

## Chapter V

### PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

#### A. Introduction

47. The Commission, at its fifty-ninth session (2007), decided to include the topic “Protection of persons in the event of disasters” in its programme of work and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur. At the same session, the Commission requested the Secretariat to prepare a background study, initially limited to natural disasters, on the topic.<sup>283</sup>

48. At the sixtieth session (2008), the Commission had before it the preliminary report of the Special Rapporteur,<sup>284</sup> tracing the evolution of the protection of persons in the event of disasters and identifying the sources of the law on the topic, as well as the previous efforts towards codification and development of the law in the area. It also presented in broad outline the various aspects of the general scope with a view to identifying the main legal questions to be covered and advancing tentative conclusions without prejudice to the outcome of the discussion that the report aimed to trigger in the Commission. The Commission also had before it a memorandum by the Secretariat,<sup>285</sup> focusing primarily on natural disasters and providing an overview of existing legal instruments and texts applicable to a variety of aspects of disaster prevention and relief assistance, as well as of the protection of persons in the event of disasters.

49. The Commission considered, at its sixty-first session (2009), the second report of the Special Rapporteur<sup>286</sup> analysing the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, and issues relating to the definition of “disaster” for the purposes of the topic, as well as undertaking a consideration of the basic duty to cooperate. The report contained proposals for draft articles 1 (Scope), 2 (Definition of disaster) and 3 (Duty to cooperate). The Commission also had before it written replies submitted by the Office for the Coordination of Humanitarian Affairs of the Secretariat of the United Nations and by the International Federation of Red Cross and Red Crescent Societies to the questions addressed to them by the Commission in 2008.

50. At its 3029th meeting, on 31 July 2009, the Commission took note of draft articles 1 to 5, as provisionally adopted by the Drafting Committee.<sup>287</sup>

51. At its sixty-second session (2010), the Commission provisionally adopted draft articles 1 to 5 at the 3057th meeting, held on 4 June 2010. The Commission further had before it the third report of the Special Rapporteur<sup>288</sup> providing an overview of the views of States on the work undertaken by the Commission, a consideration of the principles that inspire the protection of persons in the event of disasters, and a consideration of the question of the responsibility of the affected State. Proposals for the following three further draft articles were made in the report: draft articles 6 (Humanitarian principles in disaster response), 7 (Human dignity) and 8 (Primary responsibility of the affected State).

52. At its sixty-third session (2011), the Commission provisionally adopted draft articles 6 to 9, at the 3102nd meeting, held on 11 July 2011. The Commission had before it the fourth report of the Special Rapporteur<sup>289</sup> containing, *inter alia*, a consideration of the responsibility of the affected State to seek assistance where its national response capacity is exceeded, the duty of the affected State not to arbitrarily withhold its consent to external assistance, and the right to offer assistance in the international community. Proposals for the following three further draft articles were made in the report: draft articles 10 (Duty of the affected State to seek assistance), 11 (Duty of the affected State not to arbitrarily withhold its consent) and 12 (Right to offer assistance). The Commission provisionally adopted draft articles 10 and 11 at the 3116th meeting, held on 2 August 2011, but was unable to conclude its consideration of draft article 12 owing to a lack of time.

#### B. Consideration of the topic at the present session

53. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/652) providing an overview of the views of States on the work undertaken by the Commission thus far, a brief discussion of the Special Rapporteur’s position on the Commission’s question in chapter III, section C, of its 2011 annual report,<sup>290</sup> as well as a further elaboration of the duty to cooperate. The report also contained a discussion of the conditions for the provision of assistance and the question of the termination of assistance. Proposals for the following three further draft articles were made in the report: draft articles A (Elaboration of the duty to cooperate), 13 (Conditions on the provision of assistance) and 14 (Termination of assistance).

54. The Commission considered the fifth report at its 3138th to 3142nd meetings, from 2 to 6 July 2012.

<sup>283</sup> *Yearbook ... 2007*, vol. II (Part Two), paras. 375 and 386.

<sup>284</sup> *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598.

<sup>285</sup> A/CN.4/590 and Add.1–3 (mimeographed; available from the Commission’s website, documents of the sixtieth session).

<sup>286</sup> *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615.

<sup>287</sup> A/CN.4/L.758 (mimeographed; available from the Commission’s website, documents of the sixty-first session).

<sup>288</sup> *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/629.

<sup>289</sup> *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/643.

<sup>290</sup> *Ibid.*, vol. II (Part Two), paras. 43–44; see also para. 57 below.

55. At its 3142nd meeting, on 6 July 2012, the Commission referred draft articles A, 13 and 14 to the Drafting Committee.

56. At its 3152nd meeting, on 30 July 2012, the Commission received the report of the Drafting Committee and took note of draft articles 5 *bis* and 12 to 15, as provisionally adopted by the Drafting Committee (A/CN.4/L.812).<sup>291</sup>

#### 1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE FIFTH REPORT

57. In introducing his fifth report, the Special Rapporteur recalled the generally positive reception of Governments in the Sixth Committee to the draft articles adopted by the Commission thus far. He also placed on record his position as regards the question posed by the Commission in chapter III, section C, of its 2011 report, concerning whether the duty of States to cooperate with the affected State includes a duty to provide assistance when requested by the affected State. He indicated that an analysis of existing law and practice revealed that the provision of assistance from one State to another was premised on the voluntary character of the action of the assisting State. The Special Rapporteur observed that many States in the Sixth Committee had, in their statements, answered the Commission's question in the negative, mainly arguing that such a duty had no basis in existing international law.

<sup>291</sup> The draft articles provisionally adopted by the Drafting Committee read as follows:

*“Article 5 bis. Forms of cooperation*

“For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources.

“... ”

*“Article 12. Offers of assistance*

“In responding to disasters, States, the United Nations, and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State.

*“Article 13. Conditions on the provision of external assistance*

“The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

*“Article 14. Facilitation of external assistance*

“1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:

“(a) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

“(b) goods and equipment, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof.

“2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

*“Article 15. Termination of external assistance*

“The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actors wishing to terminate shall provide appropriate notification.”

58. The Special Rapporteur recalled that member Governments had called on the Commission to elaborate further on the duty of cooperation, which was the subject of draft article 5. He noted that cooperation played a basic role in the provision of relief. Seen from the larger perspective of public international law, to be legally and practically effective the duty to cooperate in the provision of disaster relief had to strike a balance between three important aspects. First, such a duty could not intrude into the sovereignty of the affected State. Second, the duty had to be imposed on assisting States as a legal obligation of conduct. Third, the duty had to be relevant and limited to disaster relief assistance, by encompassing the various specific elements that normally make up cooperation on the matter. From the diversity of existing international instruments and texts, it could be deduced that the duty to cooperate covered a great diversity of technical and scientific activities, as described *in extenso* in his report. He thus felt it appropriate to include in the draft articles a further draft article elaborating on the duty to cooperate, while leaving open the question of its eventual location, i.e. either as a stand-alone provision or as an additional paragraph to draft article 5. His proposal for a new draft article A<sup>292</sup> was modelled on draft article 17, paragraph 4, dealing with cooperation in the case of emergencies, of the draft articles on the law of transboundary aquifers approved by the Commission at its sixtieth session, in 2008,<sup>293</sup> which was, in turn, modelled on article 28 of the Convention on the Law of the Non-navigational Uses of International Watercourses, 1997. He noted that the first four categories of cooperation he had identified were also referred to in draft article 17, paragraph 4.

59. Paragraphs 117 to 181 of the Special Rapporteur's fifth report were dedicated to the question of the conditions that an affected State may place on the provision of assistance. The issue was considered from three, concurrent, perspectives: compliance with national laws, identifiable needs and quality control, and limitations on conditions under international law and national law. It was noted that the principal conclusions reached under each aspect were implied in several draft articles already adopted by the Commission. In particular, underlying the three perspectives was the fundamental principle found in draft article 11, paragraph 1, according to which the provision of external assistance was subject to the consent of the affected State. The power of the affected State to establish the conditions that the offer of assistance must meet was the corollary to the basic role of the affected State to ensure the protection of persons and the provision of disaster relief and assistance on its territory, in accordance with draft article 9.

60. In the view of the Special Rapporteur, assisting actors were required to provide assistance in compliance with the national law of the affected State. However,

<sup>292</sup> Draft article A read as follows:

*“Elaboration of the duty to cooperate*

“States and other actors mentioned in draft article 5 shall provide to an affected State scientific, technical, logistical and other cooperation, as appropriate. Cooperation may include coordination of international relief actions and communications, making available relief personnel, relief equipment and supplies, scientific and technical expertise and humanitarian assistance.”

<sup>293</sup> *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54.

the right to condition the provision of assistance on compliance with national law was not absolute. The affected State had a duty to facilitate the provision of prompt and effective assistance, under its sovereign obligations to its population. States had an obligation to assist in ensuring compliance with national law and an obligation to examine whether the applicability of certain provisions of national law must be waived in the event of a disaster. The latter element related, *inter alia*, to the grant of privileges and immunities; visa and entry requirements; customs requirements and tariffs; and questions of quality and freedom of movement. After reviewing existing practice, the Special Rapporteur was of the view that, rather than a strict and absolute requirement of waivers in a disaster, the affected State should consider the reasonableness of the waiver in the light of its obligations to provide prompt and effective assistance and to protect its population. In his view, it was sufficient to indicate that the affected State may impose conditions on the provision of assistance, subject to their compliance with national and international law, and, accordingly, he proposed draft article 13<sup>294</sup> to that effect.

61. The Special Rapporteur indicated that the duty of cooperation further implied the duty of the affected State and that of the assisting actors to consult each other with a view to determining the duration of the period of assistance. Such consultation could take place before the assistance was provided or during the period of the provision of assistance, at the initiative of one or the other party. He had thus proposed draft article 14 to that effect.<sup>295</sup>

## 2. SUMMARY OF THE DEBATE

### (a) General remarks

62. Regarding the approach taken by the Commission in the draft articles previously adopted, a view was expressed indicating a preference for not analysing the relationship between the affected State and third States in terms of rights and duties, but rather from the perspective of cooperation. It was observed that the vast majority of cases did not involve any *mala fides* on the part of the affected State and that, in the few extreme cases where States did withhold consent arbitrarily, it was unlikely that a right-duty approach would have been of assistance to persons affected by disasters. Furthermore, some members noted that the existence of “rights” or “duties” in this area of the law was not supported by State practice. It was also considered doubtful whether it was appropriate to refer to such concepts as applying to non-State actors. Likewise, the view was expressed that the inability to specify legal consequences for the failure to uphold a duty, for example not to arbitrarily withhold consent, suggested that the concept of duty being applied lacked content.

<sup>294</sup> Draft article 13 read as follows:

“Conditions on the provision of assistance

“The affected State may impose conditions on the provision of assistance, which must comply with its national law and international law.”

<sup>295</sup> Draft article 14 read as follows:

“Termination of assistance

“The affected State and assisting actors shall consult with each other to determine the duration of the external assistance.”

63. According to another view, the function of law, including international law, was, *inter alia*, to regulate those situations where there existed possible violations of accepted rules and principles. One could not, according to this view, discount the importance of legal rules in drawing the distinction between acceptable and unacceptable actions, particularly in the context of States acting with *mala fides*. Furthermore, the view was expressed that the articulation of minimum rights and duties should not *a priori* be viewed as inhibiting the encouragement of voluntary cooperation.

64. A doubt was expressed as to the usefulness of the adoption of draft articles in the form of a convention. According to another view, by their nature the draft articles implied the need for more specific implementing legislation under national law. It was suggested that the Commission keep this in mind when turning to discussing the eventual form of the draft articles, which could include a framework convention or a set of guiding principles.

65. It was proposed that the Commission consider formulating a model instrument for humanitarian relief operations in the event of disasters patterned on a status-of-forces agreement, which could be annexed to the draft articles and which could serve a practical purpose. While several speakers spoke in favour of dealing with some of the practical aspects of the topic, others expressed doubts about the feasibility of the proposal.

### (b) Comments on draft article A

66. General support was expressed for the proposal to further elaborate on the duty of cooperation within the draft articles. At the same time, it was suggested that greater precision be given to the draft article. For example, it was suggested that reference also be made to financial assistance as one of the ways in which States and other actors could provide assistance. It was also suggested that a reference be included to the assisting actor consulting with the affected State in order to ascertain what kind of assistance was required.

67. The view was expressed that draft article A did not itself deal with the duty to cooperate, which existed on the level of principle, but rather with the more operational duty to provide cooperation or assistance, in the forms listed. Accordingly, the provision was also linked to draft article 12. It was pointed out that the use of the word “shall” seemed to contradict the general position that no legal obligation to provide assistance existed. The concern was also expressed that the language of the draft article appeared to limit the discretion of assisting States to determine the nature of assistance to be provided.

68. According to a further view, it was not appropriate to speak in terms of legal obligations when addressing the duty to cooperate, given its general and discretionary nature. Greater clarity was also called for as regards on which actors the duty in the draft article was being imposed. Doubts were also expressed as to the feasibility of imposing obligations on non-State actors in the draft articles.

69. It was suggested that account needed to be taken of the fact that the extent of personal damage inflicted by a

disaster was often the result of poverty, the lack of safe and adequate housing and access to drinkable water and sanitation.

(c) *Comments on draft article 13*

70. The view was expressed that, while there existed some conditions that could not be imposed on the provision of assistance, as a general rule the affected State could subject the provision of assistance to whatever conditions it deemed necessary. Agreement was also expressed by some members with the view that, in determining the extent of appropriate conditions imposed, regard should be had to the principles of State sovereignty and non-intervention, while at the same time the responsibilities of States to protect persons on their territory should be taken into account. As such, any condition imposed by the affected State should be reasonable and should not undermine the duty to protect, including the duty to facilitate assistance, nor lead to the arbitrary withholding of consent to external assistance (art. 11, para. 2). It was also suggested that it had to be clarified that the conditions imposed by the affected State for the provision of assistance should comply first and foremost with national and international human rights norms. It was further suggested that reference be made to the need to adopt a gender perspective, so as to ensure greater effectiveness of the assistance being provided.

71. It was suggested that the draft article be more detailed so as to include references to the various elements dealt with in the report of the Special Rapporteur. A further view was that the relative lack of detail in the Special Rapporteur's draft provision gave rise to the risk of unwarranted broad interpretations by affected States of the range of conditions that they could apply to the provision of assistance.

72. The view was expressed that the key issue was obtaining the necessary exemptions from national law in order to allow for the prompt provision of assistance, and it was suggested that the provision be more specific on that point. Agreement was expressed with the Special Rapporteur's suggestion that the affected State consider the reasonableness of waiving its internal requirements in each circumstance with a view to ensuring prompt and effective assistance. A further view was that it was not easy to ask States simply to waive their domestic legislation, which could give rise to difficulties under their respective constitutional systems and raised questions about the rule of law. In terms of a further suggestion, it could be recommended that States specifically anticipate in their legislation the possibility of the waiver of internal requirements in the case of disasters.

(d) *Comments on draft article 14*

73. While several members welcomed the inclusion of draft article 14, which would in their view ensure greater legal certainty in the implementation of assistance, others questioned its utility and recommended that it be deleted or replaced with a "without prejudice" clause. Concern was expressed that the provision seemed to condition termination on the existence of consultation. It was suggested that a more flexible provision was needed, so as

to reflect the various realities that could arise. It was also suggested that the provision more explicitly acknowledge that the duration of assistance was ultimately a matter for decision by the affected State. Other members cautioned against an approach that recognized a uniform and unilateral right of affected States to terminate the assistance being provided to them, as it could unnecessarily affect the rights of affected persons.

74. Suggestions for improvement included specifying that, upon termination, the respective parties should cooperate to allow for the repatriation of goods and personnel. It was also suggested that reference could be made to the need for a procedure for termination, to be agreed upon by the affected State and assisting actors.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

75. The Special Rapporteur cautioned against reopening draft articles that had already been provisionally adopted by consensus. In his view, the comments and observations made on previously adopted draft articles were more appropriately to be taken into account during the second reading of the draft articles.

76. The Special Rapporteur concurred with the views expressed during the debate that draft article 13 could benefit from further detail, in order to have greater practical value, and agreed to making drafting suggestions in the Drafting Committee for such improvements.

77. As for the relationship between draft article 5 and draft article A, the Special Rapporteur recalled that draft article 5, in general terms, set forth the duty to cooperate in the specific context of disasters. Draft article A indicated the principal areas in which such cooperation should take place. To his mind, the misgivings raised by some members were more terminological in nature and could be remedied in the Drafting Committee.

78. As regards the proposal to negotiate a model status-of-forces agreement for disasters, he noted that the model status-of-forces agreement prepared by the Secretariat of the United Nations<sup>296</sup> envisaged the activities of the military forces of States for peacekeeping operations. However, such a model agreement to be prepared by the Commission in the context of disasters would have to include the activities of non-military actors. He noted that the United Nations model status-of-forces agreement was very detailed, as was the case with similar texts being developed in other forums and national models for civil defence. While the usefulness of such documents could not be denied, in his view, such an endeavour would exceed the scope of this topic as it was approved by the Commission.

79. As to the question of the final form of the draft articles, he recalled that the approach of developing draft articles was simply the usual practice of the Commission, and was without prejudice to the final form in which they were going to be adopted. He remained open-minded on the matter and preferred to defer it until a later stage of consideration.

<sup>296</sup> A/45/594.

80. The Special Rapporteur further indicated his intention to spend most of his next report on disaster risk reduction, including the prevention and mitigation of disasters. That report might extend to the protection of humanitarian assistance personnel. He also planned to propose a draft article on the use of terms, as well as other miscellaneous provisions.

### C. Text of the draft articles on the protection of persons in the event of disasters provisionally adopted so far by the Commission

81. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.<sup>297</sup>

#### PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

##### *Article 1. Scope*

The present draft articles apply to the protection of persons in the event of disasters.

##### *Article 2. Purpose*

The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

##### *Article 3. Definition of disaster*

“Disaster” means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

##### *Article 4. Relationship with international humanitarian law*

The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.

##### *Article 5. Duty to cooperate*

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United

Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

##### *Article 6. Humanitarian principles in disaster response*

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

##### *Article 7. Human dignity*

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

##### *Article 8. Human rights*

Persons affected by disasters are entitled to respect for their human rights.

##### *Article 9. Role of the affected State*

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

##### *Article 10. Duty of the affected State to seek assistance*

To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate.

##### *Article 11. Consent of the affected State to external assistance*

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known.

<sup>297</sup> For the commentaries to draft articles 1 to 5, see *Yearbook ... 2010*, vol. II (Part Two), para. 331. For the commentaries to draft articles 6 to 11, see *Yearbook ... 2011*, vol. II (Part Two), para. 289.