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**Summary record of the 2978th meeting**

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## 2978th MEETING

Tuesday, 15 July 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

*Present:* Mr. Al-Marri, Mr. Brownlie, Mr. Caflich, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

### Reservations to treaties (*continued*) (A/CN.4/588, sect. A, A/CN.4/600, AC/N.4/L.723 and Corr.1, A/CN.4/L.739 and Corr.1, A/CN.4/L.740)

[Agenda item 2]

#### THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. PELLET (Special Rapporteur), said that his concluding remarks concerning the discussion of the thirteenth report on reservations to treaties (A/CN.4/600) would not be particularly brief, even though the report as a whole had not prompted much opposition. By and large, members' comments had focused on the second paragraph of draft guideline 2.9.9 (Silence in response to an interpretative declaration).

2. However, he wished to begin by disposing of draft guideline 2.9.10 (Reactions to conditional interpretative declarations). Unlike several other members, he continued to be of the view that those unilateral statements, which were defined in draft guideline 1.2.1<sup>170</sup> and which sought to impose a specific interpretation of the treaty, were not reservations. Seeking to impose a specific interpretation was one thing, but wishing to exclude or to modify the legal effect of certain provisions of the treaty in their application to the reserving State was quite another matter. It would be recalled that in 2001<sup>171</sup> the Commission had decided not to review the definition of conditional interpretative declarations contained in draft guideline 1.2.1. Instead, while recognizing the existence of those unilateral declarations as a hybrid category—which in some respects resembled reservations, but in others resembled interpretative declarations—the Commission, and the Special Rapporteur, had realized that conditional interpretative declarations behaved much more like reservations than “simple” interpretative declarations; moreover, their legal regime was, if not identical, at least very similar, to that of reservations, so that there was some doubt as to the advisability of including a set of guidelines on conditional interpretative declarations in the Guide to Practice. Since then, that decision had frequently been revisited, but the

Commission was not yet ready to dispense with the draft guidelines on conditional interpretative declarations altogether, since it could not be sure that their legal regime corresponded fully to that of reservations until it had ascertained that the effects of interpretative declarations were identical to those of reservations. In the interim, the Commission had decided that the draft guidelines on conditional interpretative declarations should be adopted provisionally, even though they might eventually be deleted and replaced by a single guideline to the effect that the legal regime of reservations was also applicable to conditional interpretative declarations.

3. To that end, he had recommended that the Commission refer draft guideline 2.9.10 to the Drafting Committee. He believed that the draft guideline would probably disappear once the Guide to Practice was complete; nonetheless, it seemed unwise to declare it stillborn at that juncture, since basically all it said was that the procedural rules for the formulation of acceptances of and objections to reservations applied *mutatis mutandis* to reactions to conditional interpretative declarations, whereby the authors subjected their consent to be bound by the treaty to a specific interpretation thereof.

4. Subject to those precautions, on which some members had insisted, and bearing in mind those clarifications, there seemed no reason for the Commission to depart from its “provisionally traditional” prudent position on the matter, at least for the moment. The Drafting Committee should consider and the Commission should provisionally adopt the draft guideline by placing it in square brackets, as it had done with draft guideline 2.4.7 and as, in his view, it ought to have done with other draft guidelines on the question, among them guidelines 2.4.8, 2.4.10 and 2.5.13. While some members had been dubious about the content of draft guideline 2.9.10, there had been no outright opposition to the procedure he proposed.

5. He had taken note of one member's reproach that the report proper had not distinguished clearly enough between conditional and non-conditional interpretative declarations. Although he had not yet found any instances of scope for confusion, he would endeavour to look more closely at the matter when drafting the relevant commentaries.

6. Before turning to draft guideline 2.9.9, he wished to summarize various points raised during the discussion. He apologized for the inconsistency between paragraph 7 [282] of the report, which referred to three types of reactions to interpretative declarations, and subsequent paragraphs which described four reactions: approval; opposition; reclassification; and silence.

7. One member had challenged his view that reclassification came under a separate category from opposition to interpretative declarations, suggesting that it was a subcategory. The statistics showed that reclassification of an interpretative declaration as a reservation was, more often than not, a means of rejecting the very substance of the declaration. Nevertheless, in the first place, reclassification and rejection of the substantive content of an interpretative declaration were two completely different intellectual operations; in other words “declassification”

<sup>170</sup> *Yearbook ... 1999*, vol. II (Part Two), pp. 103–106.

<sup>171</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 18, para. 20.

was a first step towards rejection of the content, generally on the ground that the reservation itself was unlawful. Secondly, it was not really important whether reclassification was a category or a subcategory, since it was still a form of opposition to a declaration, albeit a very special form of opposition.

8. Thirdly, those considerations were closely bound up with an interesting comment that had been made at the start of the debate, but which had not been taken up by other speakers. He agreed with that comment to the effect that the counter-interpretation of or challenge to the nature of the interpretative declaration need not, as such, prevail, as the author of the reclassification might be mistaken. He likewise agreed that, since it could not be presumed that a State was acting in bad faith, one should instead start from the presumption that the author of the declaration had intended to interpret the treaty and not to modify its effects. He proposed to reflect that comment in the commentary to draft guideline 2.9.3.

9. Turning to the comments on specific draft guidelines, and to draft guideline 2.9.1, he noted that one member had rightly characterized the example of approval of an interpretative declaration cited in paragraph 8 [283] of the report as “conditional approval”. The wording of the relevant part of the commentary would need to be amended accordingly.

10. As to the text itself, several members had voiced concern about the possible effects of approval, as defined in draft guideline 2.9.1. However, as he had pointed out during the discussion, the second part of the Guide to Practice related not to the effects of reservations and interpretative declarations, but to the formulation of reservations and interpretative declarations and of reactions thereto. The Commission should deal with the effects of such reactions when it considered the fourth part of the Guide to Practice and at that juncture only, since the effects of reservations and interpretative declarations depended to a great extent on the reactions they prompted. On the other hand, he had no problem with the suggestion made to draw attention to the connection between article 31 of the 1969 Vienna Convention and draft guideline 2.9.1 in the commentary.

11. The terminology he had proposed in order to differentiate between reactions to interpretative declarations and reactions to reservations, whether approval or opposition, had not given rise to any objections. Nor had the principle of opposition to an interpretative declaration set forth in draft guideline 2.9.2 been challenged, although a few members had questioned the appropriateness of the last phrase, namely “with a view to excluding or limiting its effect”. While he considered it essential to point out that opposition to an interpretative declaration might take the form of a counter-interpretation, he would not insist on retaining the last phrase. A decision on the matter should be left to the Drafting Committee.

12. With regard to the comments in the report, his attention had been drawn to an error in paragraph 17 [292]: Poland could hardly have opposed its own interpretative declaration; the States in question were Austria, Germany and Turkey.

13. More importantly, one member had used his position on the declaration made by Egypt concerning the 1997 International Convention for the Suppression of Terrorist Bombings as a pretext for drawing attention to a lacuna in the Guide to Practice regarding reservations which entailed further obligations. However, he was unrepentant, adamantly maintaining his position, outlined in paragraph 18 [293], that since the declaration aimed to extend the scope of the Convention, it could not be assigned the status of “reservation”; that statement followed inexorably from draft guidelines 1.4.1 and 1.4.2, which excluded from the scope of the Guide to Practice statements purporting to undertake unilateral commitments and unilateral statements purporting to add further elements to a treaty respectively. However, he was willing to prolong the dialogue on the subject if, as was perhaps the case, he had misunderstood the comments in question.

14. Aside from the two somewhat academic questions to which he had already referred, the first paragraph of draft guideline 2.9.3 had prompted no real objections. However, several members had been in favour of deleting the bracketed second paragraph. Of the eight members who had spoken on the subject, five had favoured retaining the “hard” version of the text, whereby States and international organizations must “apply” (rather than “take into account”) draft guidelines 1.3 to 1.3.3. If he were to be allowed a vote—not that a vote on the question was necessary—he would advocate the retention of the paragraph, since it provided a useful clarification. Nevertheless, if the Commission in plenary decided to refer draft guideline 2.9.3 to the Drafting Committee, it should be on the understanding that the second paragraph would be retained, although its exact wording could be left to the Committee.

15. Only one member had suggested that the Commission should dispense with draft guidelines 2.9.4 to 2.9.7, while all the others had considered that they should be referred to the Drafting Committee; they had prompted few substantive comments. He was grateful to those members who had drawn attention to an error in the title of draft guideline 2.9.4, where the word “protest” should read “opposition”.

16. He had been relieved to note that the closing phrase of draft guideline 2.9.4 (“any State or any international organization that is entitled to become a party to the treaty”) had not caused the outcry he had expected: the Commission had understood, as he had explained during his oral presentation, that the issue at stake in draft guideline 2.9.4 was different from that in draft guideline 2.6.5.

17. There had been no objections to draft guidelines 2.9.5 and 2.9.6. He was not convinced that the proposal to delete the reference to draft guideline 2.1.6 from draft guideline 2.9.7, which had not been endorsed by other members, was a good idea. The matter could be taken up again in the Drafting Committee.

18. All members who had spoken on the question had requested the Special Rapporteur to prepare similar draft guidelines on the form of statement of reasons for and communication of interpretative declarations themselves,

which had thus far not been covered in the Guide to Practice. If the Commission endorsed that idea, he would draft a document for consideration by the Commission either during the current session or at its next session.

19. The thorniest problem dealt with in the report was undoubtedly the question of silence. Not that draft guideline 2.9.8 had elicited any major objections; in fact, almost all members had been in favour of referring both draft guideline 2.9.8 and draft guideline 2.9.9 to the Drafting Committee. However, he had the impression that the relationship between the two provisions had not always been fully grasped. Furthermore, the content of draft guideline 2.9.9, particularly the second paragraph, had been widely criticized. While he accepted that criticism, he had little to offer by way of a solution. Fortunately, only one member had proposed the deletion of draft guideline 2.9.9, and another the deletion of 2.9.8. This was fortunate because both provisions were necessary. The first, draft guideline 2.9.8, laid down the principle that, contrary to the situation in the case of reservations, acceptance of an interpretative declaration could not be presumed. However, the second, draft guideline 2.9.9, attempted to qualify it by stating, first, that silence *per se* did not equate to consent and, secondly, that silence could be considered to be acquiescence in certain specific circumstances, like other forms of conduct.

20. He could frankly see no contradiction in draft guideline 2.9.9. The general principle was laid down in draft guideline 2.9.8, and expressed more clearly in the first paragraph of draft guideline 2.9.9. However, the principle was not rigid and would allow for exceptions and nuances, as was indicated in the second paragraph.

21. Most of the doubts, criticisms and suggestions voiced had focused on the second paragraph. In particular, he had been reproached for not indicating the “specific circumstances” in which a State or an international organization might be considered as having acquiesced in an interpretative declaration. He had already pleaded guilty to that charge during his oral presentation of his report, as some members had recognized, and he maintained that it would be very difficult to go any further in the draft guideline itself without inserting a very lengthy text on acquiescence, which seemed neither realistic nor desirable.

22. In that connection, he recalled that, in 2006, the Secretariat had prepared an excellent study on acquiescence and its effects on the legal rights and obligations of States<sup>172</sup> for the attention of the Working Group on the long-term programme of work. Unfortunately, to the best of his recollection, the paper had not convinced the Working Group that the fascinating topic should be included on the Commission’s agenda. That would not, however, justify a surreptitious attempt to place such a vast and difficult subject on the agenda by roundabout means, via a relatively minor aspect of the topic of reservations to treaties, for acquiescence in interpretative declarations seemed to follow the same logic and to be subject to the same rules as in other areas.

23. He still maintained that in the draft guidelines themselves it was impossible to do more than caution States that although, in principle, their silence with regard to an interpretative declaration did not commit them, in certain specific circumstances it might be regarded as equivalent to acquiescence, and therefore to approval of the interpretative declaration. He honestly failed to see how those circumstances could be spelled out in the draft guideline itself. Perhaps an attempt could be made to narrow them down, but the Guide to Practice was certainly not the place to restate the whole theory of acquiescence.

24. On the other hand, he was quite prepared to try to flesh out the commentary by providing some concrete examples. However, he was not entirely optimistic that he would find any, and thought it might be necessary to resort to hypothetical examples. One speaker had given the example of a State omitting to react to an interpretative declaration, when almost all of the States parties to the treaty had done so. In that case, its silence might be opposable to it. In his opinion, that would also be true of a State that remained silent with regard to an interpretative declaration of which it had been duly notified and which expressly or necessarily related to a situation of direct concern to itself. In those circumstances, a State’s silence might also be opposable to it.

25. It was difficult to find cases in which, outside the judicial framework, a State’s silence in the face of another party’s interpretation of a treaty had been deemed to be acquiescence pure and simple, although there were cases in international law of acquiescence through silence in the interpretation or modification of a treaty, as the Eritrea–Ethiopia Boundary Commission had noted in its 2002 decision (*Decision regarding delimitation of the border between Eritrea and Ethiopia*), which he had quoted in paragraph 39 [314] of his report. That decision relied on the decision of the ICJ in the *Temple of Preah Vihear* case and on the arbitral decision in the *Case concerning the location of boundary markers in Taba between Egypt and Israel*. Another example which sprang to mind was that of the 1986 arbitral award in the *La Bretagne* case, referred to in the Secretariat study. However, in all those cases, silence was only one element of some more general considerations leading the court or arbitral tribunal to conclude that a State’s interpretation had been accepted by the other State concerned.

26. He therefore endorsed the suggestion that silence might be one of the elements of an overall pattern of conduct from which acceptance could be inferred and that he should recast the second paragraph of draft guideline 2.9.9 accordingly. Basically, silence itself constituted one of those mysterious “specific circumstances” from which acquiescence in the declaration could be inferred. By following that promising lead, it could be possible for the Drafting Committee to arrive at a second paragraph to the effect that silence might constitute an element of conduct from which it might be possible to infer the acceptance of an interpretative declaration by a State or an international organization.

27. Another speaker had recommended a further alternative worth exploring, namely the possibility of drafting the second paragraph as a “without prejudice” clause.

<sup>172</sup> Document distributed only to the members of the Commission (ILC(LVIII)/WG/LT/INFORMAL/4 of 20 June 2006).

Once again, he would not venture to suggest any specific wording. While the Drafting Committee's deliberations should follow the lines he had suggested, it was not necessary for the plenary to provide it with firm instructions, since only one member had proposed the deletion of that draft guideline, all other speakers having taken the view that the Commission should not remain silent on the question of silence.

28. Although, in his summing up, he had not mentioned members by name, he hoped he had taken account of all the views expressed, even those which he had not found entirely convincing. He therefore requested the Commission to agree to refer draft guidelines 2.9.1 to 2.9.10 to the Drafting Committee, on the understanding that this referral included the second paragraph of draft guideline 2.9.3; that the referral of draft guideline 2.9.10 was without prejudice to the maintenance or otherwise in the Guide to Practice of the draft guidelines specifically dealing with conditional interpretative declarations that would be ultimately adopted; and, lastly, that he would submit as soon as was possible draft guidelines on the form of, statement of reasons for and communication of interpretative declarations themselves.

29. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to refer draft guidelines 2.9.1 to 2.9.10, contained in the thirteenth report on reservations to treaties, to the Drafting Committee.

*It was so decided.*

30. The CHAIRPERSON said it was his understanding that, in accordance with the Special Rapporteur's proposal, the referral of draft guideline 2.9.10 to the Drafting Committee was without prejudice to the retention of the draft guidelines on conditional interpretative declarations in the Guide to Practice, and that, in the near future, the Special Rapporteur would submit draft guidelines on the form of, statement of reasons for and communication of interpretative declarations.

*It was so agreed.*

**Protection of persons in the event of disasters<sup>173</sup>  
(A/CN.4/590 and Add.1-3,<sup>174</sup> A/CN.4/598<sup>175</sup>)**

[Agenda item 8]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

31. The CHAIRPERSON drew attention to a memorandum by the Secretariat on protection of persons in the event of disasters (A/CN.4/590 and Add.1-3), an excellent document on which the Secretariat was to

<sup>173</sup> The Commission, at its fifty-eighth session, decided to include the topic in its long-term programme of work, *Yearbook ... 2006*, vol. II (Part Two), p. 186, para. 257 (d), on the basis of a proposal by the Secretariat, annex III. It included the topic in its programme of work at its fifty-ninth session (2007) and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur, *Yearbook ... 2007*, vol. II (Part Two), p. 98, para. 375; see also p. 100, para. 378 (h).

<sup>174</sup> Mimeographed; available on the Commission's website.

<sup>175</sup> Reproduced in *Yearbook ... 2008*, vol. II (Part One).

be congratulated. He invited the Special Rapporteur, Mr. Valencia-Ospina, to introduce his preliminary report on the topic (A/CN.4/598).

32. Mr. VALENCIA-OSPINA (Special Rapporteur) said that his preliminary report on the protection of persons in the event of disasters should be read in conjunction with the Secretariat memorandum contained in document A/CN.4/590 and Add.1-3, and with annex III of the report of the Commission on the work of its fifty-eighth session.<sup>176</sup> The document modestly described by the Secretariat as a "memorandum" comprised a fairly exhaustive background study, requested by the Commission at its previous session,<sup>177</sup> superseding the much briefer memorandum submitted by the Secretariat to the Working Group on the long-term programme of work at the Commission's fifty-eighth session.<sup>178</sup> In that earlier memorandum, the Secretariat, responding to a request by the Working Group, had submitted a proposal on the topic, entitled "International disaster relief law".<sup>179</sup> At the same session, the Commission, following the recommendation of its Planning Group, but without debating the matter in plenary, had decided to include in its long-term programme of work, under the title "Protection of persons in the event of disasters", the topic proposed by the Secretariat. The initial memorandum had been reproduced as a synopsis of the topic in annex III of the report of the Commission on the work of its fifty-eighth session.<sup>180</sup> Given that the report he was now presenting was preliminary in nature, he would refrain, as far as was possible, from repeating information contained in the two Secretariat memorandums.

33. It should be noted that the selected bibliography to be found in Addendum 3 to the Secretariat memorandum (A/CN.4/590) did not list a very important recent publication containing the proceedings of the forty-first colloquium of the French Society for International Law on "The responsibility to protect" held at the University of Paris X-Nanterre from 7 to 9 June 2007.<sup>181</sup>

34. During its fifty-ninth session, the Commission had decided to include the topic in its current programme of work.<sup>182</sup> However, no official documentation, either from 2006 or from 2007, cast light on the reasons why the Commission had decided to single out "protection of persons" over "relief" or "assistance", the basic aspect of the subject, which the Secretariat had emphasized in its original proposal. There was, therefore, a need at the preliminary stage for the Commission in plenary clearly to define the scope of the topic, elucidating its core concepts and principles. The main aim of his report, which was strictly preliminary in nature, was to stimulate discussion which would provide him, as Special Rapporteur, with the requisite guidance to enable him to make concrete

<sup>176</sup> *Yearbook ... 2006*, vol. II (Part Two), p. 206.

<sup>177</sup> *Yearbook ... 2007*, vol. II (Part Two), p. 101, para. 386.

<sup>178</sup> Document distributed only to the members of the Commission (ILC(LVIII)/WG/LT/INFORMAL/1 of 12 May 2006).

<sup>179</sup> Document distributed only to the members of the Commission (ILC(LVIII)/WG/LT/INFORMAL/1/Rev.1 of 11 July 2006).

<sup>180</sup> See footnote 176 above.

<sup>181</sup> French Society for International Law, *La Responsabilité de protéger: Colloque de Nanterre*, Paris, Pedone, 2008.

<sup>182</sup> *Yearbook ... 2007*, vol. II (Part Two), para. 375.

proposals on the approach to be followed, representing the general view within the Commission.

35. In providing a legal framework for dealing with disasters, it was necessary to bear in mind that a disaster was not an isolated event, but a process or continuum in which it was possible to distinguish three successive phases: pre-disaster, the disaster proper and post-disaster. In its widest sense, the provision of assistance in the event of a disaster raised a broad spectrum of specific issues in relation to each phase: response, in other words relief, during the disaster proper; prevention and mitigation beforehand; and rehabilitation in the aftermath. However, there was no clear demarcation between the three phases, since concepts such as “relief” and “assistance” covered the stage prior to the disaster and the stage following the immediate response. Contrasting the concept of protection with those of response, relief, assistance, prevention, mitigation and rehabilitation raised the question of whether it was distinct from those other concepts, or encompassed them.

36. In both its original proposal and its subsequent study, the Secretariat had placed the emphasis on the law applicable to the operational phase of disaster response. However, in its second memorandum, it attached greater importance to the concepts of prevention, mitigation, preparedness and rehabilitation, to some of which only passing reference had been made in the earlier memorandum. Similarly, chapter V of the second memorandum provided a more detailed examination of protection as another vital component of a regime of international disaster response and, even more, of a relief effort.

37. The approach adopted by the International Federation of Red Cross and Red Crescent Societies (IFRC) likewise focused on the law applicable to the operational phase of the response, which had been embodied in the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance adopted by the thirtieth International Conference of the Red Cross and Red Crescent in November 2007.<sup>183</sup> However, the publication entitled *Law and Legal Issues in International Disaster Response: A Desk Study*,<sup>184</sup> on which the guidelines were based, did not ignore preparedness, emergency assistance, recovery and rehabilitation, but always placed them in an operational context.

38. In his own opinion, protection was a broad concept that subsumed all the more specific notions: not only response, relief and assistance, but also prevention, mitigation, preparedness and rehabilitation. That broad general concept included both the operational side of protection, namely assistance, and also the notion of protection *stricto sensu*, which denoted a law-based approach, which he would explain later in his statement.

<sup>183</sup> *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, Geneva, International Federation of Red Cross and Red Crescent Societies, 2008, p. 8. Available at: [www.ifrc.org/PageFiles/41203/introduction-guidelines-en.pdf](http://www.ifrc.org/PageFiles/41203/introduction-guidelines-en.pdf) (accessed 12 December 2012).

<sup>184</sup> D. Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study*, Geneva, International Federation of Red Cross and Red Crescent Societies, 2007 (summary of a larger study; the complete study is available at: [www.ifrc.org/PageFiles/41194/113600-idrl-deskstudy-en.pdf](http://www.ifrc.org/PageFiles/41194/113600-idrl-deskstudy-en.pdf)) (accessed 12 December 2012).

39. For the purposes of the topic, protection had been qualified as the protection of persons, a concept that was not new in international law. It denoted a particular relationship between persons affected by disasters and their rights and obligations in that context. The legal regimes which directly regulated the protection of persons were international humanitarian law, international human rights law and international law relating to refugees and internally displaced persons. Those regimes were guided by a basic identity of purpose—the protection of the human person in absolutely all circumstances—and they could apply simultaneously to the same situation, because they essentially complemented each other. The law on the protection of persons in the event of disasters shared a significant number of fundamental principles with international humanitarian law, such as humanity, neutrality, impartiality and non-discrimination, all of which would usefully guide the future development of the topic.

40. From the title of the topic adopted by the Commission, it could be deduced that the work to be undertaken would focus not on all the possible legal consequences of disasters, but on those relating to the protection of persons. The title also incorporated a distinct perspective, that of the individuals who were victims of a disaster, thereby suggesting a rights-based approach to treatment of the topic. The essence of such an approach was the identification of a specific standard of treatment to which the individual, the victim of a disaster *in casu*, was entitled. As the Secretary-General had indicated in another context, a rights-based approach dealt with situations not simply in terms of human needs, but in terms of society’s obligation to respond to the inalienable rights of individuals; empowered them to demand justice as a right, not as a charity; and gave communities a moral basis from which to claim international assistance when needed.

41. From the standpoint of the victims of disasters, the task of identifying the rights and obligations that entered into play in disaster situations and the consequences that might flow therefrom raised questions not only of international humanitarian law, but also of international human rights law, including the existence or otherwise of a right to humanitarian assistance, regardless of whether such a right was a human right *stricto sensu* or simply a right of those affected by a disaster. In any event, recognition of the existence of such a right could be taken as constituting a challenge to the guiding principle of the sovereignty of the State and its corollary of non-intervention, according to which the State had the primary responsibility of affording protection to disaster victims on its territory or territory under its jurisdiction or control. The implication of that fundamental principle was that humanitarian assistance could be provided only with the consent of the State directly affected by the disaster. Yet at the same time, the ICJ had stated, in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, that “the provision of strictly humanitarian aid to persons or forces in another country ... cannot be regarded as unlawful intervention, or as in any other way contrary to international law” [para. 242].

42. The traditional system of State sovereignty was, however, currently witnessing the emergence of various

concepts related to the responsibility of States. In its original proposal, the Secretariat had noted that the protection of persons could be viewed as falling within the contemporary reflection on an emerging principle entailing the responsibility to protect. That responsibility entailed the responsibilities to prevent, react and rebuild, which corresponded respectively to the three phases of a disaster situation. However, the relevance of the concept to the present topic and the appropriateness of extending it to the protection of persons in the event of disasters, which went far beyond the narrow context of armed conflict in which it had been developed, was not self-evident and required careful consideration.

43. The original proposal by the Secretariat for the topic had suggested that the definition of disaster should be limited initially to natural disasters, based on a perceived more immediate need. The truth of that statement could hardly have been confirmed more dramatically than by the events of May and June 2008, coinciding with the first part of the Commission's current session. Cyclone Nargis had devastated vast areas of Myanmar, leaving 2.5 million people homeless, over 50,000 missing and at least 84,000 dead. Ten days later, Sichuan Province in China had been hit by an earthquake measuring 7.9 on the Richter scale which, according to official Chinese sources, had killed over 80,000 people, many of them children, and left over 5 million homeless. According to an article in the 6 July 2008 issue of *The New York Times*,<sup>185</sup> in June 2008 the United States had suffered flooding of historic proportions in the state of Iowa and, after more than two months of the harshest drought in recent memory, over a thousand wildfires in California.

44. The Secretariat's study (A/CN.4/590 and Add.1–3) had taken a more inclusive approach, however, noting that while the bulk of the study pertained to disasters emanating from natural phenomena, few of the legal instruments and texts cited maintained a clear distinction between natural and man-made disasters.

45. He himself was of the view that the title eventually agreed upon by the Commission suggested a broader scope than that of natural disasters alone. Such an approach would seem the best way of achieving the underlying objective of codification and progressive development of the topic. The need for protection could be said to be equally strong in all disaster situations, whether categorized according to cause, duration or the context in which they occurred. The conceptual scope should take account of all of those categories, irrespective of whether they occurred in isolation or overlapped. In that connection, reference might be made to the very recent report by the IFRC,<sup>186</sup> dated 26 June 2008, according to which the HIV/AIDS epidemic in sub-Saharan Africa should be categorized as a disaster comparable to famine or flooding. Despite the holistic approach suggested, armed conflict

*per se* would be excluded because there was a particular and highly developed field of law, namely international humanitarian law, which dealt in great detail with such situations.

46. The multiplicity of actors involved in disaster situations was an indisputable fact. In its work on the topic, the Commission would clearly need to take account of the role, not only of States, but also of intergovernmental and non-governmental organizations and private entities, whether non-profit or commercial.

47. The Secretariat study contained an exhaustive list of existing instruments directly applicable to various aspects of the operational component of protection (A/CN.4/590/Add.2, annex II). While no universal instrument dealing with the general aspects of protection of persons in the event of disasters existed at the multilateral level, there were some universal, regional and subregional instruments dealing with specific aspects of protection. Much of the material relevant to the topic, however, took the form of non-legal pronouncements, non-binding instruments and soft law adopted under the aegis of the United Nations and other intergovernmental organizations, and the form of models, guidelines and the like, elaborated by NGOs or private individuals. To those must be added a significant number of bilateral agreements regulating the provision of assistance and cooperation among States parties as well as the domestic legislation which, in almost every country of the world, dealt with national calamities or aspects thereof.

48. Given such a disparate corpus of texts with varying degrees of binding force, the value that could be accorded to them as sources for the codification and progressive development of international law must be clearly determined. In its most recent study, the Secretariat had explained that reference was made to all pertinent instruments—regardless of their nature and current ratification and implementation status and of whether, as was the case with most of the instruments cited, they were of a non-binding nature—as evidence of the types of provisions that had been elaborated and adopted in other codification-related exercises.

49. In undertaking its work on the topic, the Commission should be aware, not only of its innovative nature, but also of the difficulty of squaring it with the accepted notions of codification and progressive development of international law in accordance with its Statute. Regardless of the form that would be proposed for its final product, the Commission generally embodied the result of its work in draft articles, a practice that should be applicable to the present topic. In taking up the topic, the Commission was taking up a challenge that could usher in a new era in the contribution of international law to the solution of the pressing needs of the international community. He himself would do his utmost, together with members of the Commission, the Secretariat and all State and non-State actors concerned, to achieve a result that would ensure effective protection of persons in the event of disasters, in fulfilment of the purpose of the United Nations set forth in Article 1, paragraph 3, of the Charter of the United Nations.

<sup>185</sup> Eric Klinenberg, "Are You Ready for the Next Disaster?", *New York Times*, 6 July 2008. Available from [www.nytimes.com/2008/07/06/magazine/06wwln-idealab-t.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2008/07/06/magazine/06wwln-idealab-t.html?pagewanted=all&_r=1&) (accessed 12 December 2012).

<sup>186</sup> *World Disasters Report: Focus on HIV and Aids*, Geneva, International Federation of Red Cross and Red Crescent Societies, 2008. Available from [www.ifrc.org/PageFiles/89755/2008/WDR2008-full.pdf](http://www.ifrc.org/PageFiles/89755/2008/WDR2008-full.pdf) (accessed 12 December 2012).

**Responsibility of international organizations (*continued*)\* (A/CN.4/588, sect. E, A/CN.4/593 and Add.1, A/CN.4/597, A/CN.4/L.725 and Add.1)**

[Agenda item 3]

REPORT OF THE WORKING GROUP (*concluded*\*\*)

50. Mr. CANDIOTI (Chairperson of the Working Group), introducing the recommendations resulting from the discussions held in the Working Group on responsibility of international organizations, recalled that the Working Group had been established by the Commission at its 2964th meeting on 16 May 2008 for the purpose of considering the issues of countermeasures and the advisability of including in the draft articles a provision on admissibility of claims (see the 2964th meeting, above, para. 66). During the four meetings held between 28 May and 8 July 2008, it had first considered the question of the inclusion of a provision on admissibility of claims, on the basis of a draft article prepared by the Special Rapporteur. While some drafting comments had been made on the proposed text, the Working Group had agreed on the advisability of including a provision of that nature in the draft articles and had recommended that the additional draft article should be referred to the Drafting Committee. The Commission had accepted that proposal.

51. The Working Group had then proceeded to consider the issue of countermeasures. Members had engaged in a discussion on the advisability of elaborating draft articles on countermeasures taken against international organizations. Several members of the Working Group had maintained that the Commission should elaborate provisions on countermeasures with a view to regulating such measures and establishing certain limits to their use. Others had been of the view that the Commission should refrain from including provisions on countermeasures in the draft articles. The point had been made that the practice was almost non-existent and that the Commission should do nothing to encourage recourse to countermeasures. It had also been noted that countermeasures against international organizations were likely to have a destabilizing impact on the functioning of international organizations and to be a potential source of disputes.

52. The discussion had revealed that a majority of the members of the Working Group were in favour of including in the draft articles provisions regulating the issue of countermeasures. The Working Group had therefore agreed to continue its work on the basis of the draft articles proposed by the Special Rapporteur, with a view to considering some modifications thereto. It had accordingly considered whether—and if so, to what extent—the legal position of members and non-members of an international organization should be distinguished where their right to resort to countermeasures against the organization was concerned. Drawing such a distinction had generally been felt to be necessary. While it had been suggested that members of the organization should not be prevented from resorting to countermeasures against it, a majority of the members of the Working Group had emphasized that

the specific relationship existing between the organization and its members needed to be taken into account. Having considered various ways of dealing with that situation, the Working Group had come to the conclusion that the provisions embodied in draft article 52, paragraphs 4 and 5, should be reformulated and placed in a separate draft article. The substance of the new draft article should provide that an injured member of an international organization could not take countermeasures against the organization so long as the rules of the organization provided reasonable means to ensure the compliance of the organization with its obligations under Part Two of the draft articles.

53. The Working Group had also considered whether further restrictions should be added to those provided for in the draft articles already introduced by the Special Rapporteur. It had agreed that the draft articles should specify the need for countermeasures to be taken in such a manner as to respect the specificity of the targeted organization, in other words, the effect of countermeasures on the larger purposes of the organization, its capacity to perform its functions, and so forth. The precise location of that provision could be determined by the Drafting Committee.

54. Lastly, the Working Group had agreed that, in the light of the view expressed in the debate in plenary, the draft articles should not address the question dealt with in article 57, paragraph 2.

55. The Working Group thus recommended that draft articles 52 to 57, paragraph 1, should be referred to the Drafting Committee, together with the recommendations regarding their improvement that he had just outlined.

56. He wished to thank the Special Rapporteur on responsibility of international organizations and members of the Working Group for their constructive participation, and the Secretariat for the valuable support it had provided to the Group.

57. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the oral report of the Working Group referring draft articles 52 to 57, paragraph 1, to the Drafting Committee, together with the Working Group's recommendations.

*It was so decided.*

### Cooperation with other bodies

[Agenda item 12]

STATEMENT BY THE REPRESENTATIVE OF THE  
INTER-AMERICAN JURIDICAL COMMITTEE

58. The CHAIRPERSON welcomed Mr. Pérez, of the Inter-American Juridical Committee, and invited him to address the Commission.

59. Mr. PÉREZ (Inter-American Juridical Committee) said it was an honour to represent the Inter-American Juridical Committee before the International Law Commission for the purpose of reporting, in accordance with the customary practice, on the Committee's current activities and conveying the Commission's comments and questions to the Committee.

\* Resumed from the 2971st meeting.

\*\* Resumed from the 2968th meeting.

60. The agenda for the Committee's seventy-third regular session, to be held in Rio de Janeiro in August 2008, attested to the diversity of the issues it addressed. They related both to private and to public international law and covered a vast range of policy conflicts such as the relationship between international trade and economic development; between national security, democracy and public access to information; and between universal principles and regimes for the protection of human rights and the need asserted, particularly in the context of anti-discrimination law, for systems calibrated to address regional realities, and even issues that might be considered as "constitutional" matters for the legal system of the Organization of American States (OAS). The breadth of those complex and important tasks could be explained in part by the unique nature of the Committee's mandate, which included not only the progressive development and codification of public international law but also a special responsibility to promote the harmonization of private international law among OAS member States. The Committee's competence to provide advisory opinions on matters submitted to it by the General Assembly and Permanent Council of the Organization of American States, and also its own authority to address issues *ex proprio motu*, could further expand the range of issues it addressed. The increasing artificiality of the classic division between public and private international law, and the continuous expansion of the topics and policy tensions addressed by international law, as exemplified by the topic of human rights in relation to humanitarian catastrophes, made the work of the Committee of increasing relevance to universal organizations such as the International Law Commission that nominally addressed only issues of public international law. Such, at least, was his hope in making his presentation, and the spirit in which he would attempt to answer the members' questions.

61. At its seventy-first regular session in August 2007, the Committee had been informed that the Chair of the Permanent Council of the Organization of American States had requested that it should study the scope of the right to identity. The Committee had reviewed a draft opinion prepared by one of its members, which it had then approved, albeit with one dissenting vote and with minor changes. The opinion had concluded that the right to identity had three dimensions. First, it had its own autonomous character. In addition, it was indispensable as a means for the exercise of civil, political, economic and social rights. Lastly, it encompassed other rights such as the right to a name, nationality and family, and thus established a set of rights which comprised individual identity. The nature of the right to identity was connected to values and principles inherent in human dignity, social life and the exercise of human rights. It also constituted *jus cogens*, because it was the *sine qua non* for other fundamental rights. It was thus the kind of right that could not in any circumstances be suspended under the American Convention on Human Rights: "Pact of San José, Costa Rica". Partly in response to the Committee's opinion, a working group set up in the Permanent Council's Committee on Juridical and Political Affairs was now at work on a draft inter-American programme for a universal civil registry and the right to identity.

62. At its seventieth regular session in February and March 2007, the Committee had approved a proposal from one of its members that the Committee study the topic of the rights of migrant workers and their families. After a year of extensive work, two rapporteurs had produced a document entitled "Primer or manual on the rights of migrant workers and their families".<sup>187</sup> The Committee had adopted a resolution approving that document and forwarding it to the Permanent Council and, through it, to the member States of OAS so that they could disseminate it as they considered appropriate. The object of the document was to further respect for, and promotion of, the rights of migrant workers and their families, including but not limited to respect for the provisions of the Vienna Convention on Consular Relations.

63. At its thirty-fifth regular session in June 2005, the General Assembly of the Organization of American States had adopted the agenda for the seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) and had asked the Committee to assist in the preparations for that meeting. Proposals on one of the topics to be discussed, namely "Consumer protection: applicable law, jurisdiction and monetary restitution", had been submitted by the Governments of Brazil, Canada and the United States of America by means of an innovative Internet discussion group that had facilitated the participation of civil society experts in the process. A meeting of governmental and non-governmental experts had been held in December 2006. At the Committee's seventy-second regular session in March 2008, it had discussed a report by one of the rapporteurs which suggested that negotiations were at an impasse. The Committee had then adopted a resolution seeking to provide guidance to the negotiators to enable them to move the negotiations forward. The resolution had stressed that consumer protection was one of the key emerging issues in the development of transborder trade, and that consumers involved in transborder commercial transactions needed to have access to remedies at a cost proportionate to the value of their claims and that guaranteed adequate, effective and prompt reparation. The resolution also suggested that, given the wide range of substantive topics involved in transborder commercial contracts between consumers and providers, the negotiations and deliberations to resolve the various issues, ranging from jurisdiction, applicable law and recognition and enforcement of judgements to methods for alternative dispute resolution such as arbitration and collective or class action proceedings, might require innovative forms of international cooperation on the part of OAS member States. The CIDIP process was moving into a new and very creative phase, for two key reasons: first, the drafting of treaties was giving way to the elaboration of model laws, perhaps in parallel with the move from treaties to regulations in the European Union; and secondly, the focus was shifting from technical issues of international legal cooperation to substantive policy issues such as the balance of welfare between producers and consumers, and the creation of secured bases for transactions.

64. At its thirty-seventh regular session in June 2007, the General Assembly of the Organization of American

<sup>187</sup> Document OEA/SER.Q-CJI/doc.292/08 of 5 March 2008.

States had called on the Committee to provide a comparative study on existing laws of member States concerning the protection of personal data. The Committee, while complying with that mandate, had recognized that there was a relationship between access to information and the strengthening of democracy, accountability of civil servants and the crucial role of transparency in public administration in combating corruption. Accordingly, it had approved a resolution instructing its rapporteurs to continue working on the topic in partnership with other organs of OAS. One of the Committee's rapporteurs was now participating in the initiative launched by the Carter Center to hold a seminar on access to information, which would issue a declaration and plan of action.

65. In 2007, the General Assembly of the Organization of American States had asked the Committee, on the basis of information received from member States, to prepare a model law on cooperation between States and the International Criminal Court (ICC), taking into account the hemisphere's different legal systems. The Committee's rapporteur had transmitted to member States a questionnaire concerning their existing laws and legal impediments to cooperation with the ICC. During the Committee's most recent session, the rapporteur had presented two reports extensively discussing the issues raised by the mandate. The rapporteur, as an interim proposal, had made reference to existing laws such as those enacted by Argentina, Canada, Costa Rica, Peru, Trinidad and Tobago, and Uruguay, reflecting experience in implementing the Rome Statute of the International Criminal Court in the different legal systems of the hemisphere. The Committee had adopted a resolution approving the two reports and urged the rapporteur to continue work on fulfilling the mandate to prepare a model law.

66. In June 2005, the General Assembly of the Organization of American States had instructed the Permanent Council to establish a working group in charge of receiving input, *inter alia* from the Committee, with a view to the preparation of a draft convention against racism and all forms of discrimination and intolerance. In its initial response, the Committee had recommended that the proposed convention should be precise and consistent with existing regional and universal instruments; apply not only to acts attributable to Governments but also to private acts; and address the role of the Inter-American Court of Justice and the Inter-American Commission on Human Rights. The drafting process had moved in a more positive direction in response to the Committee's recommendations. The Committee expected, at its next session, to provide more detailed comments on the current draft, which raised important issues such as the tension between the desire to punish hate crimes and the need to protect freedom of expression.

67. The two remaining topics on the Committee's agenda were quasi-constitutional matters. The first was entitled "Reflections on an Inter-American court of justice". In 2007, one of the Committee's most senior members had proposed reopening the debate on the idea of establishing an inter-American court of justice. His proposal had been to amend the Charter of the Organization of American States in order to establish a body whose purpose would be, like that of the International Court of

Justice, to settle disputes and to issue advisory opinions. In that member's opinion, the Inter-American Juridical Committee could assume the role of a court serving both those new functions. At its most recent session, the Committee had decided to study the idea at greater length, in view of the fact that the Secretary General of the Organization of American States had indicated his support for the establishment of an inter-American court and in the light of the concerns expressed by many member States about the expediency of relying on the International Court of Justice to resolve wholly intra-American disputes. However, that study would not be predicated, as had initially been proposed, on an expansion of the role of the Inter-American Juridical Committee, which already had more than enough responsibilities of its own.

68. The last topic, which constituted a very interesting development, was entitled "Follow-up on the application of the Inter-American Democratic Charter".<sup>188</sup> The Charter was a unique instrument that had been adopted as a resolution of a special session of the General Assembly of the Organization of American States on 11 September 2001. The Charter prescribed special procedures for the involvement of the political organs of the OAS in responding to threats to democracy in OAS member States and set forth standards and procedures for determining sanctions against Governments that failed to meet the requirements of the Charter. In August 2007, the Committee had met with the Secretary General of the Organization of American States to discuss his report on the implementation of the Charter, in which he had stated, *inter alia*, that a range of issues relating to its implementation called for clarification. Among the key issues that had been identified by the Secretariat of the Organization of American States and noted by the Committee were such fundamental questions as the precise legal status of the Inter-American Democratic Charter in relation to the Charter of the Organization of American States. Some argued that the Inter-American Democratic Charter had no more than interpretative significance, while others maintained that it was at best a political statement. On the other extreme were those who saw it as an authoritative interpretation of the Charter of the Organization of American States comparable to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in its resolution 2625 (XXV) of 24 October 1970. Some narrow interpretative issues had also been raised: for example, the Secretariat of the Organization of American States questioned whether the term "government", as used in the Charter for the purposes of establishing a member State's consent to a mission by the Secretary General, also included non-executive branches of government, such as the judiciary. After an extended debate, with one dissenting vote, the Committee had decided to return to the item so as to provide answers to the interpretative questions raised by the Secretariat of the Organization of American States; to date, however, the rapporteurs on that topic had not yet submitted their reports.

<sup>188</sup> Inter-American Democratic Charter (Lima, 11 September 2001), OEA, *Official Documents*, OEA/Ser.G/CP-1 ([www.oas.org/OASpage/eng/Documents/Democratic\\_Charter.htm](http://www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm)). See also ILM, vol. 40, No. 5 (September 2001), p. 1289.

69. The range of issues addressed by the Inter-American Juridical Committee was vast, largely because it responded to an ever-increasing number of requests submitted by the political organs of OAS. However, that breadth of range was also partly attributable to the fact that the Committee was sometimes “ahead of the curve”, in that it anticipated future developments in international law well before political interest in—much less political support for—those topics had manifested itself. Although the Committee’s effectiveness depended on its not being too far ahead of the curve, it ran the risk of becoming irrelevant if it failed to anticipate future needs. Closing with that humbling reminder of the precarious position in which the Committee found itself, Mr. Pérez thanked the members of the Commission for their attention and invited their questions and comments.

70. Mr. BROWNLIE said that the idea of a regional system of peaceful settlements in the form of an inter-American court of justice was one that had far-reaching implications. He would be interested to know more about the rationale behind States’ desire to avoid referring regional problems to the ICJ. The Court regularly dealt with territorial and maritime disputes between Latin American States and it was not usual to hear criticisms of the way in which it handled those disputes. A more difficult issue was that, in cases involving regional issues, there was often an overlap between regional and international adjudication. For example, the Court of Arbitration in the *Beagle Channel* case had been composed of present and former members of the ICJ, yet neither party in the dispute had wished to include any Latin American judges, on the grounds that, since the case concerned a boundary dispute, the Court of Arbitration should be composed of non-regional members.

71. Mr. VASCIANNIE, referring to the conclusion drawn by Mr. Pérez that the Inter-American Juridical Committee was “ahead of the curve”, asked how the Committee set about distinguishing between policy and legal questions when proposing topics for study to the General Assembly of the Organization of American States. He wondered whether there was any consensus within the Committee as to how such a distinction should be made.

72. Mr. PÉREZ (Inter-American Juridical Committee), responding to Mr. Brownlie’s question, said that the concerns he had heard expressed by Spanish-speaking members of the Committee related, not to partiality or substantive bias on the part of the Court, but rather to the fact that in disputes between countries with Spanish-speaking populations, the burden of conducting litigation in a foreign language was perceived as excessive and something of an affront to the dignity of those concerned. There was also a perception among the Latin American legal intelligentsia that in a few specific areas, such as the boundary dispute mentioned by Mr. Brownlie, insufficient consideration was given to specialized Latin American norms such as *uti possidetis juris*. While he appreciated Mr. Brownlie’s point about the desirability of wholly dispassionate adjudication, his personal view was that adjudication by a stranger to a region sometimes involved forgoing the advantage of localized knowledge. A balance between the two was therefore needed.

73. In response to Mr. Vasciannie’s question, he said that each member of the Committee presumably had his or her own internal algorithm for distinguishing between legal and policy questions. There was an interesting divide between *common law* lawyers trained in dynamic adjudication, who were very open to policy sensitivities, and civil law lawyers, who, having been trained in textual exegesis, were perhaps less inclined to accept the dynamic character of law. Beyond that distinction and the influence of each member’s own professional experience, he could not hazard a guess as to how members distinguished between legal and policy questions.

74. Mr. NOLTE said he would like to hear more about the background to the dispute as to whether the term “government”, as used in the Inter-American Democratic Charter, also included the judiciary. His instinctive reaction was that the term definitely included the judiciary for the purposes of international law.

75. Ms. ESCARAMEIA said that both her questions related to the relationship between the Inter-American Juridical Committee and the International Law Commission. With regard to the proposal to establish an inter-American court of justice, she asked whether any objection had been raised to the regionalization of international law on the grounds that it might lead to the fragmentation of international law. In its work on that topic, the Commission had not dealt with the proliferation of or the relationship between judicial institutions themselves. She also wished to know whether any initiative had ever been proposed, either by a member of the Committee or by the General Assembly of the Organization of American States, to discuss the work of the International Law Commission systematically. Other regional bodies, such as the Asian–African Legal Consultative Organization, periodically discussed the Commission’s work.

76. Mr. PÉREZ (Inter-American Juridical Committee) said that, when a topic was discussed by the Committee, it was considered to be standard practice and a matter of due diligence to ascertain whether the International Law Commission had already addressed that topic; however, no system had been established to institutionalize a regular study of the Commission’s work. He would certainly transmit Ms. Escarameia’s very interesting proposal to the Committee. It was true that there was some overlap and cross-fertilization between the work of the two bodies, some members of the Inter-American Juridical Committee having served as members of the International Law Commission and *vice versa*. Consequently, there was considerable sensitivity within the Committee to the work of the Commission.

77. Concern regarding the fragmentation of international law was a matter constantly discussed in the Committee. The centenary of the Inter-American Juridical Committee had been marked by an attempt to draft a corpus of specialized regional law. His own reaction as a participant in that discussion had been astonishment at the strength of members’ commitment to avoiding any discrepancy between regionalized law and general international law. Nevertheless, there was a perception that the need for regional attention might sometimes require a deviation from general international law. The Working

Group to Prepare a Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance, for example, was founded on the premise of a need for specialized attention, notwithstanding the earlier recommendation of the Committee that the existing body of international instruments was commensurate with the task and that the work of implementation had higher priority.

78. With regard to Mr. Nolte's question concerning the definition of "government" contained in the Inter-American Democratic Charter, he said that the judiciary was obviously a part of government for the purposes of State practice in international law; nevertheless, in the case of the Inter-American Democratic Charter, the issue of *lex specialis* arose. That Charter was founded on the premise that OAS member States were a kind of league of democracies, the notion being that when a State diverged from an agreed set of democratic norms, the principle of non-intervention should be accorded less significance, and procedures for international intervention should be invoked. One of the specific procedures provided for was that the Secretariat could undertake a mission to a member State's territory with the consent of that member State's government. The technical question that arose was whether the Charter should be interpreted to mean that "government" for the purposes of giving such consent meant only the executive, which was the ordinary branch of government that had international capacity under the 1969 Vienna Convention and other relevant instruments, or whether the invitation could be submitted by the judiciary, if it considered, for example, that its own rights under a democratic constitutional structure had been breached by the executive. That was a difficult question of interpretation; some might argue that it was fundamentally a policy question. He would hesitate to offer a view on the matter at the current juncture, as the Committee had not yet discussed it.

79. Mr. HASSOUNA said that the activities and experience of the Inter-American Juridical Committee might be useful to other regional organizations, such as the League of Arab States and the African Union. Consequently, he would like to propose that some form of cooperation be established between the various judicial bodies for the benefit of all concerned.

80. International criminal responsibility was an important issue, not only in the Americas, but in all regions of the world. Given that some OAS member States, such as the United States of America, had not yet signed the Rome Statute of the International Criminal Court whereas others were perhaps already parties to it, he wondered whether OAS had a common position concerning the desirability of signing and ratifying that Statute.

81. The CHAIRPERSON, speaking as a member of the Commission, said that, like Mr. Vasciannie, he had had the honour of serving on the Inter-American Juridical Committee. On the basis of that experience, he felt it was necessary to strengthen cooperation between the International Law Commission and other regional bodies concerned with the codification of international law, and also between those regional bodies and the Inter-American Juridical Committee. As for the proposal to

establish an inter-American court of justice, he was inclined to think that it might create more problems than it solved.

82. Mr. PÉREZ (Inter-American Juridical Committee), responding to Mr. Hassouna's question, said that there was no common inter-American position regarding the International Criminal Court; however, there was a consensus that States that wished to join the Court should be able to do so, and that they should make every effort to overcome any technical barriers thereto within their domestic legal systems. In that spirit, the Committee had sought to serve its technical and administrative function of solving member States' problems on the basis of lessons learned from other member States. In that sense, it was the least political and most dispassionate form of international civil service. The suggestion, made by Mr. Hassouna and supported by the Chairperson, for closer interregional cooperation was in keeping with that spirit, and he would commend it to the Committee.

83. In closing, he thanked members for their very thoughtful and revealing questions and comments, which he would take back to the Committee so that all its members could learn from them.

84. The CHAIRPERSON thanked the representative of the Inter-American Juridical Committee for his valuable contribution to the work of the Commission, and wished him a safe journey home.

*The meeting rose at 12:50 p.m.*

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## 2979th MEETING

*Wednesday, 16 July 2008, at 10 a.m.*

*Chairperson:* Mr. Edmundo VARGAS CARREÑO

*Present:* Mr. Al-Marri, Mr. Brownlie, Mr. Cafisch, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

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### Protection of persons in the event of disasters (continued) (A/CN.4/590 and Add.1–3, A/CN.4/598)

[Agenda item 8]

PRELIMINARY REPORT OF THE SPECIAL  
RAPPORTEUR (continued)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the Special Rapporteur on the protection of persons in the event of disasters (A/CN.4/598).