

Protection of Persons in the Event of Disasters

Statement of the Chairman of the Drafting Committee

30 July 2012

Mr. Chairman,

It is my pleasure, today, to introduce the second report of the Drafting Committee for the sixty-fourth 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.812.

The report reproduces the texts and titles of five draft articles, namely draft articles 5 *bis*, 12, 13, 14 and 15, provisionally adopted by the Drafting Committee over the course of five meetings, held from 5 to 11 July 2011. The Drafting Committee had before it a proposal for draft article 12, made by the Special Rapporteur in his fourth report last year, but which the Committee was unable to consider owing to a lack of time. In addition, the Drafting Committee had before it draft articles A, 13 and 14, as proposed by the Special Rapporteur in his fifth report, document A/CN.4/652, and which were referred to the Drafting Committee at the 3142nd meeting, held on 6 July 2012.

Before turning to this year’s 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 5 *bis*

Mr. Chairman,

Draft article 5 *bis* concerns the various forms of cooperation envisaged in the draft articles, and is designed to provide further specification to draft article 5, dealing with the duty to cooperate generally, without establishing any additional legal obligations. The Drafting Committee based its work on the Special Rapporteur’s proposal for a draft article A, contained in his fifth report. If you recall, the proposed draft article was modeled on article 17(4) of the draft articles on Articles on the Law of Transboundary Aquifers, of 2008, dealing with “emergencies”, which is a concept analogous to disasters.

The Drafting Committee decided to exclude the first sentence in the Special Rapporteur’s initial proposal as it overlapped with draft article 5. In doing so, the Drafting Committee understood that the provision, nonetheless, had to be read in the light of draft article 5, and accordingly, the element of reciprocity implicit in the duty to cooperate, was equally applicable to it.

The focus of the work, therefore, was on refining the language of the remainder of the text, which was the second sentence in the initial proposal of the Special Rapporteur. The Drafting Committee also decided to include an explicit link to the purpose of the cooperation being envisaged, i.e., the protection of persons affected by a disaster, so as to give the draft article the necessary orientation. This was done through the inclusion of the opening phrase “[f]or the purposes of the present draft articles”, thereby connecting the provision to, *inter alia*, draft article 2 establishing the purpose of the draft articles.

The initial proposal by the Special Rapporteur was formulated in terms of what States are obliged to do under the duty to cooperate in draft article 5. On the basis of suggestions made during the Plenary discussion, the provision was recast in more descriptive terms, as an indication of the forms in which the assistance in draft article 5 was being contemplated. Accordingly, the earlier reference to “States and other actors...shall provide” was deleted.

As regards the specific forms of humanitarian assistance listed in the provision, the Drafting Committee decided to tailor the formulation more closely to the context of disasters by placing the reference to humanitarian assistance, which appears last in the Articles on the Law of Transboundary Aquifers, first in the present draft article, since it is the most important form of cooperation when coming to disaster response; and by including a reference to “medical” expertise was added, also given the significance of cooperation in such . The Drafting Committee

decided to retain the reference to scientific cooperation, as an important type of cooperation being envisaged. It also decided to use the word “resources” at the end of the provision, as a more all-encompassing reference, which would include, but not be limited to, “expertise”, as in the version initially proposed by the Special Rapporteur. The word “includes” is meant to indicate that the list is non-exhaustive in nature. It is also understood that the forms of cooperation are without prejudice to what the Commission might decide to do in the future once it turns to the question of prevention and disaster risk reduction.

The Drafting Committee decided to locate the draft article immediately after draft article 5, given its link to that provision, but without prejudice to the possibility that it might be incorporated into draft article 5, possibly as a second paragraph, during the second reading.

The title of draft article 5 *bis* is “Forms of cooperation”, which the Drafting Committee considered as more closely reflecting the content of the draft article.

Draft article 12

Mr. Chairman,

Draft article 12 concerns offers of assistance. The Drafting Committee proceeded on the basis of the proposal made by the Special Rapporteur in his fourth report, at the Commission’s session last year. Following from the debate on the draft article in the Plenary, the Drafting Committee agreed to draw a distinction between the respective positions of States and competent international organizations, on the one hand, and non-governmental organizations on the other. This was done by splitting the draft article into two sentences, with a different emphasis placed in each.

The first sentence deals with the position of States, the United Nations, and other competent intergovernmental organizations. The Drafting Committee proceeded from the stance that the majority of the responses given by States to the question posed by the Commission in its 2011 report, as well as the views expressed in the Plenary of the Commission, gave a clear indication that, at present, there exists no legal obligation on States to provide assistance to affected States.

Likewise, referring to the actions of international organizations in terms of duties was complicated, since they operated in terms of their respective mandates and competencies. The Drafting Committee deleted the reference to the word “shall” in the original proposal of the Special Rapporteur in order to make this clear.

Accordingly, the Drafting Committee took as the basis of its work, the approach of the Special Rapporteur, in his proposal, which focused, instead, on the right of States and international organizations to “offer” assistance, which should not *a priori* be regarded as interference into the internal affairs of the affected State. The key question faced by the Drafting Committee was how best to formulate the text, namely, whether to adopt a formula in terms of a “right to offer”, or to use another formulation such as “can offer” or “may offer”. A plurality in the Drafting Committee preferred the former, and it eventually settled for the phrase “have the right to offer assistance”. This was done for reasons of emphasis: while it was the prevailing view of the Drafting Committee that States were not obliged to provide assistance, nonetheless, as a matter of policy, they were to be encouraged to do so. The sense of the Drafting Committee was that the words “have the right to offer” sent a signal to States and competent international organizations that not only can they offer assistance, but that they were, in fact, encouraged to do so (even if not out of a legal obligation).

I wish to place on record that there was a minority view in the Drafting Committee which had reservations about the use of the word “right” and which preferred the more traditional reference to “may” or “can”. According to this view, the nuance intended by drawing a distinction between “right” and “may” was not conveyed by the actual meanings of the words, and could, instead, lead to unintended interpretations, including on the use of the word “may” in other draft articles.

The Drafting Committee decided to use the word may in the second sentence, by way of introducing a distinction with the position of non-governmental organizations, which were not be considered as being on the same level as States and international organizations, but which, nonetheless, were free to offer assistance to the affected State. The Drafting Committee was reluctant to recognize a “right” to offer assistance on the part of non-governmental organizations, out of recognition that the activities of such entities are governed by national law, which may place restrictions on offers of assistance. The Committee considered a proposal to make this explicit in the draft article itself, but decided to leave it for explanation in the commentary.

The title of draft article 12 is “[o]ffers of assistance”. The earlier version suggested by the Special Rapporteur had included the words “right to” in the title, but the Drafting Committee decided to delete such reference to accord with its decision not to use such formulation within the provision in the context of non-governmental organizations.

Draft article 13

Mr. Chairman,

Draft article 13 deals with the question of the conditions which affected States may place on the provision of external assistance. Following on suggestions made during the Plenary debate that the Drafting Committee consider elaborating on the Special Rapporteur’s proposal for draft article 13, as proposed in his fifth report, the Drafting Committee undertook its work on the basis of a revised proposal by the Special Rapporteur for two draft articles. The second draft article was adopted as a new draft article 14, which I will turn to in due course. Draft article 13 consists of four sentences.

The first sentence recognizes the basic rule that the affected State may place conditions on the provision of external assistance. The Drafting Committee considered a proposal to delete the reference to “external”, but decided to retain it because the scope of the provision is limited to the assistance provided by third States or other assisting actors, such as international organizations, and did not cover assistance provided from internal sources. An earlier version had referred to conditions “imposed” on the provision of assistance, but the Drafting Committee decided to adopt the formula “may place conditions on” which accorded more with the voluntary spirit in which such assistance is provided, while at the same time recognizing the right of the affected State to place conditions, not only in general terms, in advance of a disaster, but also in relation to specific offers of assistance made by specific actors during the response phase.

The second sentence identifies the legal framework within which the permissibility of such conditions is to be evaluated, namely the present draft articles, other applicable rules of international law and the national law of the affected State. It will be explained in the commentary that the reference to national law should not be read as requiring the existence of

national law. While there may exist cases where national law is non-existent or insufficient, the Drafting Committee worked on the assumption that most States have some national law applicable, even if indirectly, to the special context of the response to disasters.

The third sentence establishes the basic requirement that conditions should be informed by the identified needs of the persons affected by a disaster, as well as by the quality of assistance being offered. The phrase “take into account” implies that conditions relating to the identified needs and the quality of assistance are not the only ones which States can place on the provision of external assistance. The word “identified” is understood as implying a duty to justify. It is not just any assertion of needs, but rather the needs of the persons affected by the disaster that are identified and justified, according to the means available to the affected State, and on a continuing basis as the scale and impact of the disaster becomes apparent.

The last sentence places the burden on the affected State, in the process of formulating conditions, to indicate the scope and type of assistance being sought. The Drafting Committee also considered a suggestion to have the last sentence moved to draft article 10, but decided that it to leave this matter to the second reading.

The title of draft article 13 is “Conditions on the provision of external assistance”.

Draft article 14

Mr. Chairman,

Draft article 14 deals with the question of the facilitation of external assistance. As already indicated, the provision has its origins in the proposal for a draft article 13, made by the Special Rapporteur in his fifth report. The Drafting Committee proceeded on the basis of a revised proposal, made by the Special Rapporteur for two new draft articles, the second being what the Commission now has before it as draft article 14.

The initial proposal of the Special Rapporteur dealt with the question of compliance with national law as a specific form of conditionality. However, the Drafting Committee decided to reorient the provision so as to approach the issue from the perspective of facilitation of assistance. In other words, while the provision initially dealt with waiving or making exceptions

to national law, it now more squarely deals with applying national law in order to facilitate assistance.

In paragraph 1, the affected State is required to take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance. The reference to “take the necessary measures, within its national law”, refers to, *inter alia*, legislative, executive and administrative measures, which could include actions taken under emergency legislation. It may also extend to non-legal, practical, measures designed to facilitate assistance. The initial proposal referred to the possibility of the affected State waiving its national law, which proved difficult for some members of the Drafting Committee, as it could have been misinterpreted as envisaging States circumventing their internal rules. It also raised concerns about constitutional limitations on the possibility of waiving internal rules. Furthermore, the possibility of waiver of national law did not cover other scenarios such as the extension of privileges and immunities. The possibility of a State waiving or suspending the application of its national legislation or regulations, in order to facilitate the prompt and effective provision of external assistance, is nonetheless still covered by the concept of “necessary measures”.

Examples of two particularly pertinent areas of assistance are listed in subparagraphs (a) and (b). The words ‘in particular’ are included to indicate that the list in subparagraphs (a) and (b) are not exclusive. Subparagraph (a) deals with personnel, and includes a reference to military personnel out of recognition of the role played by the military in major disaster-response operations. Subparagraph (b) deals with goods and equipment. The commentary will elaborate on both categories, as well as the question of search dogs.

The second paragraph emphasizes the duty of the affected State to facilitate compliance with its national law, by ensuring that its relevant legislation and regulations are readily accessible. Such duty was framed in flexible terms so as not to impose too onerous a burden on the affected State. The reference to “facilitat[ion] of compliance with national law” brings in the element of conditionality, which is the subject of draft article 13, in the context of requirements established by the national law of the affected State.

The title of draft article 14 is “Facilitation of external assistance”.

Draft article 15

Mr. Chairman,

Draft article 15 deals with the question of the termination of assistance, and has its origins in the proposal for a draft article 14, made by the Special Rapporteur in his fifth report. The Drafting Committee worked on the basis of a revised version, prepared by the Special Rapporteur, which took into account the views expressed in the Plenary debate, and which focused less on the issue of termination and more on that of the duration of the external assistance, which would include, by definition, its termination. The Drafting Committee, however, reoriented the provision closer to the initial proposal of the Special Rapporteur, made in his fifth report, by focusing on the point of termination of external assistance.

The provision is comprised of two sentences. The first sentence is concerned with the requirement that the affected State, the assisting State, and as appropriate other assisting actors, should consult each other as regards the termination of the external assistance, including the modalities of such termination. In adopting the present formulation, the Drafting Committee sought to strike a balance between the recognition of right of the affected State to terminate the external assistance it is receiving, which is implicit in the fact that it plays the primary role in the response to the disaster (under article 9, paragraph 2), while at the same time not prejudicing the position of the various actors, including assisting States, which have provided, or are providing, such assistance.

Accordingly, the provision was not drafted in terms of granting the affected State a unilateral right of termination. Instead, the Committee recognized that assisting States and other assisting actors may themselves need to terminate their assistance activities. The provision thus preserves the right of any of the mentioned States, including the affected State, or actors to seek to terminate the assistance being provided, but on the understanding that this is done in consultation with the other States or actors, as appropriate.

The Drafting Committee decided to retain the words “assisting actors”, which are drawn from existing instruments, to describe international organizations and non-governmental organizations, on the understanding that they will be defined in an article on the use of terms to be developed in the future. The provision is drafted in bilateral terms, but does not exclude the

scenario of multiple assisting States providing external assistance. The reference to “modalities” is one to the procedures to be followed in order to bring about the termination of external assistance.

The second sentence establishes a notification requirement, which ought to be given by the party wishing to terminate the external assistance. The provision is deliberately drafted flexibly so as to anticipate notification before, during or after the consultation process, so as to take into account all possibilities.

The draft article should be read in the context of the entire draft articles, and in particular in light of purpose of the draft articles, as indicated in draft article 2, so that the termination of external assistance should not adversely affect persons affected by a disaster.

The title of draft article 15 is “Termination of external assistance”.

Mr. Chairman,

This concludes my introduction of the second 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 as presented.

Thank you.