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**DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS SIXTY-FIRST SESSION**

Rapporteur: Ms. Marie G. JACOBSSON

CHAPTER VII

PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

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CHAPTER VII

PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

A. Introduction

1. 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.
2. At the sixtieth session (2008), the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/598), tracing the evolution of the protection of persons in the event of disasters, identifying the sources of the law on the topic, as well as 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, focusing primarily on natural disasters (A/CN.4/590 and Add.1 to 3) 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.

B. Consideration of the topic at the present session

3. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/615 and Corr.1) analysing the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, and issues relating to the definition of “disaster” for purposes of the topic, as well as undertaking a consideration of the basic duty to cooperate. The report further contained proposals for draft articles 1 (Scope), 2 (Definition of disaster) and 3 (Duty to cooperate). The Commission also had before it the Memorandum by the Secretariat (A/CN.4/590 and Add.1-3), as well as written replies submitted by the Office for the

Coordination of Humanitarian Affairs of the United Nations Secretariat and the International Federation of the Red Cross and Red Crescent Societies to the questions addressed to them by the Commission in 2008.

4. The Commission considered the second report from its 3015th to 3019th meetings, from 6 to 10 July 2009, respectively.

5. At its 3019th meeting, on 10 July 2009, the Commission referred draft articles 1 to 3 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 a Working Group to discuss the draft article.

6. At its ... meeting, on ... July 2009, the Commission received the report of the Drafting Committee and took note of draft articles 1 to 5, as provisionally adopted by the Drafting Committee (A/CN.4/L. ...)

1. Introduction by the Special Rapporteur of the second report

7. The Special Rapporteur explained that his second report sought to provide concrete guidance in furtherance to the questions posed in the preliminary report. He recalled that the previous year's discussions in the Commission and the Sixth Committee had centred on four main questions: (1) the proper understanding of "protection of persons" in the context of the topic; (2) whether the Commission's work ought to be limited to the rights and obligations of States, or whether it should include the conduct of other actors; (3) which phases of disaster should be addressed; and (4) how to define a "disaster". In addition, varying opinions existed as to which principles should inform the Commission's work, and in particular the relevance of the emerging principle of the Responsibility to Protect.

8. The Special Rapporteur recalled that several States in the Sixth Committee had supported a rights-based approach to the topic. He noted that the rights-based approach did not endeavour to set up a regime that competed with or was redundant to human rights or other related regimes. Rather, it provided a framework in which the legitimacy and success of a disaster relief effort could be assessed according to how the rights of affected parties are respected, protected and

fulfilled. At the same time, the rights-based approach was not exclusive, and had to be informed by other considerations when appropriate, including the needs of disaster victims. Needs and rights were two sides of the same coin.

9. The Special Rapporteur further noted that the Commission was dealing with two different relationships: that of States *vis-à-vis* each other, and that of States *vis-à-vis* affected persons. The conceptual distinction suggested a two-stage approach to the discussion, focusing first on the rights and obligations of States *vis-à-vis* each other, and then the rights and obligations of States *vis-à-vis* affected persons.

10. Draft article 1¹ sought to delimit the scope of the project by maintaining a primary focus on the actions of States, and their ability to ensure the realization of the rights of persons in the event of disasters. It further reflected the fact that a disaster-response effort could not adequately account for the rights of affected persons without endeavouring to respond to their needs in the face of such an event. The phrase “in all phases of a disaster” underscored the project’s primary focus on disaster response and early recovery and rehabilitation, while not foreclosing the consideration at a later stage of preparedness and mitigation at the pre-disaster phase. As regards the concept of “the Responsibility to Protect”, the Special Rapporteur recalled the 2009 report of the Secretary-General on implementing the responsibility to protect, which clarified that the concept did not apply to disaster response.²

¹ Draft article 1, as proposed by the Special Rapporteur, reads as follows:

Scope

The present draft articles apply to the protection of persons in the event of disasters, in order for States to ensure the realization of the rights of persons in such an event, by providing an adequate and effective response to their needs in all phases of a disaster.

² A/63/677, para. 10 (b).

11. In his proposal for draft article 2,³ the Special Rapporteur provided a definition of “disaster” based on the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998,⁴ which followed the approach of defining a “disaster” as a “serious disruption of the functioning of society”. The proposal of the Special Rapporteur, however, excluded armed conflict to preserve the integrity of international humanitarian law, which provided a comprehensive body of rules applicable in that situation. Furthermore, contrary to the Tampere text, the proposed definition required actual harm, so as to limit the scope of the project to situations that actually called for the protection of persons. The proposed definition also omitted any requirement of causation since a disaster could be the result of virtually any set of factors, natural, man-made or otherwise. Nor did the draft definition require that the disaster “overwhelm a society’s response capacity”, which would shift the focus of the topic away from the victims of a disaster.

12. Draft article 3⁵ reaffirmed the international legal duty of States to cooperate with one another and envisaged, in appropriate circumstances, cooperation with non-State actors. It was recalled that cooperation was a fundamental principle of international law, enshrined in the

³ Draft article 2, as proposed by the Special Rapporteur, reads as follows:

Definition of disaster

“Disaster” means a serious disruption of the functioning of society, excluding armed conflict, causing significant, widespread human, material or environmental loss.

⁴ United Nations, *Treaty Series*, vol. 2296, p. 5.

⁵ Draft article 3, as proposed by the Special Rapporteur, reads as follows:

Duty to cooperate

For the purposes of the present draft articles, States shall cooperate among themselves and, as appropriate, with:

- (a) Competent international organizations, in particular the United Nations;
- (b) The International Federation of Red Cross and Red Crescent Societies; and
- (c) Civil society.

Charter of the United Nations and in the Friendly Relations Declaration.⁶ The importance of international cooperation in the context of disaster response had, likewise, been reaffirmed by the General Assembly, most recently in resolution 63/141, of 11 December 2008, and numerous international instruments recognized the importance of regional and global cooperation and coordination of risk-reduction and relief activities. In its Memorandum, the Secretariat had noted that cooperation was “a *conditio sine qua non* to successful disaster relief actions”.⁷ The principle had also been the subject of a number of draft articles developed by the Commission on various topics. The Special Rapporteur further noted that other relevant principles merited restatement as well and would be the subject of proposed draft articles in subsequent reports, particularly in connection with assistance and access in the event of disasters.

2. Summary of the debate

(a) Draft article 1 (Scope)

A rights- and needs-based approach to the topic

13. Support was expressed for the rights-based approach to the topic, as a starting point. It was maintained that the human rights protection mechanism provided the best protection for the alleviation of the suffering of victims. It was suggested that a “rights-based approach” should take into account all categories of rights, including, with special emphasis, economic and social rights which might be more seriously affected by disasters. Likewise, both individual and collective rights were applicable since special groups of people, such as refugees, minorities and indigenous peoples might be made more vulnerable in the case of disasters. At the same time, it was suggested that the draft article limit itself to a general assertion of the applicability of human rights, without specifying which rights, or expressly qualifying their applicability in the context of disasters.

14. Support was further expressed for the Special Rapporteur’s readiness to complement the rights-based approach with a consideration of the needs of persons, a needs-based approach

⁶ *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV) of 24 October 1970.

⁷ A/CN.4/590, para. 18.

being the one followed by the International Federation of the Red Cross and Red Crescent Societies. Support was also expressed for the view of the Special Rapporteur that no dichotomy existed between the rights- and needs-based approaches. It was also suggested that emphasis be given to the relationship between poverty, underdevelopment and exposure to disaster situations, as well as to the plight of developing countries, particularly of the least-developed.

15. Other members disagreed with the equation of “rights” and “needs”, maintaining that each concept existed at a different level of generality. While “rights” referred to a legal concept, “needs” implied a reference to particular factual situations. The concern was expressed that an instrument declaring the rights of persons affected by disasters may not provide the pragmatic response that the topic needs since in emergency situations certain human rights are derogable. In the event of disasters, individual interests, collective interests and the interest of public order are frequently interwoven. With limited resources these interests often have to be balanced against the particular circumstances. The rights-based approach alone did not seem to provide answers to these important questions.

16. It was further pointed out that, in the event of disasters, it is the affected State which has first and foremost the right and obligation to provide assistance in connection with a disaster which has occurred on the territory under its control. The view was expressed that the rights-based approach seemed to imply the contrary, namely that the affected State must always accept international aid, an obligation that was not based on State practice. Instead, it was pointed out that the affected State is entitled to ensure proper coordination of efforts of relief, and may refuse some kinds of assistance; and it was for the Commission to consider what the consequences would be if the affected State did not comply with the obligation not to reject a *bona fide* offer of assistance, or with a request for access to victims. It was suggested that the Commission should bear in mind the reasons for the unwillingness of some States to resort to international assistance.

17. Agreement was expressed with the Special Rapporteur’s conclusions on the non-applicability of the concept of responsibility to protect, although some expressed the view that any such decision by the Commission should not prejudice the possible relevance of the concept in the future.

Scope ratione materiae

18. While support was expressed for draft article 1, several members queried the phrase “adequate and effective response”. Some were of the view that “adequate” was sufficient. The view was expressed that the draft article went beyond the question of scope, by including elements on the objective of the draft articles. It was accordingly proposed to divide the draft article into two. General support was also expressed for not drawing a strict distinction between natural or human causes, which was not always possible to do in practice. It was also suggested to invert the reference to “rights” and “needs” as presented in the draft article.

Scope ratione personae

19. Support was expressed for the extension of the scope of the draft articles to cover the activities of non-State actors. In addition, support was expressed for the Special Rapporteur’s preference for dealing first with State actors, and in particular the primary role of the affected State, leaving the consideration of non-State actors to a later stage.

Scope ratione temporis

20. General support was expressed for the Special Rapporteur’s proposal to focus first on response to disasters which have occurred, leaving the question of prevention and disaster risk reduction and mitigation for a later stage of the work. Several members emphasized the importance of considering the pre-disaster stage.

(b) Draft article 2 (Definition of disaster)

21. As regards the proposed definition of “disaster” in draft article 2, while support was expressed for a definition framed in terms of the effect of the harm incurred, in line with the Tampere Convention, other members expressed a preference for defining it in terms of the occurrence of an event. It was noted that the Tampere Convention was adopted in a special context (telecommunications), and that a more general definition of disaster was necessary.

22. Several members queried whether the adjectives “serious”, “significant” and “widespread” established too high a threshold. The concern was expressed that the affected State could refuse international assistance on the grounds that the disaster was not sufficiently serious. It was

further suggested that the definition include some causal elements in order to properly exclude other crises, such as political and economic crises. In terms of another view, it was preferable not to include a requirement of causality, which could be difficult to prove in practice.

23. Support was also expressed for limiting the definition to actual loss. Other members suggested inserting references to imminent threats of harm, as well as including situations that seriously undermine crops, such as pests and plant diseases that cause famine, and severe drought or other situations where access to food and water is seriously affected. It was also proposed that damage to and destruction of both property and the environment should be considered, at least insofar as such damage affects persons.

24. It was pointed out that the question of whether to include humanitarian assistance in the context of armed conflict was more a matter for the scope of the draft articles than the definition. A preference was expressed for treating the exclusion of “armed conflicts” in a without prejudice clause dealing with the application of international humanitarian law. Views were expressed that there may be situations in which it would be difficult to separate a situation of an armed conflict from a pure disaster and that the most important matter was to ensure that the *lex specialis* of international humanitarian law continue to apply in situations of armed conflict. There was a suggestion for a need for a “flow-chart” describing the roles of various actors in disaster response so as to enable the Commission to identify when a particular legal need might occur.

(c) Draft article 3 (Cooperation)

25. Several members spoke in favour of draft article 3 as a general assertion of the central role that international cooperation plays in the protection of persons in the event of disasters. It was maintained that there existed a strong argument for requiring the affected State to cooperate with other States, subject to certain conditions, including respect for the principle of non-intervention. This could also be extended to cooperation with the United Nations, other intergovernmental organizations, and entities and non-governmental organizations whose role in international disasters has been recognized by the international community. Likewise, an affected State is entitled to receive cooperation from other States and intergovernmental organizations, upon request.

26. At the same time, it was maintained that the provision implicitly suggested that a State must favourably consider international assistance. However, international assistance was a supplement, as opposed to a substitute, to the actions of the affected State. Furthermore, support was expressed for the caution advised by the Special Rapporteur that the principle of cooperation should not be stretched to trespass on the sovereignty of affected States. At the same time, it was maintained that the recognition of the primary responsibility of affected States to provide assistance to the victims of disasters should not be understood as leaving the international community in the position of a passive observer in situations where persons affected by disasters are deprived of the basic protection of their needs and rights.

27. A view was expressed stressing the different character of cooperation with the United Nations as compared with other international organizations. Moreover, the different obligations concerning cooperation with ICRC and IRCF were mentioned.

28. Concerns were expressed regarding the phrase “civil society”. Several members noted that the term was not an accepted legal category. Caution was advised in imposing on the affected State an obligation to cooperate with its own domestic non-governmental organizations.

29. Some members expressed concerns about the provision, since in their view it did not clearly enunciate the scope of the obligation of cooperation. A preference was thus expressed for further reflection on the draft article, in anticipation of an exposition of other applicable principles. Doubts were also expressed about the assertion that solidarity constitutes an international legal principle.

3. Concluding remarks of the Special Rapporteur

30. The Special Rapporteur observed that the plenary discussion had been constructive, mainly in that it brought about a good measure of rapprochement, and not the least because it had touched upon a number of questions that would be dealt with in future reports. It was his understanding that the rights-based approach had received wide support since a focus on the rights of individuals provided the most solid, if not the only, legal basis for the work of codifying and progressively developing the law pertaining to the topic. He recalled that such approach had to be understood in two senses: requiring particular attention be paid to the needs and concerns of individuals who are suffering; and as a reminder that people have legal rights when disaster

strikes, thereby reaffirming the place of international law in the context of disasters. He also reiterated that, while there were serious questions regarding what is permissible under international law should the affected State fail to satisfy the rights of individuals, a rights-based approach did not mean that any human rights violations justify forced humanitarian intervention. The rights-based approach merely created a space to assess the prevailing legal situation, in light of both the State's rights as a sovereign subject of international law, and of its duty to ensure the rights of individuals in its territory.

31. He noted that members had supported the second report's understanding of the dual nature of the protection of persons and had agreed that the Commission should begin by establishing the rights and duties of States *vis-à-vis* each other before focusing on the rights of States *vis-à-vis* the persons in need of protection. He pointed, furthermore, to significant agreement on other elements of the topic's scope: to focus first on the disaster proper and immediate post-disaster phases without prejudice to work at a later stage regarding preparedness and mitigation in the pre-disaster phase; as well as to consider the rights and obligations of States, without prejudice to provisions relating to the conduct of non-State actors.

32. With respect to draft article 1 entitled "Scope", he recalled the various suggestions made during the plenary debate, and agreed with the basic suggestion of dividing the article into two draft articles, one addressing the scope proper and the other addressing the purpose.

33. Regarding draft article 2, the Special Rapporteur observed that all members expressly or implicitly agreed with the need to include a definition of disaster in the set of draft articles. There was also agreement that it was impractical to make a distinction between natural and man-made disasters, and that the definition may encompass material and environmental loss, to the extent that such loss affects persons, and that it should require some actual harm, even though some members emphasized that imminent harm should be considered sufficient.

34. He noted, *inter alia*, the preference of some members to include a reference to causation, as well as a desire to focus on an "event or chain of events", instead of the consequences. He further observed that there was strong support for the exclusion of armed conflict from the

definition although it was generally felt that some alternate formulation would be necessary to avoid overlap with international humanitarian law while capturing all situations that could be properly called “disaster”.

35. As regards draft article 3, the Special Rapporteur observed that all those who spoke recognized that the duty to cooperate is well established in international law as the expression of the Charter principle of cooperation, and that it lay at the very core of the present topic. Nevertheless, he acknowledged that there existed the view that before a decision could be taken to refer the proposed text to the Drafting Committee it would be necessary for the Commission to discuss the other principles which were to be included in the draft articles and to examine the corresponding formulations to be advanced by the Special Rapporteur. He confirmed that other relevant principles, including humanity, impartiality, neutrality and non-discrimination as well as sovereignty and non-intervention, merited restatement and would be the subject of proposed draft articles in subsequent reports, particularly in connection with assistance and access in the event of disasters. He did not believe it necessary to suspend work on the draft article pending his formulation of new proposals. He noted the various drafting suggestions that were made, including that the provision needed to more sharply differentiate between the duty on member States to cooperate with the United Nations under the Charter and duties owed to other organizations and entities.
