

Protection of Persons in the Event of Disasters

Statement of the Chairman of the Drafting Committee

20 July 2010

Mr. Chairman,

It is my pleasure, today, to introduce the fourth report of the Drafting Committee for the sixty-second session of the Commission. This report, which deals with the topic “Protection of persons in the event of disasters”, is contained in document A/CN.4/L.776.

The report relates to draft articles 6 to 9 adopted by the Drafting Committee. The Committee held 6 meetings from 5 to 8 July 2010, and had before it draft articles 6 to 8, as proposed by the Special Rapporteur in his third report, document A/CN.4/629. Those three draft articles were referred to the Drafting Committee at its 3057th meeting, on 4 June 2010.

Allow me to note that the Drafting Committee ran out of time, and was unable to consider the requirement of the consent of the affected State, as proposed by the Special Rapporteur in paragraph 2 of his draft article 8. That issue, therefore, remains to be considered by the Drafting Committee at next year’s session.

Before turning to the report, allow me to pay tribute to the Special Rapporteur, Mr. Eduardo Valencia-Ospina, whose constructive approach and patient guidance greatly facilitated the work of the Drafting Committee. I also thank the other members of the Committee for their active participation and

significant contributions. Furthermore, I wish to thank the Secretariat for its valuable assistance.

Draft article 6

Mr. Chairman,

Draft article 6 sets out the key humanitarian principles relevant to disaster response. The provision is based on the draft proposed by the Special Rapporteur. It consists of three parts, which I will discuss in turn: the first confirms the three core humanitarian principles applicable in this topic, the second is the reference to non-discrimination, and the third a reference to the needs of the particularly vulnerable.

Before proceeding with these three components, I wish to make some general clarifications. First, as regarding the placement of draft article 6, there had been some suggestions in the plenary to have the content of the draft article in the preamble. However, the Drafting Committee felt it more appropriate to reflect the principles in the body of the draft articles given their significance in the context of the provision of disaster relief and assistance. There was also a suggestion in the plenary that the three principles be split and each be the subject of their own article with a definition. That suggestion was not followed, since it was not considered necessary to redefine principles which were generally accepted as humanitarian principles recognized by international law. Instead, a mere reference to the principles was considered sufficient. It was also decided to leave the question of how to best reflect the principle of sovereignty to the provision on the primary role of the affected State.

As for the principles themselves, while there was general agreement on the inclusion of the reference to those of humanity and impartiality, there were some

questions as to the pertinence of including the principle of neutrality, which connotes a context of armed conflict, and is commonly considered as a principle of international humanitarian law. Nonetheless, the Committee was of the view that the fact that the principle of neutrality originated in a specific branch of international law did not make it inapplicable to other fields of the law. It was recognized that the principle of neutrality was commonly referred to in instruments pertaining to disaster relief and assistance, and that even though it shared the same origin as the concept of neutrality more generally, it nonetheless had acquired a more specific meaning in the context of such assistance. It was in the latter sense that the principle was being referred to in draft article 6. The Committee considered a proposal to make this clearer in the text by qualifying the principles as “humanitarian” principles. However, it was, on balance, considered infelicitous to refer to the “humanitarian principle of humanity”. The Committee also preferred to avoid the implication that only those principles would be applicable to disaster response, to the exclusion of other principles, such as sovereignty. While in the end the qualifier was not included, the reference to “humanitarian” in the title of draft article 6 serves to circumscribe the nature of the principles listed therein. The commentary will, in defining their content, make it clear that the principles referred to are not general principles of international law, but humanitarian principles which are the basis for disaster relief and assistance.

The Drafting Committee recalled the proposal made in the Plenary that a reference to the principle of non-discrimination be expressly made, and that it was not sufficient to leave it to implication from the principle of impartiality. The Committee noted that such a provision was included in the resolution, entitled “Humanitarian Assistance”, of the Institute of International Law, adopted at the 2003 Bruges session (“Bruges resolution”), and that the IFRC *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* of 2007 (“IFRC Guidelines”), referred, in article 4, to disaster relief and initial recovery assistance being provided without “adverse distinction”.

There was general agreement in the Committee as to the importance of the inclusion of such a reference in the draft articles. It proceeded accordingly on the basis of a proposal of the Special Rapporteur for the inclusion of a reference to the principle of non-discrimination.

At first, the Committee considered the possibility of including the reference to non-discrimination in a second paragraph to the draft article, but decided instead to retain the reference in the same paragraph, so as to avoid the implication that non-discrimination was secondary to the other three principles. The proposal of the Special Rapporteur further included a reference, inspired by the Bruges resolution, to the qualification that in applying the principle of non-discrimination “the needs of the most vulnerable groups” ought to be taken into account. The Committee accepted, in principle, the inclusion of such qualification, in the context of the present topic, on the understanding that “positive discrimination” in favour of vulnerable groups did not violate the principle of non-discrimination. It also took note of the fact that the qualification appeared in the IFRC Guidelines. The word “while” was introduced by way of balancing the principle and the qualification thereto, so as to avoid the perception that the principle was contradicted by the qualifier.

The Committee was concerned about making a reference to “groups” which could be interpreted as excluding individuals, and considered referring instead to “persons”. In the end it settled for a more neutral reference to “the vulnerable”. The Committee also had a discussion whether to include a further qualifier such as the “most” vulnerable, which appeared in the Bruges resolution. There was a sense that some qualifier was necessary since victims of disasters are, by definition, “vulnerable”. The Committee accordingly agreed on the phrase “particularly vulnerable”, which was used in the IFRC Guidelines.

The title of draft article 6 is “Humanitarian principles in disaster response”.

Draft article 7

Mr. Chairman,

Draft article 7 recognizes the importance of the inherent human dignity of the human person being respected and protected during the process of responding to a disaster.

With regard to the opening phrase “in responding to disasters”, the Committee had initially considered a more neutral reference to “for the purposes of the present draft articles”, but settled on a formulation that provided a more substantive indication of the context in which the provision applies. The reference to “responding to” was chosen over the more generic “in their response”, so as to give a sense of the continuing nature of the obligation to respect and protect the human dignity of affected persons throughout the duration of the response period.

The reference to “States, competent intergovernmental organizations and relevant non-governmental organizations” provides an indication of the actors to which the provision is addressed. It recognizes the reality that a vast amount of disaster relief assistance is provided by assisting States and non-State actors such as international organizations and non-governmental organizations. The Committee initially considered, in addition to States, a more general reference to “other relevant actors”, but settled for the current formulation for the sake of consistency with that adopted in draft article 5. Different views existed in the Committee as to whether the reference to non-governmental organizations would also cover multinational corporations. The sense in the Committee was that such issue would have to be decided more globally for the entire draft articles, and that,

if it were to include such entities, it would only be in the context of their actions in disaster relief and assistance. This will be reflected in the commentary.

The formula “shall respect and protect” indicates the action required. The Committee initially considered only a reference to “respect”. Nonetheless, it was recognized that the combination “respect and protect” is a relatively common formulation, which accords with contemporary doctrine and jurisprudence in international human rights law. The former indicates a negative obligation to refrain from doing something and the latter a positive obligation to take action. In the context of human dignity the dual duty to “respect and protect” is important, particularly in the context of disaster relief and assistance. Furthermore, the duty to protect also requires States to adopt legislation proscribing the activities of third parties involved in situations which raise concerns about the violation of the principle of respect for human dignity. It was also understood that it was implicit in the reference to the obligation to “protect” that this would be commensurate with the legal obligations borne by the different actors mentioned in the provision, and that, by definition (and as will be confirmed in draft article 9), it would be the affected State which would bear the primary obligation to protect. Nonetheless, there was a concern expressed in the Committee that the reference to a positive obligation to “protect” would impose too great an obligation on States in a time of crisis brought about by a disaster.

In adopting the concluding clause “the inherent dignity of the human person” the Drafting Committee was inspired by its work on a similar provision currently before the Committee under the topic “expulsion of aliens”, which, in turn, is based on the formulation of article 10, paragraph 1, of the International Covenant on Civil and Political Rights.

The Drafting Committee initially considered a proposal by the Special Rapporteur, following a suggestion made in the plenary, to include a reference to

the respect for the human rights of the persons concerned as set out in relevant international instruments. In the Committee's view, human dignity and human rights exist at different levels of generality: human dignity is not a human right but instead a principle underlying all human rights. After considering the possibility of dealing with compliance with human rights obligations in a second paragraph to draft article 7, the Committee eventually preferred to include the issue in a separate draft article, and eventually did include it as draft article 8 which I will turn to next.

The title of draft article 7 is "Human Dignity".

Draft article 8

Mr. Chairman,

Draft article 8 deals with the obligation to respect the human rights of persons affected by disasters. As just described, the provision has its origins in the work on draft article 7 on human dignity. Initially the Committee considered the possibility of including a reference to the respect of human rights in the original provision on the primary responsibility of the affected State (which has now become draft article 9), but it was felt that doing so would render the draft article unnecessarily complex. The Committee instead opted for a separate provision on human rights to be located immediately after draft article 7 as an indication of the linkage between the two provisions.

The key issue considered by the Committee was how to properly disaggregate the differing human rights obligations of the various actors falling within the scope *ratione personae* of the draft articles. It was appreciated that the extent of the obligation of the affected State to respect the human rights of persons

affected by disasters would vary from the obligations of assisting States, which may be involved in the assistance effort to a different degree. These would, in turn, be different from the obligations under international law, if any, of other assisting actors, including international organizations and non-governmental organizations. The Committee initially considered several proposals attempting to reflect such differing obligations. However, none of the formulations met with general approval, in part owing to a difference in opinion in the Committee on the extent of human rights obligations imposed on non-governmental organizations. This was compounded by the existence of multiple views as to whether the category “non-governmental organizations” would include the activities of other non-State actors, such as multi-national corporations, an issue I have already alluded to.

An early proposal had included the qualification that the human rights obligations being referred to were those “[a]s set out in the relevant international agreements”. However, the Committee decided not to include such a reference out of concern that it would be too limiting, since it excluded human rights obligations applicable on States by way of customary international law, and would not easily cover assertions of best practices for the protection of human rights included in non-binding texts, of which there exist a relatively large number relevant to disaster relief and assistance. The Committee also considered other formulas, including, “as applicable”, “in accordance with applicable rules of national and international law” and “as recognized in national and international law”, but none obtained sufficient support in the Committee.

In the end, the Committee opted for a simpler formulation that affirms the entitlement of persons affected by disasters to have their rights respected. It is implicit that there is a corresponding obligation to respect such rights. In opting for such formulation, the Committee was inspired by its work on a similar provision recently worked out in the context of the topic “expulsion of aliens”.

Draft article 8 is thus included in the draft articles as a general indication of the existence of human rights obligations, without seeking to specify what those obligations are, nor seeking to add to or qualify such obligations. The reference at the beginning of the draft article to “persons affected by disasters” reaffirms the context in which the draft articles apply, and is not to be understood as suggesting that persons not affected by a disaster do not similarly enjoy such rights. It is also understood that the reference to “human rights” incorporates both substantive rights and limitations (such as the possibility of derogation) as recognized by existing international human rights law.

The title of draft article 8 is “Human Rights”.

Draft article 9

Mr. Chairman,

Draft article 9 deals with the position of the affected State. It corresponds to the proposal for paragraph 1 of draft article 8 in the Special Rapporteur’s third report. The Drafting Committee decided, for the sake of clarity, to separate into two paragraphs the obligation of the affected State to protect persons and to provide disaster relief assistance. In addition, the Committee affirmed the primary role of the affected State in directing, controlling, coordinating and supervising disaster relief and assistance activities on its territory.

There is actually a third issue in this scheme, namely the concomitant requirement that the affected State consent to the provision of disaster relief and assistance by assisting States and other actors, and the extent to which such requirement of consent may be qualified. As mentioned at the outset of my report,

the Drafting Committee did not have sufficient time to consider that aspect, and will return to it next year in a separate draft article 10.

Before turning to each paragraph, allow me to make one general clarification. One of the issues that arose during the discussion concerned the meaning of the term “affected State”. Since the issue was pertinent to the entire set of draft articles, it was agreed that there would eventually be a provision on “use of terms” which would include a definition of “affected State”. Accordingly, it was not necessary to include such a specification in draft article 9.

As already described, paragraph 1 deals with the duty to ensure the protection of persons as well as to provide disaster relief and assistance. A key issue of discussion related to whether it was necessary to include a description of the origin of the duty. During the plenary debate, several members had spoken out in favour of a reference to the principle of sovereignty. Although the Special Rapporteur’s intention had been to deal with sovereignty in the context of consent, the Drafting Committee decided to include a reference in paragraph 1 of draft article 9, as a reminder that sovereignty did not only establish rights, but also implied the existence of obligations. Although some felt that it was not strictly necessary to make a reference to sovereignty, the Committee nonetheless decided to do so out of recognition that, in the present context, such reference was common to texts concerning disaster relief and assistance and would not be out of place in the draft. The Committee considered several options on how best to reflect the concept, including the phrases “in the exercise of its sovereignty” and “in the exercise of its sovereign rights and duties”, but settled on the present formulation.

The initial version of the Special Rapporteur referred to the “primary responsibility” of the affected State. The Committee recognized that this was a common way of referring to the concept in many of the texts applicable to disaster

relief and assistance. Nonetheless, it decided to refer to the “duty” of the affected State out of concern for the possible confusion that may arise owing to the use of the term “responsibility”, both because it is a term of art typically used in the Commission with a different connotation, and out of a need to avoid any perceived connection with the concept of “responsibility to protect”. The paragraph was further aligned with the language used in draft articles already adopted through the inclusion of the formula “provision of disaster relief and assistance”.

Paragraph 2, follows from paragraph 1, stating that the affected State not only has the duty to protect and provide assistance, but also plays the primary role in overseeing the provision of such assistance.

Further to the decision to drop the reference to “responsibility” in the first paragraph, replacing it with a reference to an obligation (“duty”), the Committee also aligned the second paragraph so as to recognize the “primary role” of the affected State, as a consequence of the duty identified in the first paragraph. The inclusion in paragraph 2 of the word “role” was inspired by General Assembly resolution 46/182 of 19 December 1991 and was done in order to allow for a margin of appreciation for the affected State which might prefer (or might only be able) to take on a more limited role of overall coordination. Any language suggesting an obligation to direct, control, coordinate and supervise would have been too restrictive and would not necessarily accord with the options available to the affected State in the context of a disaster.

The earlier reference to the “primary responsibility” gave rise to a difference of views in the Committee, with some members being concerned that it implied “secondary” or even “tertiary” responsibility. The issue was resolved once the Committee replaced the word “responsibility” with “role”, as there was no disagreement that the affected State had the primary role. This had, in fact, been anticipated in draft article 5, on the duty to cooperate, which had been adopted by

the Committee in 2009 on the understanding that there would be a ‘balancing’ provision laying out the primary role of the affected State. The Committee also considered using the phrase “first and foremost” as in resolution 46/182, but the proposal did not garner general support. An earlier version of the paragraph made reference to the source of the primary role as being “under its national law”. However, this was deleted since it was not always the case that internal law exists to regulate the matter, nor that such law always covers all of the relevant aspects.

The Drafting Committee also considered the formula “direction, control, coordination and supervision”, which had been in the Special Rapporteur’s proposal. It was recognized that while there existed other formulas of actions taken by the affected State, the proposed formula was used in the Tampere Convention and seemed to be gaining general currency and use in the field of disaster relief and assistance. The Committee did consider an alternative formula of “initiation, organization, coordination and implementation”, as per resolution 46/182, but decided to retain the Tampere version as being the more contemporary one.

The title of draft article 9 is “Role of the affected State”.

Mr. Chairman,

This concludes my introduction of the fourth report of 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.