one perspective, a human rights approach should not only be perceived from the angle of according the protection of the individual but also take into account community interests, in particular of the vulnerable groups, while bearing in mind the obligations and limitations of States affected by disaster. Since human rights law allowed certain derogations in times of emergency, analogies could be drawn as to what rights and duties would apply in disaster situations. Moreover, a rights-based approach was not exclusive of rights of victims to humanitarian assistance; there was a need to be respectful of the rights of the affected States, in particular their sovereignty and, consistent with the principle of subsidiarity, their primary role in the initiation, organization, coordination and implementation of humanitarian assistance, which should not be taken unilaterally. It was emphasized that a rights-based approach should not be seen as incompatible with or contradicting principles of sovereignty and non-intervention.

229. Some members, viewing a rights-based approach as one that would focus on the human rights of the victim, observed that it may not always be the case that such an approach would prove to be beneficial. Stressing the contemporary nature and high visibility of the topic, together with the attendant high expectations, it was necessary for the Commission to assess carefully whether in

fact a rights-based approach would be the most propitious approach for meeting such expectations. In this connection, it was essential to determine what consequences would flow from a rights-based approach, in particular whether such an approach would also require addressing questions on how such rights would be enforced. Thus, although the rights of persons affected by disasters were an important part of the background to the topic, it was contended that the real focus ought to be on the obligations that would be taken to facilitate action to protect such persons. Such obligations could implicate many actors, including the affected State and States offering assistance as well as international and non-governmental organizations.

(b) *Scope of the topic*

230. Some members concurred with the suggestion by the Special Rapporteur that a broad approach be pursued in the consideration of the topic. In this regard, it was confirmed that the topic as conceived by the Commission was intended to broadly focus on individuals in a variety of disaster situations. For some other members, a broad approach was without prejudice; it would be easier, at a later stage, to narrow the scope from a broader perspective than to broaden it from a narrower perspective. Moreover, it did not exclude the possibility of taking a step-by-step approach in the elaboration of the topic, beginning with natural disasters.

Scope ratione materiae

231. Some members highlighted the need to define "protection" for the purposes of this topic. Such an exercise should seek to determine the rights and obligations of the different actors in a disaster situation. It could also deal with rights and duties of the international community as a whole, thus helping to elucidate the content of obligations *erga omnes*. It was highlighted that a range of human rights was relevant in a disaster situation, including the right to life, the right to food, the right to the supply of water, the right to adequate shelter or housing, clothing and sanitation and the right not to be discriminated against. Reference was also made to article 11 of the Convention on the Rights of Persons with Disabilities, by the terms of which States have a duty to ensure protection and safety of persons with disabilities in several situations, including disasters.⁶⁰³ While recognizing the role played by non-State actors in providing assistance, the point was made that their obligations should not be reflected in the language of the responsibility to protect. Some members emphasized the necessity to underline the primary role of the affected State as a general principle and the contributory and subsidiary role of other actors as part of an overarching umbrella of international cooperation and solidarity. It was similarly important to elaborate on the content of a right of initiative insofar as it related to activities of such actors in disaster situations.

⁶⁰³ "States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters."

232. Commenting on a possible definition of a disaster since there was none generally agreed in international law, the view was expressed that the definition of hazard in the Hyogo Framework of Action⁶⁰⁴ was a useful starting point, but one which required precision beyond simply adopting a holistic approach. Some other members, however, considered it too wide. Instead, it was suggested that the definition under the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations provided a good basis for future work.⁶⁰⁵

233. Some members noted that it was important that the scope not be limited to only natural disasters; human suffering was not partial to the origin of the disaster. The goal underpinning protection applied to all disasters irrespective of their cause. Indeed, increasingly there was a recognition in scientific circles that human activity contributes to natural disasters, including, for example, deforestation being a contributory factor to flooding. Moreover, in many situations disasters involved complex emergencies, and it was not always easy to determine whether the cause was natural or man-made.

234. It was nevertheless pointed out by some other members that the primary focus should be on natural disasters; man-made disasters should be included only if they met a certain threshold, for instance if they had the effects of a natural disaster. Others, however, viewed any possible threshold to be unworkable. Furthermore, politically, natural disasters seemed to be less sensitive than man-made disasters and in many instances man-made disasters, such as nuclear and industrial accidents or oil spills, were already the subject of international regulation.

235. In another view, the distinction between natural or man-made disasters did not resolve all the definitional problems. The key consideration was to determine whether the nature of the needs in such a wide range of circumstances could be subsumed under the notion of disaster and whether a meaningful regime could be developed to cover all the needs.

236. For some members, as evident from the title of the topic, environmental protection was not directly part of the protection regime. Moreover, it was already well regulated. However, some other members favoured the possibility of covering the environment and property

⁶⁰⁴ Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters, see Report of the World Conference on Disaster Reduction, held in Kobe, Hyogo, Japan, 18–22 January 2005 (A/CONF.206/6 and Corr.1), resolution 2.

“A potentially damaging physical event, phenomenon or human activity that may cause the loss of life or injury, property damage, social and economic disruption or environmental degradation. Hazards can include latent conditions that may represent future threats and can have different origins: natural (geological, hydrometeorological and biological) or induced by human processes (environmental degradation and technological hazards).”

⁶⁰⁵ Article 1, paragraph 6, of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations:

“‘Disaster’ means a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long-term processes.”

within the scope of the topic insofar as there was a link with protection of persons, for example, if the disaster in question affected or threatened to affect the life, dignity and elementary basic needs of human beings. According to another view, to the extent that environmental disasters would be covered as part of the broad approach covering both natural and man-made disasters, environmental or property damage should not be excluded *a priori*.

237. Several members agreed to exclude armed conflict from the scope of the topic. Such exclusion would be justified precisely because there was a well-defined regime that governed such conflicts, as *lex specialis*. Moreover, it was exigent to exercise caution to ensure that international humanitarian law is not undermined. Some other members, on the other hand, observed that the exclusion itself should be examined further. In some instances, in complex emergencies for example, a natural disaster situation was exacerbated by a continuing armed conflict. Moreover, issues concerning assistance in the law relating to internal armed conflict were not as robustly regulated as in the law relating to international armed conflict; this rule gap may need further exploration in the context of disasters.

Scope *ratione personae*

238. In addition to individuals as victims, it was necessary to address the status, rights and obligations of the providers of relief and assistance, including other States, international organizations and NGOs. It was also suggested that there was need to explore further whether the notion of protection of “persons” should include both natural and legal persons.

Scope *ratione temporis*

239. Some members agreed with the Special Rapporteur on the need to address the various phases of a disaster and consider, as appropriate, questions concerning prevention, assistance and rehabilitation. It was nevertheless pointed out that there was a need to be cautious in order not to overly extend the scope: indeed, in certain instances different rights and obligations would ensue for different phases and these needed to be identified for each phase, as some rights might be more relevant in one phase than in other phases. This would require the identification of the areas of law that needed development and which would create specific implementable obligations by States, on the basis of each phase. In this connection, some other members expressed preference for a focus, at least for the time being, on response and assistance in the immediate aftermath of a disaster, alongside prevention during the pre-disaster phase. Also relevant for consideration was whether natural disasters which had sudden onset had characteristics that would require different treatment from disasters with a slow onset.

Scope *ratione loci*

240. For some members, the nature of the topic was such that it would be immaterial whether a disaster has occurred within one State or has transboundary effects. It was nevertheless pointed out that it may be useful to explore whether there were problems which were peculiar

to disasters affecting a single State or multiple States that could require a differentiated focus.

(c) *Right to humanitarian assistance*

241. Several members concurred in the proposition that humanitarian relief efforts were predicated on the principles of humanity, impartiality and neutrality. Equally relevant were the principle of non-discrimination and the principle of solidarity, as well as international cooperation. Moreover, sovereignty and territorial integrity were guiding principles in the coordination of humanitarian emergency assistance. Some members contended that sovereignty entailed duties that a State owed to its inhabitants, including the duty of protection. The principles of sovereignty and non-intervention were no excuse to act in a manner that denied victims access to assistance. However, to the extent that sovereignty or non-intervention entailed both negative and positive obligations, it would be necessary, although the issues implicated by the subject were controversial, for the Commission to address the context, in particular situations in which a State is recalcitrant and refuses assistance amidst continuing human suffering or oppresses its own people.

242. In relation specifically to the right to humanitarian assistance, some members doubted its existence when viewed as implying the right to impose assistance on a State that did not want it and urged the Special Rapporteur to proceed on the assumption that there was no such right. Such a right would be in conflict with principles of sovereignty and non-intervention, be contrary to the need for consent of the affected States, as stipulated in relevant General Assembly resolutions, including resolution 46/182 of 19 December 1991,⁶⁰⁶ and was unsupported by State practice. Cogent policy considerations also militated in favour of rejecting such a right: it could be easily abused and give rise to double standards.

243. It was nevertheless pointed out by some other members that instead of considering the right to humanitarian assistance as “a right to impose assistance”, it was more appropriate to envisage it as a “right to provide assistance”; such an approach would be in line with the reasoning of the ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case.⁶⁰⁷ The point was also made that if an affected State cannot discharge its obligation to provide timely relief to its people in distress, it must have an obligation to seek outside assistance.

244. Some members noted that the right to humanitarian assistance was viewed as an individual right, typically exercised collectively, which should be recognized as implicit in international humanitarian law and international human rights law. Its non-fulfilment was considered a violation of fundamental rights to life and human dignity.

⁶⁰⁶ Annex, para. 3: “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.”

⁶⁰⁷ *Military and Paramilitary Activities in and against Nicaragua*, (see footnote 600 above).

245. Some other members noted that it was too premature to discuss the content of a right to humanitarian assistance; it could be a subject of detailed analysis by the Special Rapporteur at a later stage.

246. It was also observed that the 2003 resolution on humanitarian assistance of the Institute of International Law provided a useful indication of some of the problems to be discussed and their possible solutions.⁶⁰⁸

Relevance of the responsibility to protect

247. While noting that the Special Rapporteur seemed to be tentative in underpinning the topic on the basis of the responsibility to protect, some members, in view of the broad approach to the topic, pointed to the inevitability of considering the relevance of the responsibility and addressing the various contentious issues. A future report by the Special Rapporteur could touch on this aspect and, in this regard, other relevant developments in the area were highlighted.⁶⁰⁹ Some members also saw a connection between protection and aspects of human security which needed to be explored.

248. Some other members doubted the existence of a responsibility to protect, particularly in the context of disasters. Its emergence as a principle was confined to extreme circumstances, namely situations of persistent and gross violations of human rights and could not be easily transferable to disaster relief without State support. In this regard, it was also recalled that the World Summit Outcome document invokes such a responsibility for each State to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Any action by the international community would be through the United Nations, acting in accordance with Chapters VI and VII of the Charter of the United Nations.⁶¹⁰ Some members did not see any compelling reason why the responsibility to protect could not be extended to or transposed in situations involving disasters.

249. Some members viewed the responsibility to protect as bearing on humanitarian intervention. The Commission should therefore be cautious in its approach. Some other members pointed out that the responsibility was still primarily a political and a moral concept, the legal parameters of which were yet to be developed, and did not change the law relating to the use of force. In the view of other members, however, the responsibility to protect existed as a legal obligation without necessarily extending to the use of force.

⁶⁰⁸ 2003 Resolution on Humanitarian Assistance of the Institute of International Law, 2 September 2003, Sixteenth Commission, Institute of International Law, *Yearbook*, vol. 70 (2003), Session of Bruges (2003), Part II.

⁶⁰⁹ See, for example, the report of the High-level Panel on Threats, Challenges and Change entitled “A more secure world: our shared responsibility” (A/59/565 and Corr.1); the report of the Secretary-General entitled “In larger freedom: towards development, security and human rights for all” (A/59/2005 and Add.1–3); and the report of the International Commission on Intervention and State Sovereignty entitled *The Responsibility to Protect* of December 2001, available from www.responsibilitytoprotect.org; and the 2005 World Summit Outcome document (General Assembly resolution 60/1 of 16 September 2005).

⁶¹⁰ The 2005 World Summit Outcome (see footnote above).

250. Some other members stressed that the topic could be elaborated independently, without any consideration of whether there was a responsibility to protect.

(d) *Sources relevant to the consideration of the topic*

251. It was recognized that the Commission's exercise was likely to be based more on *lex ferenda* than *lex lata*. Accordingly, it was essential to proceed deliberately in the process of systematization. There were certain legal rights and duties that may be accepted as such in a legal instrument emerging from the Commission. At the same time, there were also moral rights and duties to be recommended *de lege ferenda*. For some, while the practice of non-State actors may be relevant in identifying best practices, it could not count as practice relevant in the formation of custom or the interpretation of treaty law.

252. Some members stressed the need for the Commission to be faithful to its mandate and concentrate on the legal aspects of the matter, focusing on the *lex lata*, and, where appropriate, bearing in mind the *lex ferenda*.

253. It was also suggested that the emphasis could be on practical problem-solving, concentrating on areas where there was a rule deficit, taking into account lessons learned in previous disasters. Such an approach would have the advantage of limiting the current broad scope of the topic and enable the Commission to contribute effectively to the legal framework relating to disasters. In this connection, there was a further need to better identify the areas that warranted the adoption of a set of articles or guidelines on the topic, focusing on the problems that confronted persons in the event of disaster. At the same time, it was pointed out that it was important not to duplicate work already done elsewhere, for example, in the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance adopted by the International Red Cross and Red Crescent Conference at its thirtieth Conference.⁶¹¹

254. While agreeing with the relevance of international humanitarian law, human rights law, refugee law and the law relating to internally displaced persons in the consideration of the topic, some members noted that other fields of law, such as the international law relating to immunities and privileges, customs law and transportation law were also germane. A further suggestion was to avoid reproducing such rules in detail.

255. It was also pointed out that customary international law was not so peripheral in its relevance to the topic; it incorporated certain general principles, such as sovereignty and non-intervention, the principle of cooperation and the Martens clause, which were of great importance to the topic.

256. It was also suggested that the Commission should not only aim at normatively elaborating a series of rules of conduct for the actors concerned, but should also consider institutional aspects, such as the establishment of a specialized agency to coordinate responses to and assistance in large-scale disasters. It was also noted in this respect

that the role played by the United Nations and NGOs, as well as problems encountered in the field, needed to be assessed and analysed.

(e) *Future programme of work and final form*

257. Some members, concurring with the Special Rapporteur, noted that it would be desirable to decide on the form relatively at an early stage in the consideration of the topic. It was also pointed out that, given the fact that the Commission's work would largely be in the area of progressive development rather than in codification, the pragmatic goal of the project would be to lay down a framework of legal rules, guidelines or mechanisms that would facilitate practical international cooperation in disaster response. In this regard, some members expressed a general preference for a framework convention setting out general principles, and which could form a point of reference in the elaboration of special or regional agreements. Some other members favoured non-binding guidelines, perceiving them as a more realistic outcome.

258. Some members noted that it was premature to take a decision on the final form; such a decision could be deferred until a later stage. Meanwhile, as was customary in the working methods of the Commission, draft articles should be presented for consideration.

259. A suggestion was made also for the Special Rapporteur to provide a provisional plan of the future work to be discussed in a working group, alongside other issues relevant to the topic. The establishment of such a working group was considered premature by some other members. In order to have a better appreciation of the problems, it was also suggested that at an appropriate time it would be worthwhile to invite experts in the field within the United Nations system and the NGO community for a dialogue.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

260. The Special Rapporteur expressed his appreciation for the comments made on his preliminary report. He was more than convinced that the Commission would steer the topic towards a successful conclusion, notwithstanding its complexity and the challenges ahead. The detailed observations made would help the Special Rapporteur in the preparation of future reports. The completion of the project would definitely require consultations and contacts with key actors, including the United Nations and the International Federation of the Red Cross and Red Crescent.

261. In charting out the future course of action, the Special Rapporteur welcomed the general support given to taking a broad approach in the consideration of the topic. At the same time, he recognized that it was feasible to proceed by focusing initially on natural disasters, without losing sight of other types of disasters. In this regard, he recalled that the Commission, in its 2006 report, had already anticipated that approach when it was proposed that the more immediate need was to consider the activities undertaken in the context of natural disasters, without prejudice to the possible consideration of the international principles and rules governing actions undertaken in the

⁶¹¹ See footnote 602 above.

context of other types of disasters.⁶¹² Indeed, the request by the Commission in 2007 to the Secretariat was to prepare a study initially limited to natural disasters.⁶¹³

262. While acknowledging that the concept of protection was wide enough to encompass the three phases of a disaster, the Special Rapporteur also pointed out that, at least initially, the focus should be on response, without necessarily excluding the study, at a later stage, of prevention and mitigation on the one hand, and rehabilitation on the other.

263. He emphasized that a codification effort that takes into account the rights of the victims had a stronger foundation in law. It gave rise to justiciable rights, with correlative rights and duties on other actors, against the backdrop of the principles of sovereignty, non-intervention and cooperation, principles which have been reaffirmed 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 1970). The affected State not only has a primary responsibility to provide assistance to affected people, but also its consent was essential in the provision of humanitarian assistance.

264. The Special Rapporteur also noted that it would be the task of the Commission to elaborate draft articles without prejudice to the final form. The objective, as noted in the 2006 report, would be to elaborate a set of provisions that would serve as a legal framework for the conduct of international disaster relief activities, clarifying the core legal principles and concepts thereby creating a legal “space” in which such a disaster relief work could take place on a secure footing. The text could serve as the basic reference framework for a host of specific agreements between the various actors in the area, including, but not limited to, the United Nations.⁶¹⁴ The final form would be a convention or a declaration incorporating a model or guidelines. In this connection, the Special Rapporteur drew attention to the relevance of the Framework Convention on civil defence assistance, done at Geneva on 22 May 2000.

⁶¹² *Yearbook ... 2006*, vol. II (Part Two), annex III, p. 206, paras. 1–2.

⁶¹³ *Yearbook ... 2007*, vol. II (Part Two), p. 101, para. 386.

⁶¹⁴ *Yearbook ... 2006*, vol. II (Part Two), annex III, p. 210, para. 24.