

Protection of persons in the event of disasters

Statement of the Chairman of the Drafting Committee

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Mr. Chairman,

It is my pleasure to introduce the report of the Drafting Committee on the topic “Protection of persons in the event of disasters”, which is contained in document A/CN.4/L.758.

At its 3019th meeting, held on 10 July 2009, the Commission referred draft articles 1 to 3, as proposed by the Special Rapporteur in his second report, to the Drafting Committee, on the understanding that if no agreement was possible on draft article 3, it could be referred back to the Plenary with a view to establishing on Working Group to discuss the draft article.

The Drafting Committee has successfully completed its consideration of all the draft articles referred to it, and provisionally adopted five draft articles. The Committee held eight meetings from 13 to 17 July 2009.

Before addressing the details of the report, let me first pay tribute to the Special Rapporteur, Mr. Eduardo Valencia-Ospina, whose guidance and cooperation greatly facilitated the work of the Drafting Committee. I also

thank the members of the Drafting Committee for their active participation and valuable contributions.

Mr. Chairman,

The work of the Drafting Committee was undertaken on the basis of a revised proposal for the draft articles, prepared by the Special Rapporteur who took into account the various drafting and structural suggestions made during the plenary debate. Following some such suggestions, the Special Rapporteur proposed splitting some of the draft articles into a total of five draft articles. I propose to discuss each draft article in numerical order.

Draft Article 1 - Scope

Draft article 1 deals with the scope of the draft articles. Its wording is based on the first part of the formulation initially proposed by the Special Rapporteur in his second report, and tracks the title of the topic. This latter point was significant when the Committee came to discussing suggestions for changes. In particular, while it was generally agreed that the scope of the draft articles should include the pre-disaster phase, different suggestions were made as to how best to reflect the scope. Such suggestions ranged from changing “in the event of” to a formulation such as “in relation to” or “in case of” (which allowed more room for the inclusion of pre-disaster activities), as well to expressly mentioning the various phases of disasters.

In the end, it was decided to keep the existing formulation out of concern that a change to draft article 1 might have required a change to the title of the topic. Furthermore, the Drafting Committee understood the

phrase “in the event of disasters” to include all phases of disasters. This will be explained in the commentary.

The title of draft article 1 is “scope”.

Draft Article 2 – Purpose

Mr. Chairman,

Draft article 2 has its origins in the second half of the Special Rapporteur’s initial proposal for draft article 1. In his revised text presented to the Drafting Committee, the Special Rapporteur proposed a new draft article based on his initial proposal.

The provision deals with the purpose of the draft articles. While it is not usual for texts prepared by the Commission to include a provision outlining the objectives of the draft articles in question, it is not unprecedented. The 2006 Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities include a provision (draft article 3) on purposes. Hence, while there was a view in the Committee that the provision was more preambular in nature, the majority of the Committee supported its inclusion as a distinct draft article.

The revised proposal of the Special Rapporteur included a number of modifications made in response to suggestions in the plenary. First of all, the Drafting Committee dealt with the question of the relationship between rights and needs, which had been the subject of debate in the plenary. In his revised proposal the Special Rapporteur, following a proposal made in the plenary, inverted the reference to “rights” and “needs”, so that instead of

referring to “the realization of *rights* of persons... by providing an adequate and effective response to their *needs*”, the revised proposal spoke of ensuring “an adequate and effective response to the *needs* of persons...and the realization of their *rights*”. The emphasis, therefore, is placed on the link between a high-quality (“adequate and effective”) response and meeting the needs of the persons concerned, all of which has to take place with full respect for the existing rights of the victims. This approach met with general agreement in the Drafting Committee. One of the versions developed by the Drafting Committee also included the words “in particular” before the concluding reference to respect for rights, but they were eventually removed since it implied that rights were being considered as a sub-group of needs.

Turning to the rest of the draft article, it should be noted that the initial proposals of the Special Rapporteur made a reference to “States”, which was understood as a general statement of the obligation of States to ensure an adequate and effective response. This was at the source of a division of opinion in the Drafting Committee. While some members supported an express reference to the basic duty of States to provide for the needs of victims, others took issue with the general terms in which the provision was drafted. It was not clear, for example, which States were being referred to, and whether there were different obligations for different States, for example, for the affected State as opposed to assistance-providing States. A general reference to the obligations of “States” did not, in the mind of a number of members, sufficiently bring out the aspect of the specific rights and obligations of the affected State. The solution in the end was to remove the reference to States, on the understanding that it was not strictly necessary

for a provision on the purpose of the draft articles, and that specific provisions on the obligations of States would be considered at a later stage.

Then there was the matter of the temporal application of the draft articles. As I mentioned in my introduction to draft article 1, the Committee supported including the pre-disaster phase of humanitarian assistance within the scope of the draft articles. This matter arose again in the context of the reference in the earlier versions of draft article 2 to “in the event of disasters”. Some members preferred making a specific reference to “all phases of the disaster”. However, the prevailing view in the Drafting Committee was that the formulation of the draft article could be economized to read “adequate and effective response *to* disasters” without losing the aspect of covering the pre-disaster phase. This will be explained in the commentaries.

The initial versions of the Special Rapporteur spoke of “ensuring” the realization of rights, or an adequate and effective response. The Committee, after considering various options such as “to provide for”, decided instead to use the verb “facilitate” since the draft articles were not themselves going to *ensure* a response, but rather, it is hoped that they will help *facilitate* an adequate and effective response.

It was also decided to introduce the qualifier “essential” before the term “needs”, in order to more clearly indicate that the needs being referred to are those related to survival in the aftermath of a disaster. An earlier proposal would have used the word “basic”, but it was felt that “essential” more clearly brought out the context in which such needs arise. Furthermore, the commentary will clarify that by “persons concerned” what is meant are

people directly affected by the disaster (as opposed to individuals more indirectly affected).

Likewise, the Special Rapporteur's earlier proposal spoke of "the realization" of rights, which carries an affirmative connotation. However, it was understood that some of the applicable rights are economic and social rights, for which States are obliged to progressively ensure (or to "take steps" towards ensuring). As such, a more neutral formula was sought. The Committee considered the phrase "with full respect for their rights" which is a formulation commonly employed, and which leaves the question of how those rights are to be enforced to the relevant rules themselves. The Committee also considered an alternative reference to "with due respect for their rights" but settled for "full" which carries a more active connotation.

A number of proposals to add a further qualifier were considered. These included, inter alia, adding "as appropriate", "as far as possible", "to the extent possible", "as required by the present draft articles", "in accordance with relevant provisions of international and domestic law" and "*applicable* rights". None of these suggestions met with acceptance in the Drafting Committee. The concern was that including further qualifiers risked making what was a straightforward statement of purpose into a complicated provision, and could unnecessarily water down existing legal rights. Nonetheless, the commentary will explain that there is an implied margin of appreciation for the applicability of rights, conditioned by the extent of the impact of the disaster. The extent of such conditionality, as far as it is not covered by the draft articles being developed by the Commission, is to be

ascertained by the relevant rules recognizing or establishing the rights in question.

Finally, by “rights” we are not only referring to human rights, but also, *inter alia*, to rights acquired under domestic law. There were some views in the Committee that the reference to “rights” was vague exactly because it did not clarify whether what was being referred to are human rights, or pre-existing rights, or the rights to be enumerated in the draft articles. Nonetheless a suggestion to draw up a list of applicable rights did not meet with approval in the Committee for the simple reason that it was not possible to consider all possible applicable rights, and that, accordingly, such a list could lead to an *a contrario* interpretation that rights not mentioned therein were not applicable.

The title of draft article 2 is “Purpose”.

Draft article 3 – Definition of Disaster

Mr. Chairman,

Draft article 3 contains a definition of the term “disaster” for purposes of the draft articles. The primary concern of the Drafting Committee as regards this provision was to properly delimit the scope of the definition of the term “disaster” so as to capture what is within the scope of application of the topic, while not inadvertently also dealing with other serious events, such as political and economic crises, which may also undermine the functioning of society. Such delimiting of the scope was done in two ways.

First, through a reorientation of the definition to focus on the existence of an event which caused the disruption of society. The initial version of what was draft article 2, as proposed by the Special Rapporteur in his second report, followed the approach taken in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998. That is to say that the focus of the definition was placed on the consequence of an event, namely the serious disruption of the functioning of society caused by that event, as opposed to defining a disaster as the event itself. If you recall, several members expressed a preference for the opposite approach during the plenary discussion. This was raised again in the Drafting Committee.

It was explained that the approach in the Tampere Convention represents the current thinking in the humanitarian assistance community, as subsequently confirmed by the 2005 World Conference on Disaster Reduction, convened by the United Nations at Hyogo in Japan, as well as by recent treaties and other instruments, including the 2007 IFRC Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance. Nonetheless, the prevailing view in the Drafting Committee was that the Commission was free to shift the emphasis of the approach, especially since it was embarking on the formulation of a legal instrument, which required a tighter definition, as opposed to one that is more policy-oriented. Furthermore, linking the definition to the existence of an event more clearly brought out the logical sequence of a disaster situation.

The scope of the definition of “disaster” was further limited through a series of textual refinements. The first element of the definition, as already explained, is the existence of an event. It was decided to qualify the term with the word “calamitous” to emphasize the extreme nature of the event being considered. This was inspired by the definition adopted by the Institute of International Law at its 2003 Bruges session, which deliberately established a higher threshold so as to exclude other acute crises. The commentary will further clarify the kinds of events that are not covered by the draft articles.

The Drafting Committee further decided to accept the suggestion, made in plenary, to adopt the formula “event or series of events” in order to also cover those types of disasters which, on their own, might not meet the necessary threshold, but which, taken together, would constitute a calamitous disaster for purposes of the draft articles.

Three types of consequences are anticipated in the provision, widespread loss of life, great human suffering and distress, or large-scale material of environmental damage. The element of “loss of life” is a refinement, inspired by the 1995 *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief*, and was implied in the initial proposal of the Special Rapporteur, which referred to “widespread human...loss”. It was agreed that the qualifier “widespread” would be explained in the commentary. It was also agreed that “great human suffering and distress” was a necessary element of the definition.

“Large-scale material or environmental damage” was included in the draft article on the understanding that it is not the environmental loss *per se* that would be covered by the topic, but rather the impact on persons of such loss; thus avoiding a consideration of economic loss in general. At the same time, there was a view in the Committee that such a link to actual loss might prevent the draft articles from also applying to activities designed to mitigate potential future human loss arising from existing environmental damage. These matters will be discussed in the commentary.

Finally, allow me to add that the Drafting Committee considered a suggestion to include in the draft article an express reference to the exclusion of armed conflict from the scope of the definition. The Committee opted for finding a solution to that issue in the context of draft article 4, which I turn to next. Suffice it to say that draft article 3 has to be read together with draft article 4.

The title of draft article 3 is “Definition of Disaster”

Draft article 4 – Relationship with international humanitarian law

Mr. Chairman,

Draft article 4 deals with the question of the relationship of the draft articles with international humanitarian law, and, accordingly, the extent to which the draft articles cover situations of armed conflict. If you recall, in his original proposal for draft article 2, on the definition of disaster, the Special Rapporteur had expressly excluded armed conflict. During the

plenary debate, it was suggested that the matter be best dealt with in a separate “without prejudice” draft article. The Special Rapporteur adopted this approach in his revised proposal for the Drafting Committee, by eliminating the reference to armed conflict from the definition of “disaster” while producing an additional provision stating that the draft articles were without prejudice, *inter alia*, to the rules applicable in armed conflict.

Two issues were raised during the discussion in the Drafting Committee: first, there was a proposal to nonetheless also include the express exclusion of armed conflict in the definition of disaster. The second issue related to whether a without prejudice clause was sufficient. The first matter was resolved by the solution found for the second. I will deal with each issue in sequence.

It was maintained in the Committee that, regardless of a “without prejudice” clause, without an express exclusion from the definition, armed conflicts were, in principle, to be considered “disasters” for purposes of the draft articles to the extent that they satisfied the threshold criteria in draft article 3. The Committee thus considered a proposal to include a second paragraph in draft article 3 expressly excluding armed conflict.

In the end, such approach was not followed, largely because of the concern, raised in the Committee, that a categorical exclusion would be counter-productive, particularly in situations of “complex emergencies” where a disaster, whether emanating from natural or human causes, occurs in an area where there is an armed conflict. To simply exclude the applicability of the draft articles because of the co-existence of an armed conflict would

be detrimental to the protection of the victims of the disaster; especially when the onset of the disaster pre-dated the armed conflict.

It was agreed in the Committee that, while the draft articles did not seek to regulate the consequences of armed conflict, they could nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not apply. It was felt that a “without prejudice” clause did not achieve this result since it merely preserved the applicability of both sets of rules, thereby suggesting that the draft articles applied in the context of armed conflict to the same extent as existing rules of international law. Instead, it was proposed that the new provision be drafted to clarify the relationship between the draft articles and international humanitarian law, giving predominance to the latter set of rules in situations where they are applicable.

The title of draft article 4 is “Relationship with International Humanitarian law”.

Draft article 5 – Duty to cooperate

Mr. Chairman,

The last article adopted by the Drafting Committee this year is draft article 5 on the basic duty to cooperate. If you recall, different opinions were expressed in the plenary as to the timeliness of the referral of the draft article to the Drafting Committee. There was, similarly, a view in the Drafting Committee that it was premature to adopt a general provision on the obligation of States to cooperate without an exposition of other applicable principles and without more consideration of the implications of such obligation, particularly for the affected State.

The preponderance of views in the Committee, however, supported the inclusion of the draft article, on the understanding that a provision on the primary responsibility of the affected State will be included in the set of draft articles in the future. A footnote to that effect has been appended to the draft article.

Turning to the formulation of the provision, the first thing you will notice is that it is now presented in one sentence, as opposed to a series of clauses. If you recall, the initial proposal of the Special Rapporteur had sought to separate out cooperation between States, and that between States and international organizations (particularly the United Nations), the International Federation of the Red Cross, and that with what he termed “civil society”.

Following suggestions to that effect in the plenary, the Special Rapporteur presented a revised proposal which sought to distinguish further between different levels of cooperation: mandatory with some entities, while recommendatory with others. Nonetheless, after several attempts the Committee was unable to agree on how to best capture the exact legal

relationship between States and the various entities mentioned therein. There was also the concern that the provision was becoming unnecessarily complex; and the Committee felt that it was not necessary to spell out the exact nature of the legal obligation to cooperate (whether “shall” or “should”) in the general provision on cooperation, leaving such matters for specific provisions to be adopted in the future.

Thus, the Drafting Committee returned to a position closer to the original proposal of the Special Rapporteur in which the key phrase is “as appropriate”. The phrase, which qualifies the entire draft article, serves both as a reference to existing specific rules on cooperation between the various entities mentioned in the draft article (including those such rules to be added to the draft articles in the future) which establish the nature of the obligation to cooperate, and as an indication of a margin of appreciation in determining, on the ground, when cooperation is or is not “appropriate”.

Allow me to also draw the Commission’s attention to several other terms in the draft article. The Drafting Committee decided to introduce the qualifier “competent” before “intergovernmental organizations” as an indication that, for purposes of the draft articles, cooperation would only be necessary with those entities that are involved in the provision of humanitarian assistance. Following the suggestion made in plenary, a reference to the International Committee of the Red Cross was added, as a consequence of the fact that the draft articles may also apply in complex emergencies involving armed conflict. Furthermore, the Drafting Committee standardized the earlier reference to “civil society” with “relevant non-governmental organizations”.

Finally, the commentary will clarify that cooperation is inherently reciprocal in nature, so that a duty for a State to cooperate with an international organization implies the same duty on the part of the organization.

The title of draft article 5 is “duty to cooperate”.

Mr. Chairman,

This concludes my introduction of draft articles 1 to 5 on the protection of persons in the event of disasters, as adopted by the Drafting Committee this year. It is my sincere hope that the Plenary will be in a position to take note of the draft articles presented.

Thank you Mr. Chairman.