

Protection of Persons in the Event of Disasters

Statement of the Chairman of the Drafting Committee

2 August 2011

Mr. Chairman,

It is my pleasure, today, to introduce the third report of the Drafting Committee for the sixty-third 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.794.

The report relates to draft articles 10 and 11 adopted by the Drafting Committee on 19 July 2011. The Committee held 3 meetings on 18 and 19 July 2011, and had before it draft articles 10 to 12, as proposed by the Special Rapporteur in his fourth report, document A/CN.4/643 and Corr.1. The three draft articles were referred to the Drafting Committee at the 3107th meeting of the Commission, on 18 July 2011.

Unfortunately, the Drafting Committee was only able, with the time allocated to it, to consider the Special Rapporteur’s proposals for draft articles 10 and 11. Draft article 12, accordingly, remains in the Drafting Committee for its consideration 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 once again 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 10

Mr. Chairman,

Draft article 10 is concerned with the question of the duty of the affected State to seek assistance in the situation when a disaster exceeds its national response capacity. There are three sets of issues to be noted in this draft article.

First, as already alluded to, the provision applies in a specific context, namely when the national response capacity of a State affected by a disaster is overwhelmed. The Drafting Committee decided to move the contextual phrase to the beginning of the draft article so as to emphasize the exceptional character of the duty being established. In the view of the Drafting Committee, such an assessment would be primarily one undertaken by the affected State, in accordance with draft article 9. Nonetheless, it decided not to make this explicit in the draft article out of recognition that the duty to seek assistance would also arise in situations in which it was manifestly clear that the national response capacity had been exceeded, but the affected State maintained the contrary. The assessment is intended to be an objective one. Having said so, the Drafting Committee did include a subjective element in the new opening phrase “[t]o the extent that” which recognizes the possibility of a differentiated outcome, in the sense that situations may arise where the response capacity is only partially overwhelmed. The duty to seek assistance would accordingly only apply to such extent.

The second issue, which was perhaps the key issue in connection with this draft article, pertained to the nature of the obligation being envisaged therein. There was a difference of opinion in the plenary as to whether a legal obligation, implying all the usual legal consequences in case of breach, was being envisaged, or whether the provision should be cast in recommendatory or hortatory terms.

While the preponderance of views was in favour of a legal obligation, indicated by the word “duty”, I wish to state for the record that there was another view in the Committee which preferred a formulation along the lines of “the affected State should seek assistance”. Here I might add that those that favoured a legal obligation maintained that it was grounded, *inter alia*, in existing obligations under international human rights law, and that the duty arose as a corollary to draft article 9 establishing the duty of the affected State to ensure the protection of victims of a disaster. Others took the position that it did not reflect the present state of the law, and was not called for as a matter of progressive development of the law given that, in most cases of disasters and regardless of whether their national capacity is overwhelmed or not, affected States are willing to receive the assistance from the international community as a matter of international cooperation and solidarity as opposed to out of a sense of legal obligation.

I wish to also recall that the Drafting Committee agreed with the Special Rapporteur’s proposal to use the verb “seek” (as opposed to “request”) since the concept of “seeking assistance” implied a process of interaction with potential assistance providers.

The third set of issues that arose during the debate on this draft article related to the actors from which assistance ought to be sought. The Drafting Committee decided to retain the reference to the United Nations out of recognition of the central role the Organization plays in the coordination of humanitarian relief assistance. The Committee decided to retain the reference to non-governmental organizations also out of recognition of the important role such entities play in the actual delivery of assistance. Nonetheless, draft article 10 uses the same formula as that in draft article 5, namely by including the qualifier “relevant”. This is an indication that it would be sufficient for the affected State to seek assistance from those non-governmental organizations in the best position to assist it.

Furthermore, the provision includes two additional qualifiers. First, the reference to “from among” grants the affected State the discretion to choose which international actors it considers appropriate to seek assistance from. Furthermore,

the Drafting Committee also decided to include the qualifier “as appropriate”, which had been proposed by the Special Rapporteur, but to do so at the end of the provision to avoid any interpretation that the duty to seek assistance only existed in cases where it would be appropriate to do so. Instead, the phrase serves to provide a further indication of the margin of appreciation that the affected State has in determining not only from which actors to seek assistance (covered by the words “from among”), but also what types of assistance and what combination of offers of assistance to accept – it being implicit that the affected State is expected to make a good faith determination.

The title of draft article 10 is “Duty of the affected State to seek assistance”.

Draft article 11

Mr. Chairman,

Draft article 11 concerns the important question of the grant of consent by the affected State to external assistance.

Paragraph 1 establishes the basic principle that the provision of external assistance is subject to (“requires”) the consent of the affected State. The provision is based on paragraph 2 of the proposal of the Special Rapporteur for draft article 8, made in his third report. Other than a drafting refinement introduced by rephrasing the beginning of the paragraph as “[t]he provision of...”, the main substantive issue that arose pertained to the limitation in the Special Rapporteur’s proposal which had indicated that such assistance could “only” be provided with the consent of the affected State. The view of the Drafting Committee was that this was not in line with the overall approach of the draft articles which granted the affected State the primary, but not exclusive, role in the protection of persons affected by disasters (draft article 9). The Committee thus excluded such a

qualifier on the understanding that the provision of assistance by external actors was to be undertaken, in principle, on the basis of the consent of the affected State, which reflected the legal position in the vast majority of cases of disasters. However, the resulting constructive ambiguity leaves room for the possibility that in some limited cases, such as when there is no functioning government to grant consent or where consent is being refused arbitrarily in the face of a manifest need for external assistance, either such consent is to be implied or the lack of consent would not serve as a bar to the provision of such assistance.

Paragraph 2 recognizes the right of the affected State not to grant consent. This is subject to the restriction that the withholding of consent cannot be undertaken arbitrarily. The Drafting Committee also considered the possibility of presenting the qualifier as one of “unreasonableness” but settled for “arbitrariness”. Whether a decision was unreasonable or not implied a subjective analysis, which could amount to second-guessing the decisions of an affected State. Arbitrariness, on the other hand, implied a more objective test. The commentary will discuss the meaning of the “arbitrary withholding of consent” in more detail.

The Drafting Committee decided to exclude the reference to the affected State being “unable or unwilling” on the grounds that such situations would amount to the arbitrary denial of consent, and accordingly were already taken care of in the text.

Paragraph 3 establishes a duty of notification on the affected State to make its decision regarding offers of assistance known. The Drafting Committee preferred the more general reference to “pursuant to the present draft articles” so as to avoid an interpretation that offers of assistance are dealt with only in draft article 12, as had been proposed in the Special Rapporteur’s text. Instead, such offers are to be analyzed in the context of the entire set of draft articles.

The Drafting Committee was then seized with the question of the nature of the obligation being placed on the affected State. There were suggestions that emphasis be placed on a speedy response to an offer (through the possible

inclusion of the words “without delay”), and that the duty should not be limited to announcing the decision, but also require the giving of reasons when offers of assistance were refused. However, the Committee was mindful of not imposing an onerous burden on the affected State at a time of crisis, by requiring that it give reasons justifying its decisions. Hence, the Drafting Committee preferred a more flexible formula designed to strike a balance between the need, in principle, for responses to be given to offers of assistance while allowing for the exigencies of responding to a disaster. This was done in two ways. First, the obligation applies “whenever possible”, implying that there may be situations where responding to an offer may not be feasible. Greater flexibility was also introduced by adopting a formula that no longer made a reference to the recipients of the offer. In an earlier version, it was proposed that the affected State would be required to “notify all concerned”. This was changed to an obligation to “make its decision regarding the offer known”. Hence, it would be for the affected State to determine the mode of communication. What is decisive is the result, namely that actors extending offers of assistance would come to know the decision of the affected State on such offers. I might add that while the provision does not make a reference to the giving of reasons as a requirement, it was understood that failure to give a reasoned response (in the context of a denial of consent) might give rise to a presumption of arbitrariness. This will be explained in the commentary.

The title of draft article 11 is “Consent of the affected State to external assistance”.

Mr. Chairman,

This concludes my introduction of the third report of the Drafting Committee this year. It is my sincere hope that the plenary will be in a position to adopt the draft articles as presented.

Thank you.
