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Summary record of the 3019th meeting

Topic:
Protection of persons in the event of disasters

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

The meeting rose at 1.05 p.m.

3019th MEETING

Friday, 10 July 2009 at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

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

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

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

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

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

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

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

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

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

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

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

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

8. Overall, there appeared to be more areas of agreement than disagreement. Consequently, he wished to join with others who favoured referring the three draft articles to the Drafting Committee. If agreement could not be reached in the Drafting Committee, the draft articles should be resubmitted for consideration to the plenary Commission so that it could issue new instructions to the Special Rapporteur or establish a working group that would be given the task of preparing a new text.

9. Mr. SINGH said that he wished to join other members in expressing his appreciation to the Special Rapporteur for his second report and for his detailed introduction highlighting recent developments. The report had provided an excellent basis for the Commission's discussions.

10. As had been pointed out by several members, a rights-based approach that focused on the rights of persons affected by a disaster could give rise to difficulties. For example, individual human rights might be suspended and become unenforceable during an emergency or in the immediate aftermath of a disaster, and emphasis on the rights of individuals could detract from the objectives of saving the lives of affected persons, rescuing those in danger and caring for the injured. In such situations, the rights of individuals should be subordinated to larger community interests. Accordingly, it might be preferable to refer to the rights and obligations of States and to emphasize the need to provide an adequate and effective response.

11. As to the relevance of the responsibility to protect in the context of disasters, it might be recalled that divergent views were expressed in the Commission at the previous session, as well as in the Sixth Committee. In paragraph 14 of his report, the Special Rapporteur had drawn attention to the Secretary-General's clarification that the concept applied only to genocide, war crimes, ethnic cleansing and crimes against humanity,²²⁴ and that extending it to cover other calamities, such as climate change or natural disasters, would stretch the concept beyond recognition or operational utility. In that light, it was clear that the responsibility to protect was not relevant to the Commission's topic.

12. With regard to draft article 1, which included both the scope and the objective of the draft articles, he agreed with members who had suggested that only the first part of the text of the article, which related to scope, should be retained.

13. In draft article 2, the Special Rapporteur had defined the term "disaster" on the basis of the definition in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations. In his view, the requirements of "serious disruption of the functioning of society" and "widespread" loss raised the threshold too high and should be deleted. He agreed with Mr. Caffisch that some of the phrases quoted in paragraphs 39–41 of the report would be more suitable for expressing essential elements of the definition of disaster, namely: "a situation of great distress involving loss of human life or large-scale damage to property", "an exceptional situation in which life, property or the environment

may be at risk", or "a calamitous event resulting in loss of life, great human suffering and distress, and large scale material damage".

14. Draft article 3 required States to cooperate among themselves and, as appropriate, with competent international organizations, in particular the United Nations, the IFRC and civil society. In paragraph 64 of his second report, the Special Rapporteur recalled General Assembly resolution 46/182, which recognized that it was the primary duty of the affected State to provide for the needs of the victims of natural disasters occurring in its territory. It should be recalled that the General Assembly, reaffirming the sovereignty of States, had also recognized that the affected State had the primary role in the initiation, organization, coordination and implementation of humanitarian assistance within its territory. Draft article 3 should also attribute that primary role to the affected State.

15. The term "civil society" merited further examination. As had been suggested by some members, reference could be made to "other relevant organizations", which would include NGOs with the required expertise and capability. It would not be advisable to include a list of such organizations, since no list could be exhaustive and differences might exist between States with regard to the competence or acceptability of specific organizations. Moreover, it was up to the affected State to decide whether it needed outside assistance, and if so, which States or organizations it wished to approach to request such assistance.

16. In conclusion, he would support sending all three draft articles to the Drafting Committee.

17. Mr. VALENCIA-OSPINA (Special Rapporteur), summing up the discussion, said that he thanked all those who had taken part in the debate on the second report for their constructive approach and for the many substantive contributions that had enriched the debate. The report, which had been intended to delimit the topic and guide the Commission's future work, had provoked a discussion that had gone far beyond an analysis of the three proposed draft articles and had touched on questions that would be dealt with in future reports. In that regard, he agreed with the observation that the Commission's work of codification and progressive development of a topic of international law could not be undertaken as if it were an instant process, requiring *ab initio* a detailed exposition of the ultimate consequences of the basic tenets informing the set of draft articles to be elaborated. Rather, it was a painstaking and time-consuming exercise in which the ultimate consequences, by definition, could not be the premise but rather the result. Seen in that light, the debate would serve as an invaluable guide for further inquiries on his part into what had been generally recognized in the Commission as a highly complex and difficult topic.

18. He was gratified that the combined effect of the two reports on the topic had resulted in a considerable degree of common understanding of some of the basic premises on which the Commission might proceed. While certain aspects would become clearer in the light of future reports, that fact did not, of itself, justify halting progress at the current stage pending his submission of future proposals,

²²⁴ A/63/677, para. 10 (b).

without the benefit of a clear indication from the Commission as to the direction it wished to take. That direction could, to a large extent, be indicated by means of the formulation in the Drafting Committee of draft articles based on the three draft articles proposed in the second report.

19. Referral of the three draft articles to the Drafting Committee had been supported by many members, with whom he firmly associated himself. With flexibility, all the specific points raised in the debate appeared amenable to solutions entailing nothing more than drafting changes. Apart from cautious admonitions regarding further elaboration in subsequent draft articles, nothing in the debate had suggested that there was any fundamental opposition to the substance of the proposed draft articles, which could and should be submitted for scrutiny to the Drafting Committee.

20. That point was strikingly illustrated by the views expressed on the rights-based approach, mainly in connection with draft article 1. Although he would address in some detail and on an article-by-article basis the observations that had been made, since the rights-based approach was central to the topic as formulated by the Commission, it deserved to be highlighted at the very outset. The rights-based approach had received wide support. Keeping in mind the main objective of the topic, which was to assist victims in a disaster, it was believed that a focus on the rights of individuals provided the most solid, if not the only, legal basis for the work of the codification and progressive development of the law pertaining to the topic. The protection of victims being the central objective of the topic, respect for human rights represented the best starting point for further legal inquiry. Of particular significance was the view expressed by an initially sceptical Commission member (see the 3018th meeting above, Mr. Vasciannie, paras. 43–52) that such an approach would be broadly acceptable if it was understood to mean, first, that the approach demanded paying particular attention to the needs and concerns of individuals who were suffering; and, second, that the approach was essentially a reminder that, when disaster struck, individuals had legal rights, thereby reaffirming the place of international law in the context of disaster.

21. Nevertheless, some members remained sceptical of such an approach to the protection of persons and had expressed doubts that it would facilitate the pragmatic response that the topic should provide. It had also been suggested that a restatement of the rights and obligations of States was unlikely to enhance the protection of individuals, particularly if the Commission did not address the causes of an affected State's unwillingness to accept humanitarian assistance, such as the fear that an assisting State would interfere in its internal affairs. It was unclear to some members which rights would underpin the rights-based approach. While some thought that particular emphasis should be placed on economic, social and collective rights, others had noted that the Commission should be mindful of the limited ability of some affected States to guarantee certain rights.

22. Leaving aside for the moment the question of a contradiction more apparent than real between a rights-based and a needs-based approach, making rights language

central to the discussion would not mean that the Commission was endorsing the position of those human rights advocates who held that any human rights violation justified forcible humanitarian intervention. There were some serious questions to be addressed regarding what measures would be allowed under international law if the affected State failed to satisfy the rights of individuals, but not all of those questions could be answered in the Commission's work on the topic. However, it was clear that forcible intervention was illegal under international law, absent a justifiable claim of self-defence or action by the Security Council, even invoking the responsibility to protect—a doctrine that, in any event, most Commission members had set aside as irrelevant to the current undertaking.

23. Regarding the question of which rights would underpin the rights-based approach, the Commission had been reminded of the debate held during the first part of the current session in connection with the topic of the expulsion of aliens. Before venturing onto similar terrain, he thought it more prudent and efficient to await the Commission's reaction to the revised proposals to be submitted by the Special Rapporteur on expulsion of aliens.

24. Contrary to the views of some members, the rights-based approach did not purport to offer any definitive answers to the question of a State's duty to accept humanitarian aid. It merely created a space in which to assess that question, in the light of both the State's rights as a sovereign subject of international law and its duty to ensure the rights of individuals in its territory. At the same time, it also allowed for consideration of the questions of non-interference and the State's right to control foreign activity within its borders, which would enable the Commission, if it found it appropriate, to address such questions as the reasons for States' unwillingness to accept humanitarian aid.

25. The second report had also elicited a fruitful debate on the concept of the dual nature of the protection of persons. Many members had supported the understanding of that concept presented in the report and had agreed that the Commission should begin by establishing the rights and duties of States *vis-à-vis* each other before focusing on the rights of States *vis-à-vis* persons in need of protection. Members had stressed that the primary responsibility for the protection of persons under international law lay with the affected State, while at the same time, the Commission had been encouraged to remain mindful of other lines of responsibility, such as the one between the affected State and international organizations or between humanitarian organizations and affected persons.

26. The debate had also revealed broad agreement on other aspects of the scope of the topic. Members had generally supported the proposal to focus first on the disaster proper and immediate post-disaster phases, without prejudice to subsequent work on the issues of preparedness and mitigation in the pre-disaster phase. Some members, however, thought that the pre-disaster phase was crucial for providing effective protection to disaster victims. In addition, there was general agreement that work should focus on the rights and obligations of States, without prejudice to provisions relating to the conduct of non-State actors.

27. As could be seen from the foregoing overview, there was broad agreement in the Commission on the most salient questions regarding the substance of the topic, as presented in the second report. That significant achievement amply justified referring the draft articles embodying such substantive common ground to the Drafting Committee for textual refinement.

28. Before turning to the examination, on an article-by-article basis, of concrete suggestions for improving the layout or text of the three proposed draft articles, he wished to emphasize once more that the three draft articles were interrelated. Read jointly, they were intended to set the limits of the topic in its three dimensions: *ratione materiae*, *ratione temporis* and *ratione personae*. In particular, draft article 3 served to identify the actors to which the draft articles would apply *ratione personae*. Moreover, the three draft articles had been drafted in such a way as to avoid prejudicing any decision that the Commission might later find it necessary or appropriate to take as a result of further inquiries into the topic, such as the coverage to be given to prevention in the pre-disaster phase.

29. Lastly, the draft articles had been formulated in such a way as to bring together positions firmly held by the most relevant non-State actors concerned with humanitarian assistance: the United Nations, acting through a variety of its organs and bodies, and the International Red Cross and Red Crescent Movement, comprising the IFRC, the national societies and the ICRC. Those positions, which at first glance seemed to exemplify the rather artificial dichotomy between a rights-based approach and a needs-based approach, were not irreconcilable, but represented differences of emphasis or degree that could usefully complement each other. In his view, and that of several other Commission members, a rights-based approach, complemented by a consideration of the needs of the affected individuals, was fundamental as a guide for further work on the topic. Some members and some humanitarian actors believed that an approach based on needs would be better suited to the present undertaking, but as had been observed in the debate, individual rights could be understood as a conceptual solution to individual needs without implying that they were on the same legal plane. Working on that conceptual level to identify the relevant rights and obligations was the task to which the Commission's expertise was best suited in the light of its statutory mandate, although it should take needs into account when conducting such an inquiry.

30. With regard to draft article 1 (Scope), several members had made useful suggestions—some of which he could embrace. Some members had sought to reduce the language to a more basic statement that would essentially echo the title of the set of draft articles to be elaborated. As had been noted in the debate and as he had already stressed in his introductory statement, draft article 1 linked the scope proper of the draft articles, covered by the first part of the article, to their purpose or objectives, reflected in the second. Many members believed, however, that the reference to the rights and needs of persons related not to scope but to objectives and therefore belonged in a separate draft article or even in the preamble. A suggestion had also been made to invert the word order in the second

phrase so that “needs” would precede “rights”, which would stress that the broader basis should be needs, which might extend well beyond rights. An alternative formulation for a separate article on objectives, maintaining the original sequence, was also put forward. He could ally himself to the widely held view that the article on scope should be divided into two draft articles, one addressing scope *per se* and the other addressing objectives.

31. Also with regard to draft article 1, it had been suggested that the terms “all phases of a disaster” and “rights of persons” should be clarified, possibly in the commentary. A suggestion had also been made, and he was inclined to favour it, that in draft article 1 or 3 or elsewhere in the draft, special account should be taken of the needs of developing countries. All of those suggestions could be examined in greater detail by the Drafting Committee.

32. All those who had spoken on draft article 2 had agreed that a definition of disaster must be included in the draft articles and that it was impractical to make a distinction between natural and man-made disasters. There had also been a large measure of agreement that the definition might encompass material and environmental loss, to the extent that it affected persons, and that there must be actual harm, although for some speakers, imminent harm should be considered sufficient.

33. The debate on the draft article had clustered around three main points: the elements of the definition, such as widespread loss and serious disruption; the question of causation; and the exclusion of armed conflict. Some members had argued that the elements given were not in fact elements of a disaster but rather the consequences of one, so that the definition should include a reference to an event or a chain of events. Several members had felt that the terms “serious disruption” and “significant, widespread ... loss” warranted elaboration and that it had to be clarified whether the words “significant” and “widespread” were both necessary or whether one would suffice. Some members thought that a limiting factor should be introduced so that the definition would not be overly broad. One such factor, it had been suggested, could be a limited inquiry into causation, although many members would prefer to avoid that. A solution might be to include language like that in the last part of the Tampere definition. Lastly, many members had supported the exclusion of armed conflict from the definition, although it had generally been felt that some alternative formulation would be necessary to avoid overlap with international humanitarian law while capturing all situations that could be properly called disasters. It had been suggested that the phrase “excluding armed conflict” should be replaced by a “without prejudice” clause dealing with humanitarian law.

34. In response to these suggestions, he wished to point out that the text he had proposed for draft article 2 employed the terminology found in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, albeit in a shortened version, for the reasons explained in his report. The same terms had been used in the definition of disaster adopted only two years ago in the Guidelines for the Domestic Facilitation and Regulation of International

Disaster Relief and Initial Recovery Assistance²²⁵ by the IFRC, which incorporated the exclusion of armed conflict. These terms could also be found in the definition of disaster developed in 1992 by the Department of Humanitarian Affairs in its “Internationally agreed glossary of basic terms related to Disaster Management”.²²⁶

35. With respect to the suggestion that a reference to an event or chain of events should be included, he noted that in the context of protection of persons, it was the disruption, and not the discrete event, that constituted the disaster that called for protection, and the risk of disruption that called for prevention and preparedness. As to the use of the words “serious” or “significant”, in its commentary to principle 2 of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities²²⁷ adopted in 2006, the Commission had referred to the use of the word “serious” in both the *Trail Smelter* and *Lake Lanoux* awards and had listed a number of international conventions and other legal instruments and domestic law where the term “significant” was employed.

36. He found merit in the suggestion that the reference to exclusion of armed conflict should be replaced by a separate provision that might find its proper place among the draft’s final provisions and be modelled on article X, entitled “Relationship with other rules of international law”, of the resolution on humanitarian assistance adopted by the Institute of International Law²²⁸ in 2003 and on article 1, paragraph 4, of the IFRC Guidelines, among others. Other suggestions of a drafting nature could be usefully examined with an open mind and in greater detail in the Drafting Committee. The adoption of a definition of disaster, indispensable to a determination of the scope of the topic, was without prejudice to the possibility of elaborating, at a later stage, a separate provision on the use of terms, as was customary in most drafts adopted by the Commission.

37. Concerning draft article 3, all those who had spoken had recognized that the duty to cooperate was well established in international law as an expression of the principle of cooperation enshrined in the Charter of the United Nations. His second report had drawn attention to the characterization of the principle of solidarity as a legal principle in a number of international instruments. Nevertheless, for a number of members, the concept’s legal status was open to question. He deemed it unnecessary to pursue an inquiry into solidarity at the current stage, since no reference to it appeared in the text proposed for draft article 3.

38. There had been general agreement that the principle of cooperation, formulated as a duty of States, was at the very core of the topic. Paragraph 18 of the Secretariat memorandum²²⁹ described the principle as a *sine qua non* for disaster relief, a fact duly reflected in the Bruges

resolution. The view had been expressed, however, that before a decision could be taken to refer the proposed text to the Drafting Committee, the Commission must learn what other principles were to be included and examine the corresponding formulations. It had been suggested that the Special Rapporteur’s next report should be devoted to the treatment of additional principles. He wished to recall his earlier remark about methodology, echoing the opinion of another member of the Commission that the codification and progressive development of a topic was not an instant process. Other principles would be the subject of draft articles in subsequent reports, particularly in connection with assistance and access in the event of disasters. In paragraph 52 of his preliminary report,²³⁰ those principles were identified as humanity, impartiality, neutrality and non-discrimination, as well as sovereignty and non-intervention. The principle of sovereignty and its corollary, non-intervention, would be reflected in a provision concerning the primary responsibility of the affected State.

39. In his second report, he had recourse to the image of two axes to illustrate his approach to the dual nature of protection of persons in the event of disasters. He could employ a similar image, that of two planes, one vertical and one horizontal, to illustrate his approach to the various principles involved. The principle of cooperation, the core principle that formed the legal basis of the whole undertaking, operated on the vertical plane. Other principles, insofar as they informed the stage of assistance and access when the disaster had occurred, operated on the horizontal plane. That distinction explained why the principle of cooperation must be the subject of autonomous treatment at the very outset of the work on the topic, whereas the other principles would find their proper place in the work when the three distinct phases of the disaster cycle were addressed. If that analysis was correct, then there was no justification for postponing the formulation of a draft article on the duty to cooperate, pending further work on other principles.

40. It had also been suggested that work should be suspended pending the formulation of proposals concerning the practical consequences, in the event of a disaster, of the implementation of the principle of cooperation. He referred again to his earlier comments about methodology, which were even more pertinent to the latter suggestion, since most of the draft articles that were to constitute the bulk of the text would be devoted to the operational aspects of assistance. Those were nothing other than the practical manifestations of the implementation of the legal duty to cooperate. To use a well-known simile, it would amount to putting the cart before the horse, were the Commission to follow the suggestion to which he had just referred.

41. Specific suggestions had been made to improve the wording of draft article 3 in respect of cooperation between States and non-State actors. Many members had been opposed to the reference to civil society in subparagraph (c). He deferred to the majority view and could agree to its replacement, at an appropriate place, with a specific reference to NGOs. Some members had

²²⁵ See footnote 176 above.

²²⁶ United Nations, Department of Humanitarian Affairs (DHA/93/36).

²²⁷ *Yearbook ... 2006*, vol. II (Part Two), p. 64, para. 67.

²²⁸ See footnote 204 above.

²²⁹ A/CN.4/590 and Add. 1–3 (see footnote 181 above).

²³⁰ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598.

questioned the absence of a reference in subparagraph (b) to the ICRC. Although that omission had been intentional, to take account of the position expressed by both the ICRC and the IFRC concerning their respective mandates in the event of disasters, he would have no difficulty with including a reference to the ICRC, either as such, or under the accepted denomination of the International Red Cross and Red Crescent Movement, which encompassed both the IFRC and the ICRC as well as national Red Cross and Red Crescent societies. A specific reference to the Red Cross and Red Crescent institutions was warranted in recognition of their *sui generis* status as neither intergovernmental nor non-governmental organizations. The inclusion of a “without prejudice” clause to cover humanitarian law would place in its proper perspective the question of the applicable law—humanitarian or international disaster relief law—in the event of mixed situations involving armed conflict and disasters.

42. It had also been suggested that cooperation with the United Nations should be differentiated from cooperation with other competent international organizations in the light of the duty to cooperate enshrined in the Charter of the United Nations. To make that distinction clear, it had been suggested that the word “shall” should be reserved for the duty of States to cooperate among themselves and with the United Nations, whereas the word “should” should replace “as appropriate” and be used with respect to other competent or humanitarian intergovernmental and non-governmental organizations. He had no difficulty in agreeing to that suggestion, even though, in his opinion, the expression “as appropriate” led to the same result as the word “should”. In his view, the nature and degree of involvement of the United Nations in a given disaster situation was to be determined under a general regime put in place by the Organization with the agreement of its Member States, in conformity with its rules or pursuant to bilateral accords between the United Nations and the affected State and other States concerned. Such a general regime or bilateral accords could well envisage the channelling through the United Nations, alone or mainly, of the assistance to be provided in the event of a disaster.

43. It had also been suggested that the opening phrase, “For the purposes of the present draft articles”, should be replaced by words such as “In the event of a disaster”. The change would seem to make the provision more restrictive, as it would limit the duty to cooperate to the various phases of the disaster, whereas the current wording was intended to refer to all the protection objectives of the set of draft articles and was thus more comprehensive and more in keeping with the *raison d'être* of the topic. Once it had been agreed that a draft article on the principle of cooperation was central to the topic and merited autonomous treatment, changes of a drafting nature could properly be entrusted to the Drafting Committee in the light of the debate, including his summing up.

44. If he had referred to the salient drafting points made during the debate, his purpose had been not to transform the plenary into the Drafting Committee, but to show the flexibility incumbent upon him in the pursuit of the common goal and to demonstrate that the various views expressed were capable of rapprochement by means of drafting techniques. He could therefore conclude his

summing up by proposing that the Commission refer the three draft articles in his second report to the Drafting Committee for improvement and adoption in the light of the debate.

45. Mr. NOLTE said he had been impressed by the Special Rapporteur’s mix of stability and flexibility: he had stood his ground on certain points yet on others had taken into account the suggestions made by members of the Commission. He himself had been among those who had had reservations about whether draft article 3 should be referred to the Drafting Committee. To accommodate these concerns, he wished to make a suggestion. The Special Rapporteur had accepted the idea of dissociating the question of the scope from that of the purpose of the draft as stated in draft article 1. The problem that some members had with draft article 3 was its relative lack of substance: it proclaimed the duty to cooperate but did not indicate for what purpose. If the element of purpose now covered in draft article 1 was incorporated in draft article 3—if it was stated that the purpose of cooperation was to satisfy the needs and rights of victims of disasters—then draft article 3 might be given the content some members thought it now lacked. It would be a general statement of purpose which could be made more specific by the inclusion of additional principles. If that approach was taken, he for one would have less difficulty about referring all three draft articles to the Drafting Committee.

46. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the opening phrase of draft article 3, “For the purposes of the present draft articles”, had been intended to introduce the element of purpose. If the Commission wished to have a separate provision on the purposes or objectives of the draft articles, as distinct from the scope, and if the draft articles 1 to 3 were deemed to be closely related and to be read together, then the opening phrase of draft article 3 could be construed as referring to the purpose of the topic, namely the protection of persons, from the dual perspective of rights and needs. If, instead of drafting a separate provision, the reference to purpose were placed in draft article 3, that would not alter the substance of the draft and would simply be a question of presenting the material in the most effective manner. He was thus not at all disinclined to accept Mr. Nolte’s suggestion.

47. Sir Michael WOOD said the Special Rapporteur seemed to have overstated the degree of consensus within the Commission, both on substance and on procedure. On substance, the view had clearly been expressed that the rights-based approach was not a helpful one, and there was no agreement as to whether emphasis should be given in draft article 1 to the realization of the rights of persons, as opposed to the provision of an adequate and effective response in disaster situations. If the Commission decided to send draft articles 1 and 2 to the Drafting Committee, it should be on the understanding that the Committee’s task went far beyond textual refinement. It would be delving into the substance and fundamentals of the project, and it might conceivably fail to reach agreement and be obliged to refer the texts back to the plenary Commission. He remained of the view that it would be premature to send to the Drafting Committee any of the draft

articles, especially draft article 3, which went to the very substance of the topic. He would prefer for the Commission to continue its consideration of the texts in plenary after seeing further reports from the Special Rapporteur.

48. Mr. McRAE asked which version of the draft articles the Commission was going to refer to the Drafting Committee: the original, or the one described by the Special Rapporteur in his summing up, which would incorporate significant changes. Once he himself saw a revised version of the draft, his opposition to referring it to the Drafting Committee might dissolve. It would certainly be better for the Drafting Committee to work with the draft articles, not in their original form, but as revised by the Special Rapporteur in the light of the Commission's discussion.

49. Mr. VALENCIA-OSPINA (Special Rapporteur) said he proceeded from the premise that drafting work was done in the Drafting Committee, not in the plenary Commission. He had already accepted some of the suggestions made during the plenary debate—for example, to divide draft article 1 into two separate articles—but the precise terminology would be for the Drafting Committee to determine. The Secretariat, as was customary, had prepared a list of the drafting suggestions for distribution to the members of the Drafting Committee, and he would be glad to indicate which of those changes he could agree to. He was also willing to prepare a paper incorporating those elements for the benefit of the Drafting Committee. On that basis, at the Committee's first meeting, he could foresee, for example, quick acceptance of an article on scope, limited as suggested by Mr. Gaja.

50. Sir Michael's remarks seemed to suggest that the Special Rapporteur should continue producing reports and proposing draft articles without a firm indication of the legal basis for those texts. If neither a rights-based approach nor the principle of cooperation were to be regarded as the basis for the Commission's work on the topic, then he needed to hear what alternative bases there might be. To assert that the Commission could not accept the idea that cooperation and a rights-based approach were at the centre of the undertaking implied that it might simply have to halt its consideration of the topic.

51. Ms. XUE commended the Special Rapporteur for his summing up of the debate and for the flexibility he had shown. She observed that no Commission member had called into question the purpose of the topic, namely, the protection of the victims of disasters. The question before the Commission was how to proceed, and what international law should underpin the Commission's work, in order to provide optimum protection to persons in need.

52. She had welcomed the Special Rapporteur's clarification as to why he had immediately addressed the issues of solidarity and cooperation in draft article 3. However, if the point of departure of the Commission's work was to be that of solidarity under international law, then the title of the topic would have to be changed, from "protection of persons in the event of disasters" to, for example, "solidarity, international solidarity and cooperation in the event of disasters, for the protection of persons" or "international humanitarian intervention in the event of

disasters, for the protection of persons". The Commission should not be overly ambitious, in seeking to cover all situations that generated cases of human need.

53. Effective protection of human rights of every individual could become a vast topic that went far beyond disaster relief. While there was nothing wrong with a "rights culture", the Commission—as a body of international lawyers—needed to be clear about what it was doing: the Commission wanted States to be more responsible in the event of disasters, especially tremendous natural disasters, whether the causes were man-made or not. To that end, she agreed with the Special Rapporteur on the need to stress the aspect of international solidarity and cooperation. However, to start with international solidarity and cooperation instead of starting with the rights and obligations of the affected State resulted in a different focus. In her view, the Commission should continue discussion on that fundamental substantive issue and decide what its focus should be before sending any draft articles to the Drafting Committee.

54. Mr. Gaja had suggested retaining only the first sentence of draft article 1. If she had understood him correctly, he had referred to both aspects: the rights and obligations of affected States and international cooperation and solidarity. However, the special emphasis on solidarity and international organizations immediately introduced by the Special Rapporteur in draft article 3 reflected a different approach, and had shifted the focus from the affected State to the international community. That was a decision that needed to be debated in the plenary Commission.

55. Whether a rights-based approach or needs-based approach was adopted, the aim was to ensure the protection of individuals. International humanitarian assistance in the event of a disaster was of great importance for any State, whether small or large, weak or strong, and that was where solidarity should be strengthened. States were still the main actors in the whole process, however, and should be held primarily responsible for organizing disaster relief operations. It was therefore necessary to keep States at the centre of the Commission's work on the topic.

56. The CHAIRPERSON observed that there appeared to be a broad degree of consensus with regard to the purpose of the topic.

57. Mr. OJO said that he was in favour of sending the draft articles to the Drafting Committee and recalled that the Special Rapporteur had adequately reflected the views of all speakers in his summing up and had offered to provide additional input for the Drafting Committee. Moreover, the draft nature of the articles meant that they could be changed subsequently, when the Drafting Committee referred its work back to the plenary Commission.

58. Mr. WISNUMURTI said that he was not in favour of referring the draft articles immediately to the Drafting Committee, as it was necessary first to reach a consensus on the outstanding fundamental issues. Although there was general agreement regarding the aim of the topic, namely the protection of persons, there were differing views as to how to reach that objective. In his view, the difficulty

stemmed from the rights-based approach adopted. He had accepted that approach on the understanding that the issues of protection *vis-à-vis* the rights of the States concerned would be reflected in the text in a balanced manner. Further clarification of what was actually meant by a rights-based approach would be helpful. Did that concept encompass, for example, the whole range of human rights of victims of disaster, or only certain rights? In his view, the most important aspect of a rights-based approach was that it should focus solely on the right to protection and relief. He would welcome reflection of that limited approach in the drafting of the text.

59. Following some further debate in the plenary, it would be very helpful if the Special Rapporteur himself, rather than the Secretariat, could draw up a revised version of the three draft articles, reflecting his view of the debate so far, for the benefit of the Drafting Committee.

60. Ms. ESCARAMEIA recalled that the decision that the topic was suitable had been taken long ago. The question at hand was whether to refer the draft articles to the Drafting Committee. Of the many Commission members who had spoken during the substantive debate, only a very small minority had said that they were not in favour of referring the draft articles to the Drafting Committee, or that they were only in favour of referring draft articles 1 and 2. In her view, substantive debate on the item should not be reopened. In keeping with the majority view, all three draft articles should be referred to the Drafting Committee, which would consider them in the light of the debate and the Special Rapporteur's summing up. That was normal practice. The Drafting Committee was much more than an editorial body and had often considered substantive issues. It had never been standard practice for the Commission to have to reach agreement on all outstanding issues beforehand.

61. Mr. GAJA said that it was necessary to reach a consensus and proposed that, as a compromise, the first part of draft article 1, relating to scope in the narrow sense, should be referred immediately to the Drafting Committee, together with draft article 2, and that a working group should be established for informal discussion of draft article 3 on cooperation and the second part of draft article 1 on objectives. The working group could be chaired by the Special Rapporteur, or by another member if the Special Rapporteur preferred. When the working group had reached agreement, it would report to the plenary Commission with the recommendation that the revised articles should be referred to the Drafting Committee.

62. Mr. NOLTE said, in response to the remarks by Sir Michael, that the degree of precision required of a draft article before it could be referred to the Drafting Committee depended on the nature of the topic. Draft articles referred recently to the Drafting Committee concerning reservations to treaties had been much more precise, for example, than those concerning the expulsion of aliens, which had given rise to fairly substantive discussions in the Committee.

63. He recognized the concern expressed by Ms. Xue regarding the apparent imbalance caused by reference, in draft article 3, to a duty of cooperation, with no

mention of the role of the affected State. Other members had shared that concern, which had accounted for their reluctance to refer the draft article to the Drafting Committee. As to the way forward, it should be left to the discretion of the Special Rapporteur whether to send the draft article on cooperation to the Drafting Committee first, establishing a working group only in the event of problems with formulation, or whether to establish a working group first, and discuss the role of the affected State contemporaneously.

64. While recognizing the merit of Mr. Gaja's proposal in addressing the reservations of fellow members, in his view it would do no harm to refer all three draft articles to the Drafting Committee, on the understanding that the article on cooperation should be adopted on a provisional basis only, pending the drafting of a subsequent article on the role of the affected State.

65. Sir Michael WOOD clarified that he had not been suggesting that consideration of the topic in question should be halted, merely making the point that it was not helpful to approach the issue from a particular theoretical perspective, whether "rights-based" or otherwise. In his view, the Commission should try to come up with provisions that were realistic and practical and that would assist in providing an adequate and effective response to disasters. In other words, he was proposing a practical approach with no particular theoretical basis.

66. He agreed with the distinction made by Mr. Gaja concerning questions of scope, as covered in the first part of draft article 1, together with draft article 2, and would have no problem referring the corresponding text for consideration by the Drafting Committee, as proposed by Mr. Gaja. The second part of draft article 1 and draft article 3, however, went to the very heart and direction of the project, and he endorsed Mr. Gaja's proposal for further discussion on those issues.

67. Ms. JACOBSSON thanked the Special Rapporteur for his excellent summing up and for the flexibility he had shown. She had welcomed the acknowledgement, for example, that the definition contained in draft article 2 was not final, but would evolve over time. In her view, that applied to any draft article. She concurred with the Chairperson that there was an area of consensus within the Commission. She also agreed with the comments made regarding the possibility of substantive discussions in the Drafting Committee, depending on the nature of the topic in question. She therefore favoured referring all three draft articles to the Drafting Committee, in the light of the Special Rapporteur's summing up. She would be interested to hear the Special Rapporteur's views concerning Mr. Gaja's proposal, to which, of course, she could have no objection; having already endorsed referral of all three draft articles to the Drafting Committee, she could not object to partial referral.

68. She observed that there had been nothing in the Commission's report on the work of its sixtieth session²³¹ to indicate that the Commission would still be having problems dealing with matters of principle at the current

²³¹ *Yearbook ... 2008*, vol. II (Part Two), chap. IX, pp. 129–135.

session. She had been under the impression that it had been agreed that referring draft articles to the Drafting Committee would be the way to proceed. There was an interesting reference in the Commission's report to seeking information from international organizations on real needs.²³² In line with the practical approach advocated by Sir Michael, perhaps the Commission should give renewed consideration to the idea of inviting the views of the international organizations concerned; that might help it to decide what it really wished to achieve.

69. The CHAIRPERSON, speaking as a member of the Commission, said he thought that Mr. Gaja's proposal as modified by Mr. Nolte could provide an acceptable way out of the dilemma. Referring the draft articles to the Drafting Committee would not mean that they were lost forever to the plenary; the Commission would still have the flexibility to refer matters of substance to a working group and subsequently to debate them in the plenary, as it had done on occasion in the past. There was agreement that the basic aim was to find the best way to help victims of disaster and to help both the affected State and other States willing to provide assistance to do just that, with due respect for State sovereignty. He was committed to the topic and optimistic that the Commission could make a contribution.

70. Speaking as Chairperson, he would by all means try to avoid a vote, which he did not believe would further the Commission's work.

71. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he was receptive to suggestions that would take the work forward. Bearing in mind that the task of the Commission was to codify and develop the law, his concern had been to find the legal foundation on which the Commission could build a set of draft articles on the topic. Unlike most of the topics the Commission had dealt with, protection of persons in the event of disasters was a novel topic, and there was no wealth of doctrine, practice and jurisprudence to draw on, merely a mixture of hard law, soft law, wishful thinking and practical considerations. The Commission had had the same debate at its previous session, and he recalled Mr. Pellet saying then that in his view the rights-based approach was the only possible legal basis on which the Commission could proceed. He himself had come to the "rights culture" rather late in his career, but the concept of a rights-based approach was widespread, and the Commission must be sensitive to current thinking. However, the approach would constitute only a background; nowhere in the draft articles would there be an explicit reference to a rights-based approach or to solidarity. He had sought, not just a moral or philosophical, but a legal, underpinning for the draft articles. In future reports, he would be dealing with the principles of sovereignty and non-intervention, either by themselves or in the context of the primacy of the affected State.

72. He still believed that the best way to advance was to refer all three draft articles to the Drafting Committee, and he endorsed the view of the Drafting Committee's function expressed by other members. Like the Chairperson,

he did not believe that a vote would help matters. However, the compromise plan proposed by Mr. Gaja might be more acceptable to the Commission. If the Commission wished, he could quickly reformulate all three draft articles in the light of the discussion. The reformulation might clarify the discussions held in the plenary.

73. The CHAIRPERSON asked whether, bearing in mind the discussion and the readiness of the Special Rapporteur to rework the draft articles in the light of it, the members could reach consensus on the proposal to send all three draft articles to the Drafting Committee, on the understanding that there were some difficulties with draft article 3 that could subsequently be referred, if necessary, to a working group.

74. Mr. GAJA said that the purpose of a working group was to reach consensus before referring draft articles to the Drafting Committee. It would be helpful if a working group, taking into account the points raised in the debate, could arrive at some kind of general compromise and report it to the plenary Commission.

75. Mr. SABOIA said that, in the light of the Special Rapporteur's flexibility and his willingness to rework the draft articles to reflect the discussion, he thought that the procedure outlined by the Chairperson would be the best solution. It would not preclude the possibility of creating a working group if problems persisted, but the draft articles reformulated by the Special Rapporteur might present fewer problems than anticipated.

76. Mr. WISNUMURTI said that he was grateful for the Special Rapporteur's willingness to produce an informal text reflecting the discussion. On that basis, he could agree to either plan: forming a working group before referring the draft articles to the Drafting Committee, or referring them and forming a working group afterwards if it proved necessary.

77. Sir Michael WOOD said that he, too, was grateful to the Special Rapporteur for his flexibility. His preference would be for the formation of a working group first, as Mr. Gaja had proposed, although in the end, following that procedure or the procedure suggested by the Chairperson might come to the same thing.

78. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, of course, his preference was to refer all three draft articles to the Drafting Committee, but in the interests of consensus he was willing to submit to the Commission's decision. The procedure the Chairperson had outlined based on Mr. Nolte's proposal was closer to his own position than the proposal of Mr. Gaja, but if a working group was to be set up beforehand he would request the privilege of chairing it.

79. Ms. JACOBSSON said that she favoured the procedure outlined by the Chairperson, because it meant that the Commission could set up a working group when it was needed and not before, so that the work was not unnecessarily delayed.

80. Mr. HASSOUNA said that the reformulated draft articles that the Special Rapporteur would prepare might

²³² *Ibid.*, pp. 130–131, para. 225.

help to move the work forward, possibly without the need for a working group. He was in favour of referring all three draft articles in that form to the Drafting Committee and forming a working group if it proved necessary.

81. Ms. ESCARAMEIA said she shared the Special Rapporteur's view that all three draft articles should simply be referred to the Drafting Committee, but, that not being possible, and in the light of the Special Rapporteur's commendable flexibility, she supported the Chairperson's suggestion.

82. The CHAIRPERSON asked whether all members could agree to the proposal to refer to the Drafting Committee all three draft articles, as reformulated by the Special Rapporteur to reflect the discussion, and, if it proved necessary, to establish a working group chaired by the Special Rapporteur to study draft article 3.

83. Sir Michael WOOD said that, if he could make a slight alteration, his proposal was that the second half of draft article 1 relating to purpose should also, if it proved necessary, be referred to a working group along with draft article 3.

84. The CHAIRPERSON, speaking as a member of the Commission, said that he supported that proposal.

85. Speaking as Chairperson, he took it the Commission wished to proceed in that manner.

It was so decided.

86. Mr. VÁSQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic "Protection of persons in the event of disaster" was composed of Ms. Escarameia, Mr. Fomba, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood and Ms. Xue, together with Mr. Valencia-Ospina (Special Rapporteur) and Ms. Jacobsson (Rapporteur) (*ex officio*).

The meeting rose at 1.05 p.m.

3020th MEETING

Tuesday, 14 July 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Cafilisch, Mr. Candioti, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Shared natural resources²³³ (A/CN.4/606 and Add.1, sect. A, A/CN.4/607 and Add.1,²³⁴ A/CN.4/608²³⁵)

[Agenda item 5]

REPORT OF THE WORKING GROUP

1. The CHAIRPERSON invited Mr. Candioti, the Chairperson of the Working Group on shared natural resources, to present the Working Group's report.

2. Mr. CANDIOTI (Chairperson of the Working Group on shared natural resources) said that, at its 3013th meeting on 2 June 2009, the Commission had decided to establish a Working Group on shared natural resources. The Working Group had held one meeting on 3 June 2009, at which its members had exchanged views as to whether it might be feasible for the Commission to consider the issue of transboundary oil and gas resources in the future. The Working Group had had before it the following documents: the questionnaire on oil and gas which had been circulated to Governments;²³⁶ a document on oil and gas prepared by Mr. Yamada, the former Special Rapporteur on shared natural resources (A/CN.4/608); the fourth report on shared natural resources presented by Mr. Yamada;²³⁷ the relevant portions of Mr. Yamada's fifth report on shared natural resources;²³⁸ the comments and observations received from Governments on the questionnaire on oil and gas (A/CN.4/607 and Corr.1 and Add.1); the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-third session, prepared by the Secretariat (A/CN.4/606 and Add.1) summarizing, *inter alia*, the views expressed by delegations in the Sixth Committee in 2008 on the issue of oil and gas; and two working papers prepared by Mr. Yamada, containing excerpts from summary records of the Sixth Committee's debates on the topic of oil and gas in 2007 and 2008.

3. During its discussions, the Working Group had addressed a number of questions, including that of whether it was really necessary to examine the feasibility of any future work by the Commission on oil and gas resources and whether such work would meet a practical need; the sensitivity of the issues in question; the relationship between the issue of transboundary oil and gas resources and boundary delimitation, especially maritime boundaries; and, lastly, the difficulty of collecting information on the relevant practice. While the Working Group

²³³ In 2007, the Commission considered the Special Rapporteur's fourth report on shared natural resources, which dealt with oil and natural gas (*Yearbook ... 2007*, vol. II (Part One), document A/CN.4/580) and requested a Working Group, chaired by Mr. Enrique Candioti, to examine the questions raised in the report. At the same session, the Commission decided to proceed with the second reading of the draft articles on transboundary aquifers, independently from its future work on oil and natural gas; these two resources would be examined together (*ibid.*, vol. II (Part Two), p. 56, paras. 158–159 and pp. 59–60, paras. 178–183). At its sixtieth session in 2008, the Commission adopted on second reading a preamble and 19 draft articles on the law of transboundary aquifers (*Yearbook ... 2008*, vol. II (Part Two), chap. IV, sect. E), which it transmitted to the General Assembly.

²³⁴ Reproduced in *Yearbook ... 2009*, vol. II (Part One).

²³⁵ *Idem*.

²³⁶ *Yearbook ... 2007*, vol. II (Part Two), p. 56, para. 159.

²³⁷ *Ibid.*, vol. II (Part One), document A/CN.4/580.

²³⁸ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/591.