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Summary record of the 3107th meeting

Topic:
<multiple topics>

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(<http://legal.un.org/ilc/>)*

Paragraph (3)

64. Mr. VARGAS CARREÑO said that the example cited in the paragraph of the interpretative declaration which France had attached to its signature of Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (“Treaty of Tlatelolco”) called for some clarification. Reviewing in detail the context of that declaration, he recalled that it had contained the following passage: “The French Government interprets the undertaking made in article 3 of the Protocol as being without prejudice to the full exercise of the right of self-defence confirmed by Article 51 of the Charter of the United Nations.”³²⁴

65. France had reiterated that declaration when it had signed Protocol I in 1979.³²⁵

66. The declaration by France had caused deep concern among the Latin American States parties to the Treaty, which had made it known to the Government of France. Their concern had stemmed above all from the fact that the right of self-defence did not emanate from a treaty instrument such as the Charter of the United Nations, which spoke of an “inherent” right, but had existed before it. The exercise of that right was subject to the principles of necessity and proportionality, which had a particular dimension in the case of nuclear weapons.

67. The representatives of the Latin American States had requested an audience at the French Ministry of Foreign Affairs with a view to urging France to withdraw its reservation. France had not acceded to that request, but it should be noted that the attitude of the Government of France had changed considerably over the years and, although it had not withdrawn its reservation, it considered itself to be firmly bound by the two Protocols. To take that reality better into account, he proposed either to delete the reference to the interpretative declaration by France or to add the following text: “However, the Latin American States, through the intermediary of the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, have requested the Government of France to withdraw the part of the interpretative declaration of France referring to the possibility of the use of nuclear weapons in the case of armed attack. In the view of these States, such an interpretation does not fulfil the requirements of necessity and proportionality which are attached to the exercise of the right of self-defence under international law. France has not yet withdrawn this part of its interpretative declaration; however, it has repeatedly expressed its intention to remain a party to the Additional Protocols to the Treaty of Tlatelolco.”

68. Mr. SABOIA endorsed Mr. Vargas Carreño’s statement and his suggestion to delete the reference to the interpretative declaration of France.

69. Mr. PELLET (Special Rapporteur) said that he was firmly opposed to the idea of deleting that example and it would be shocking if he should be forced to do so, because that would amount to censorship. He failed to see why something that France had said should be censored. On the other hand, Mr. Vargas Carreño’s comments on the reaction of the Latin American States was very interesting, and he was in complete agreement that the proposed text should be inserted, although not in the body of the report itself, where it would be out of place, but in a footnote.

70. The CHAIRPERSON said that, if she heard no objection, she would take it that the members of the Commission wished to adopt Mr. Pellet’s proposal.

It was so decided.

Paragraph (3), as amended, was adopted.

The meeting rose at 1 p.m.

3107th MEETING

Monday, 18 July 2011, at 3 p.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Present: Mr. Cafilisch, Mr. Candioti, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hmoud, Mr. Kemicha, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Tribute to the memory of Mr. Francisco Villagrán Kramer, former member of the Commission

1. The CHAIRPERSON said that she had received the sad news that Mr. Francisco Villagrán Kramer, a member of the Commission from 1992 to 1996, had passed away on 12 July 2011. He would be remembered for his rich and exemplary career in the international legal field and his indefatigable support for human rights, justice, democracy and peace.

At the invitation of the Chairperson, the members of the Commission observed a minute of silence.

2. Mr. VARGAS CARREÑO said that he had had the privilege of counting Francisco Villagrán Kramer as a friend and serving with him as a member of the Commission from 1992 to 1996. Francisco Villagrán Kramer had been devoted to justice, peace and human rights. He had made outstanding contributions in the field of law as a university professor, the author of important publications and the representative of Guatemala at international conferences. At a time of great violence in Guatemala, he had agreed

³²⁴ United Nations, *Treaty Series*, vol. 936, p. 419.

³²⁵ *Journal officiel de la République française*, n° 243 du 18 octobre 1992, “Décret n° 92-1152 du 14 octobre 1992 portant publication du protocole additionnel I au traité du 14 février 1967 visant l’interdiction des armes nucléaires en Amérique latine, dit Traité de Tlatelolco, signé par la France le 2 mars 1979” (available from www.legifrance.gouv.fr).

to serve as Vice-President under General Romeo Lucas García, whose Government was known for its human rights violations. Some of his friends had found it very hard to understand that decision, but Francisco had believed that in doing so he would be able to improve the situation in Guatemala. Unfortunately, he had been mistaken, and he had subsequently decided to leave the Government and go into exile in the United States, where he had continued to work for the cause of human rights and peace in Central America. Following a change in the political situation, he had returned to Guatemala and served as a member of Parliament. He had also been a member of the Inter-American Juridical Committee.

3. As a member of the Commission, he had contributed actively and effectively to its work on such topics as succession of States, State responsibility and the draft code of crimes against the peace and security of mankind.³²⁶ He had been a good-natured man, a distinguished jurist and a prominent member of the Commission.

Protection of persons in the event of disasters (continued)* (A/CN.4/638, sect. D, A/CN.4/643, A/CN.4/L.794)

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)*

4. Mr. VALENCIA-OSPINA (Special Rapporteur), summing up the debate on his fourth report, thanked all those who had taken part for their rich and substantive contributions to the debate and their encouraging response to the matters dealt with in the report. During the course of the lively discussions, 23 members had expressly supported the referral of draft articles 10 to 12 to the Drafting Committee, while another member had agreed expressly to the referral of draft article 12 and implicitly to the referral of the other two draft articles. The remaining member had not spoken either for or against referral.

5. It was clear from the plenary debate that the Commission had embraced the Special Rapporteur's approach to the topic, which had consisted in seeking balanced solutions that could facilitate consensus. Members' comments should be assessed against that yardstick. The Commission had been able to adopt by consensus and based on the proposals contained in the Special Rapporteur's second³²⁷ and third³²⁸ reports, nine draft articles.³²⁹ That had been no mean feat in the short space of two years, given the entrenched opinions expressed by members on opposing sides of the Commission's lively debates on the topic.

6. It was in the context of its mandate to promote the progressive development of international law and its codification that the Commission had undertaken work on the protection of persons in the event of disasters.

The topic had been included in the Commission's long-term programme of work in 2006³³⁰ on the grounds that it reflected new developments in international law and pressing concerns of the international community as a whole. As had been rightly pointed out during the debate, the Commission's task was not to address the operational aspects of disaster relief, but rather to enhance the normative framework for the protection of persons in the event of disasters, to move beyond a statement of broad principles in order to define the rights and obligations of the different actors involved. It should not be deterred from proposing any articles it considered appropriate by the fact that States might disregard their obligations.

7. Article 15 of the Commission's statute drew a distinction between the codification and progressive development of international law.³³¹ However, as the Commission had concluded in 1996, that distinction was difficult if not impossible to draw in practice.³³² The Commission had accordingly proceeded on the basis of a composite idea of codification and progressive development in formulating its drafts.

8. The words "progressive development" had been chosen by the drafters of Article 13, paragraph 1 (a), of the Charter of the United Nations because when juxtaposed with the term "codification", they implied modifications of and additions to existing rules, thus establishing a balance between stability and change. As defined in article 15 of the Commission's statute, progressive development referred to subjects that had not yet been regulated by international law or in regard to which the law had not yet been sufficiently developed in the practice of States. For those who had framed the statute, "practice" meant practice reflected in law which was insufficiently developed on a given subject. However, the debate on the fourth report of the Special Rapporteur had left the impression that some members of the Commission were using the term "practice" in a much broader, almost colloquial sense, citing specific instances of "bad" or "good" practice. On the basis of such an extended meaning, some members had called for a more detailed treatment in future reports by the Special Rapporteur of events amounting to disasters. Looking at things from that perspective, he could not but endorse the position of one member who had maintained that a more elaborate recounting of the specific practice of States and other actors in that sphere would not have yielded different conclusions.

9. On the other hand, the debate had also demonstrated that several members used the term "practice" in the narrower, technical sense given to it by article 15 of the statute of the International Law Commission, as exemplified by references to *opinio juris*. One member had endorsed the need to pay careful attention to texts adopted by States and by organizations such as the IFRC, which were a distillation of practice by entities that had huge experience in the field. Another member had emphasized

³²⁶ *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

* Resumed from the 3105th meeting.

³²⁷ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615.

³²⁸ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/629.

³²⁹ *Ibid.*, vol. II (Part Two), paras. 330–331 (for draft articles 1 to 5 and the commentary thereto). For the adoption of draft articles 6 to 9, see the 3102nd meeting above, p. 172.

³³⁰ *Yearbook ... 2006*, vol. II (Part Two), p. 185, para. 257, and p. 206, annex III.

³³¹ Available from the Commission's website.

³³² *Yearbook ... 1996*, vol. II (Part Two), p. 84, para. 147 (a), and pp. 86–87, paras. 156–159.

the significant development of national legislation to facilitate disaster relief, which revealed an important trend in the thinking of States. In that connection, he recalled that, at his suggestion, the Commission had included the practice of States on the protection of persons in the event of disasters in its report to the General Assembly on the work of its sixtieth session (2008) as a specific issue on which it would welcome observations.³³³ Only three States had responded to the Commission's appeal, and it might therefore wish to reiterate that call in its report on the work of the current session.

10. He welcomed the information received from States and his colleagues to date. In his four reports to the Commission, he had reflected—and in most cases reproduced—various provisions from the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) and other relevant international instruments.

11. Although his use of binding and non-binding international instruments in support of his proposals had been acknowledged, the pertinence of using instruments adopted by or under the auspices of the General Assembly, the ICRC, the Institute of International Law and other such bodies as evidence of practice had been questioned on methodological grounds. In response, he wished to reiterate that such texts were a distillation of practice in themselves. Practice in the area of protecting persons in the event of disasters was particularly scarce. Apart from a handful of multilateral—mainly regional—agreements and a larger number of bilateral treaties on mutual assistance, the bulk of the material available on the “law of disaster relief” was constituted by non-binding instruments, adopted primarily at the intergovernmental level but also by private institutions and entities. The very notion of disaster relief law was an emerging one, consolidation of which would depend in great measure on the work of progressive development being carried out by the Commission in the context of the topic under consideration. How could the Commission fail to give due importance to resolutions of the General Assembly, such as resolution 46/182, which established the basic framework within which contemporary disaster relief activities were undertaken, or to the private codification efforts of the Institute of International Law on the subject of humanitarian assistance, when similar efforts had been invoked time and again as authoritative pronouncements of the law in relation to other, truly “traditional” topics dealt with by the Commission?

12. In his preliminary report,³³⁴ he had singled out three immediate legal sources of present-day international disaster protection and assistance—international humanitarian law, international human rights law and international law on refugees and internally displaced persons—to which he had systematically reverted in each of his three subsequent reports. In the context of international humanitarian law, some members had questioned the methodological pertinence of invoking principles and rules applicable to humanitarian assistance in armed conflict. In reply, he referred to the debate on

his third report, when the view had been expressed that a principle that by definition was envisaged in general and abstract terms could be applied to areas of the law other than those with which it originated and was traditionally associated.³³⁵ On that assumption, the Commission had been able to adopt draft article 6 on humanitarian principles in disaster response. As distinguished jurist Juan Antonio Carrillo Salcedo had written in 1997,³³⁶ humanitarian law was not limited to international humanitarian law applicable to armed conflict. One could not ignore the existence of causes of extreme suffering that were alien to the hypotheses envisaged by the Geneva Conventions for the protection of war victims, the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). The result was that humanitarian law was applicable in many circumstances, one of which was armed conflict. Although international humanitarian law applicable in a situation of armed conflict, international or otherwise, was the most developed branch of humanitarian law, the part must not be confused with the whole. The development and technical perfection of international humanitarian law applicable to armed conflict made it a model to be adapted—rather than a system to be applied—in other circumstances of humanitarian urgency.

13. A third methodological reproach had been that he had not made the concept of the responsibility to protect the cornerstone of the Commission's work on the topic. In that connection, he recalled that in his preliminary report he had drawn attention to the Secretariat's observations, in its proposal for the topic, that the protection of persons might be “located within contemporary reflection on an emerging principle entailing the responsibility to protect”.³³⁷ However, his personal opinion, expressed in the same report, was that the appropriateness of extending the concept of responsibility to protect and its relevance to the present topic both required careful consideration. Even if the responsibility to protect was recognized in the context of protection and assistance of persons in the event of disasters, its implications would be unclear. He had thus anticipated the position taken the following year by the Secretary-General in his report on implementing the responsibility to protect.³³⁸ In his second report, he had quoted with approval paragraph 10 (b) of the Secretary-General's report, explaining that the responsibility to protect applied, until Member States decided otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity.³³⁹ To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept

³³⁵ *Yearbook ... 2010*, vol. II (Part Two), p. 184, para. 325.

³³⁶ See J. A. Carrillo Salcedo, “Reflections on the existence of a hierarchy of norms in international law”, *European Journal of International Law*, vol. 8 (1997), pp. 583–595, at p. 591.

³³⁷ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598, p. 154, para. 55. See also *Yearbook ... 2006*, vol. II (Part Two), annex III, p. 207, para. 9.

³³⁸ A/63/677.

³³⁹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615, para. 14 (c).

³³³ *Yearbook ... 2008*, vol. II (Part Two), p. 16, paras. 31–33.

³³⁴ *Ibid.*, vol. II (Part One), document A/CN.4/598.

beyond recognition or operational utility. As the debate on his fourth report had confirmed beyond any doubt, the Commission had endorsed the Secretary-General's stand, which he, as Special Rapporteur, had made his own.

14. Some of the comments made during the debate had been intended to draw attention to the need for a corresponding explanation in the commentary to a particular draft article. To the extent that those comments remained relevant once the Commission had adopted the respective draft articles, they should be included in the commentaries.

15. The debate had focused to a large extent on drafting. Many suggestions had been made for amendments to the form and content of draft articles 10 to 12, which the Drafting Committee would have to discuss in detail. A specific objection had been raised to draft article 10 on the grounds that it dealt with States unwilling to provide assistance to affected persons in their territory. It had been argued that if an affected State did not wish to use its own resources, it should not seek assistance. To facilitate comprehension in that regard, he explained that, while the positioning of the words "as appropriate" in the draft article might mislead the reader into believing that they qualified the preceding phrase, "the duty to seek assistance", the real intention had been to stress the discretionary power of the affected State to choose from among the potential donors listed. Furthermore, the term "unwilling" did not appear in draft article 10 but in draft article 11, which dealt not with the duty to seek assistance, but rather with the duty of the affected State not to withhold arbitrarily its consent to external assistance offered. In that connection, he recalled that the Drafting Committee had not yet considered paragraph 2 of former draft article 8, which he had proposed in his third report³⁴⁰ and which reaffirmed in unequivocal terms that an affected State was required to give its consent to any offer of external assistance before that assistance could be provided. It had been suggested that paragraph 2 of former draft article 8 should be inserted as paragraph 1 of draft article 11.

16. In conclusion, and in accordance with the express will of all members, with the exception of one who had abstained, he requested that draft articles 10 to 12 be referred to the Drafting Committee, together with all suggestions concerning the text thereof and possible commentaries, in the hope that improved draft articles would result.

17. The CHAIRPERSON said she took it that the Commission wished to refer draft articles 10 to 12 to the Drafting Committee.

It was so decided.

³⁴⁰ Draft article 8 read as follows:

"Primary responsibility of the affected State

"1. The affected State has the primary responsibility for the protection of persons and provision of humanitarian assistance on its territory. The State retains the right, under its national law, to direct, control, coordinate and supervise such assistance within its territory.

"2. External assistance may be provided only with the consent of the affected State."

Yearbook ... 2010, vol. II (Part One), document A/CN.4/629. See also *ibid.*, vol. II (Part Two), pp. 183–184, paras. 316–324, and footnote 1339.

Organization of the work of the session (concluded)*

[Agenda item 1]

18. Mr. MELESCANU (Chairperson of the Drafting Committee) announced that Mr. Candiotti and Ms. Escobar Hernández would be joining the Drafting Committee.

The meeting rose at 3.45 p.m.

3108th MEETING

Wednesday, 20 July 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candiotti, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (continued)**

[Agenda item 13]

STATEMENT BY THE REPRESENTATIVE OF THE
INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRPERSON welcomed Ms. Hyacinth Lindsay, of the Inter-American Juridical Committee, and invited her to address the Commission.

2. Ms. LINDSAY (Inter-American Juridical Committee) said that it was an honour for her to present the 2010 annual report on the activities of the Inter-American Juridical Committee, which consisted of three chapters. The first discussed the origin, legal bases and structure of the IAJC. The second chapter considered the issues discussed at the Committee's two regular sessions held in 2010 and also contained the texts of the resolutions adopted at the two regular sessions and related documents. The third chapter concerned the other activities of the IAJC and other resolutions adopted by it. Budgetary matters were also discussed in the report.

3. With respect to innovative forms of access to justice in the Americas, the rapporteur for that topic had presented a document entitled "Access to justice: preliminary considerations". As the IAJC had decided that the most important issue was to approach access to justice in innovative ways and to expand the channels of access to justice, it intended to approve general guidelines on the topic. A report entitled "Comprehensive training of

* Resumed from the 3105th meeting.

** Resumed from the 3101st meeting.