

Ireland

Statement by

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Agenda item 79

Report of the International Law Commission on the work of its 62nd session

Chapter VII:

Protection of persons in the event of disaster

Madam Chair,

1. As this is the first time for me to take the floor, allow me to congratulate you and the other members of the Bureau on your election. I can assure you of the full cooperation of my Delegation.

2. Ireland welcomes the opportunity to comment on the Report of the International Law Commission on the work of its 62nd session. I would like to focus on Chapter VII, the Protection of Persons in the Event of Disaster, in particular detail. However I first wish to make some more general remarks concerning the Commission's Report and work.

3. Before I do, I would like to express my Delegation's sincere sorrow on the death of Professor Paula Escarameia. Her untimely passing deprives the Commission and all of us in the international law community of a valued colleague and friend.

General remarks regarding the Commission's Report

4. Ireland places great value on the work of the Commission. We are therefore concerned to ensure that the conditions exist for a high-quality engagement between States and the Commission, including through the annual debates on this item at the 6th Committee.

5. Availability of the annual Report of the Commission only a short time before the opening of the UNGA session can create difficulties in this regard. We are therefore somewhat concerned to note that, as set out at paragraph 405 of the Commission's Report, the Commission has decided that its upcoming 63rd Session would be held from 26 April to 3 June and from 4 July to 12 August 2011. Ireland wishes to point out that, subject to the availability of appropriate meeting space, earlier time-slots for future sessions of the Commission would be preferable in order to facilitate earlier production of the Commission's Report. This would contribute to a fuller and more in-depth engagement with States at the 6th Committee.

Other topics before the Commission

- Immunity of State officials and the obligation to extradite or prosecute

6. Moving on to substantive topics on the agenda of the Commission, Ireland was disappointed that the Commission was not in a position to consider the topic of Immunity of State Officials at its last session. In our view, this topic is of great importance both on its own merits and also having regard to its links to a number of other issues currently on the agenda at 6th Committee and indeed the Commission itself. We hope that the Commission will be in a position to consider this important matter at its 63rd session.

7. Regarding the obligation to extradite or prosecute, we note with interest the survey of relevant multilateral Conventions prepared by the Secretariat and the related discussion of the Working Group on the framework for consideration of the item. The elements identified in that framework - namely the legal basis, scope and content of the obligation as well as the conditions to trigger the application of the obligation - provide a useful map of the possible future work of the Commission on this issue. We hope the Commission has the opportunity to advance its consideration of this topic, as a priority, at its next session.

- Settlement of disputes

8. Ireland notes with interest the short discussion held by the Commission on Settlement of Dispute Clauses under the agenda item on Other Matters. We would be interested to hear the outcome of the Commission's deliberations, in due course. In our view, illustrative model clauses for acceptance of the jurisdiction of the International Court of Justice under article 36

of its Statute may be useful, on the understanding that States are free to reflect their particular concerns and needs in formulating the terms of their acceptance of compulsory jurisdiction. We are pleased that the Commission will continue discussion of this issue at its next session under the same agenda item and we look forward to the forthcoming working paper on the topic.

Madam Chair,

Protection of Persons in the Event of Disaster

9. I turn now to Chapter VII of the Commission's Report, on the Protection of Persons in the Event of Disaster. Let me first thank Special Rapporteur Valencia-Ospina for his work to date on this important topic, including in particular his Third Report which was before the Commission at its last session. We will comment on both the draft commentaries provisionally adopted by the Commission on draft articles 1 to 5; and the four additional draft articles provisionally adopted by the Drafting Committee (draft arts 6-9).

Commentaries on draft articles 1-5:

10. The commentary on draft article 1 (paragraph 331 of the Commission's Report) refers at point 3 to the possibility of including legal persons within the scope *ratione personae* of the draft articles in future. However, the framework – including the commentary on draft article 1 – is qualified in a number of respects by issues which cannot be applied to legal persons, such as a requirement to judge essential needs against “survival” and human need. In all the circumstances, Ireland has a preference for the draft articles to remain focused only on *natural persons* affected by disaster.

11. We note that the Commentary on draft article 1 clarifies that the draft articles are not tailored to any specific disaster type or situation in mind, but are intended to be applied flexibly to meet needs arising from all disasters, regardless of their transboundary effect. The commentaries also confirm that, although primarily focused on the post-disaster phase, the draft articles could also where appropriate cover the pre-disaster phase including disaster risk reduction and prevention. The Commentary on draft article 3 also recognises that the applicability of the draft articles is not limited by the *cause* of the disaster, whether it be natural, man-made or a complex emergency. Ireland welcomes all the above confirmations, with which we fully agree.

12. We note the Commission's confirmation that the draft articles are not limited *ratione loci* to activities in the arena of the disaster, but also cover those within assisting States and transit States. We agree with this position in principle, but consider that it would be preferable to explicitly include, at a later stage in the process, draft articles identifying and providing for the varying issues and responsibilities which may arise for assisting and transit States. Concrete issues such as access and transmit through non-affected States or territories for persons or supplies could usefully be provided for in these articles.

13. We note and welcome the Commission's Commentary on draft article 2 concerning the purpose of the draft articles. However we suggest that the commentary on this draft article could usefully be expanded to state clearly the Commission's existing view (with which we agree) that the draft articles do not relate to the principle of Responsibility to Protect.

14. The content of the Commentary on draft article 3 (definition of disaster) is of course particularly important. One of the key causation requirements – which the Commission acknowledges as setting a high threshold – is the test of “seriously disrupting the functioning of society”. The Commentaries suggest that the Commission refrain from providing further descriptive or qualifying elements, so as to leave some discretion in practice. However as

pointed out by Ireland at the 64th session of the General Assembly - there may be unintended consequences to using the effects of a disaster on “society” as the key test for applicability of the framework, without further elaboration. It is unclear whether the term applies to a State or whether a region within a State would suffice. It is further unclear what the relevant society and/or test is in the context of cross-border emergencies. This will also have implications for the applicability of later draft articles to the affected state. Although we in general agree on need to preserve flexibility in the draft articles, if this issue is not considered more fully, the applicability of the framework may be called into question at the very times when speedy responses are necessary. We would welcome further clarity on this point, either through a revised Commentary or in later draft articles.

15. We welcome the clarifications provided in the Commentary on draft article 4, but note our continued preference for a “without prejudice” clause in the final text.

16. We appreciate that the commentaries on draft article 5 refer to cooperation not only among States but also with international and non-governmental organisations; and welcome the fact that the particular issues arising in respect of cooperation with such organisations will be dealt with in future provisions.

Draft articles provisionally adopted by the Drafting Committee at ILC62:

17. I turn now to the four draft articles provisionally adopted by the Drafting Committee at the Commission’s last session, three of which relate to broad principles underpinning the general approach to disaster response.

18. First and in general, we think it would be a worthwhile exercise for the Commission to identify the existing legal bases for the principles invoked, to permit us to more readily distinguish between issues on which the Commission is engaged in codification and those on which it is seeking to progressively develop international law.

19. Further, we consider that a distinction might usefully be made between draft articles 6 (humanitarian principles) and draft articles 7 and 8 (human dignity and human rights, respectively).

20. We take the view that draft article 6, being context-specific, could usefully be included in the draft articles. However it would be important to seek to identify to what extent the principles reflect existing international law. We agree that there is value in including the standard of non-discrimination in delivery of relief in the draft articles. This would also match well with the concrete issues which we hope the draft articles will address, such as requests and consent to assistance; access; identification and immunities of relief personnel; activities in relation to preparedness for imminent disaster, risk-mitigation and so on.

21. Ireland wonders whether the principle of neutrality, more familiar to us from the context of IHL, might cause confusion and unnecessary complications. In the context of disaster relief, an obligation of non-discrimination should be sufficient to capture the imperative that disaster relief should not be delivered or withheld from persons or groups on any basis other than needs-assessment. We would also doubt the utility of including a reference to proportionality.

22. Concerning draft articles 7 and 8, we have no difficulty recognising that the principle of human dignity and the human rights which flow from that principle should be the basis on which our responses to disasters are grounded. However, we are of the view that these issues would more appropriately be addressed in a preambular section to the draft articles.

Madam Chair,

Responsibility / Consent

23. The final key issue addressed in the Third Report of the Special Rapporteur and associated Commission debate are the linked questions of the primary responsibility of the affected State and of consent.

24. We note that the Special Rapporteur during Commission debates confirmed his intention to clarify the scope and limitations of the exercise by the affected State of its primary responsibility in his next Report. We welcome and look forward to this input. In our view, it is crucial that this element of the draft is robust; and we consider this is an area in which the draft articles should seek to codify rather than develop international law. The differing views of the members of the Commission on responsibility are noted with interest in this regard. Given these differences of view – as well as the central importance of the issue – we consider that further discussion on this question within the Commission would be of great value.

25. Ireland is also of the view that the Commission might usefully consider the legal rules applicable where a State lacks either the capacity or the will to exercise its responsibility.

26. We were interested also in the short reference contained in the Commission's Report at paragraph 324 on the question of whether the requirement of consent applies only to assisting *States* or also to *NGOs and other bodies*. As an initial view, we lean towards the view that assisting States require consent, whereas NGOs and other bodies must simply comply with the internal laws of the affected State.

27. Ireland notes the Special Rapporteur's view of consent as applying throughout the period of relief activities by external actors, without further elaboration. If the overriding intention of the framework is to focus on the needs of persons affected by disaster, consideration of whether current international law prevents unreasonable or unfounded withdrawal of consent, to the detriment of the affected persons, would be of value. Examination of this matter would of course relate closely to consideration by the Special Rapporteur in his next Report of the scope of the primary responsibility of the affected State.

Madam Chair,

28. Ireland looks forward to further engaging with the Commission, as its work on this important topic progresses.

Thank you.