

Chapter IX

PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

A. Introduction

264. 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.⁵⁷⁸

265. At its sixtieth session (2008), the Commission had before it the preliminary report of the Special Rapporteur,⁵⁷⁹ 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 the 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,⁵⁸⁰ focusing primarily on natural disasters 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.

266. The Commission considered, at its sixty-first session (2009), the second report of the Special Rapporteur⁵⁸¹ analysing the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, and issues relating to the definition of “disaster” for the purposes of the topic, as well as undertaking a consideration of the basic duty to cooperate. The report contained proposals for draft articles 1 (Scope), 2 (Definition of disaster) and 3 (Duty to cooperate). The Commission also had before it written replies submitted by the Office for the Coordination of Humanitarian Affairs and the International Federation of Red Cross and Red Crescent Societies (IFRC) to the questions addressed to them by the Commission in 2008.

267. At its 3029th meeting, on 31 July 2009, the Commission took note of draft articles 1 to 5 as provisionally adopted by the Drafting Committee.⁵⁸²

268. At its sixty-second session (2010), the Commission adopted draft articles 1 to 5 at the 3057th meeting,

held on 4 June 2010. The Commission also had before it the third report of the Special Rapporteur⁵⁸³ providing an overview of the views of States on the work undertaken by the Commission, a consideration of the principles that inspire the protection of persons in the event of disasters, in its aspect related to persons in need of protection, and a consideration of the question of the responsibility of the affected State. Proposals for the following three further draft articles were made in the report: draft articles 6 (Humanitarian principles in disaster response), 7 (Human dignity) and 8 (Primary responsibility of the affected State).

269. At its 3067th meeting, on 20 July 2010, the Commission took note of draft articles 6 to 9, as provisionally adopted by the Drafting Committee.⁵⁸⁴

B. Consideration of the topic at the present session

270. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/643), providing an overview of the views of States on the work undertaken by the Commission thus far and a consideration of the responsibility of the affected State to seek assistance when its national response capacity is exceeded, the duty of the affected State not to arbitrarily withhold its consent to external assistance, and the right to offer assistance in the international community. Proposals for the following three further draft articles were made in the report: draft articles 10 (Duty of the affected State to seek assistance), 11 (Duty of the affected State not to arbitrarily withhold its consent) and 12 (Right to offer assistance).

271. The Commission considered the fourth report at its 3102nd to 3105th meetings and 3107th meeting, from 11 to 14 July and 18 July 2011.

272. At its 3107th meeting, on 18 July 2011, the Commission referred draft articles 10 to 12 to the Drafting Committee.

273. The Commission adopted the report of the Drafting Committee on draft articles 6 to 9, which had been considered at the Commission’s previous session, at the 3102nd meeting, held on 11 July 2011. The Commission further adopted the report of the Drafting Committee on draft articles 10 and 11 at the 3116th meeting, held on 2 August 2011 (sect. C.1 below).⁵⁸⁵

⁵⁷⁸ *Yearbook ... 2007*, vol. II (Part Two), paras. 375 and 386.

⁵⁷⁹ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598.

⁵⁸⁰ A/CN.4/590 and Add.1–3 (mimeographed; available from the Commission’s website, documents of the sixtieth session).

⁵⁸¹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615.

⁵⁸² A/CN.4/L.758 (mimeographed; available from the Commission’s website, documents of the sixty-first session).

⁵⁸³ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/629.

⁵⁸⁴ A/CN.4/L.776 (mimeographed; available from the Commission’s website, documents of the sixty-second session).

⁵⁸⁵ The Drafting Committee was unable to complete its consideration of draft article 12, owing to a lack of time.

274. At its 3122nd meeting, on 9 August 2011, the Commission adopted commentaries to draft articles 6 to 11 (sect. C.2 below).

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR
OF HIS FOURTH REPORT

275. In introducing his fourth report, the Special Rapporteur recalled that he had, in his third report,⁵⁸⁶ proposed a provision (contained in his proposal for draft article 8, para. 2), on the principle of the consent of the affected State. In his fourth report, he sought to build on that proposal. The broad concept of protection he had proposed since his first report called for the recognition of the tensions underlying the link between protection and the principles of respect for territorial sovereignty and non-interference in the internal affairs of the affected States.

276. Following the adoption of draft article 9 (The duty of the affected State to ensure the protection of persons on its territory), it was necessary to also consider the obligations of the same State when the magnitude of the disaster exceeded the limits of its response capacity, including the duty to seek assistance (draft article 10).⁵⁸⁷ At the same time, receiving international relief assistance depended on the consent of the affected State, which could not be withheld arbitrarily (draft article 11).⁵⁸⁸ The principles of sovereignty and non-interference, implied in the requirement of consent, were not to be considered in isolation but rather in the light of the responsibilities of the State in exercising its sovereignty. Such obligations could be seen horizontally in the relationship of the State with the international community, as well as vertically in relation to the people in the State who had suffered the disaster and are under its jurisdiction.

277. Whereas draft articles 10 and 11 dealt with the duties of the affected State, draft article 12⁵⁸⁹ concerned the right of third parties, including States, international organizations or non-governmental organizations (NGOs), to offer assistance. It served to acknowledge the legitimate interest of the international community to protect persons in the event of a disaster, which had been identified as far back as 1758 by Emer de Vattel.⁵⁹⁰ Since

such interest of the international community was to be viewed in the broader context of the primary responsibility of the affected State to protect persons affected by disasters, the offer of assistance was an expression of solidarity, based on the principles of humanity, neutrality, impartiality and non-discrimination (draft article 6). There thus existed a complementarity between the primary responsibility of the affected State and the right of non-affected States to offer assistance. Such a holistic approach, endorsed in, for example, the Hyogo Declaration of 2005⁵⁹¹ and other texts analysed in the report, had long been part of the evolution of international law, including international humanitarian law. It was pointed out that the interest of the international community in the protection of persons in the event of disasters could be effectively channelled through the timely intervention of international organizations and other humanitarian agents, adhering to the principles in draft article 6. Furthermore, the recognition of the importance of the contribution of NGOs, and their right to offer assistance, had been confirmed by recent practice. It was also recalled that the provision of assistance was subject to the consent of the affected State. Accordingly, the offer of assistance could not, in principle, be subject to the acceptance by the affected State of conditions that represented a limitation on its sovereignty. Draft article 12 simply asserted that offers of assistance were not, *ipso facto*, illegitimate, nor could they be construed as unlawful interference in the internal affairs of the affected State.

2. SUMMARY OF THE DEBATE ON DRAFT ARTICLE 12

278. In accordance with the Commission's practice, the present report contains only a summary of the debate on draft article 12. It does not contain a summary of the debate on draft articles 10 and 11, as these draft articles and commentaries thereto have been provisionally adopted at the current session.⁵⁹² A full account of the debate on draft articles 10, 11 and 12 is to be found in the relevant summary records,⁵⁹³ which will be placed on the Commission's website in due course.⁵⁹⁴

279. Support was expressed for draft article 12, and for the general proposition that offers of assistance should not be viewed as interference in the internal affairs of the affected State, subject to the condition that the assistance offered did not affect the sovereignty of the affected State as well as its primary role in the direction, control, coordination and supervision of such relief and assistance (draft article 9, para. 2). Agreement was also expressed with the Special Rapporteur's view that offering assistance in the international community is the practical manifestation of solidarity. At the same time, it was proposed that the

⁵⁸⁶ See footnote 583 above.

⁵⁸⁷ Draft article 10 read as follows:

"Duty of the affected State to seek assistance"

"The affected State has the duty to seek assistance, as appropriate, from among third States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations if the disaster exceeds its national response capacity."

⁵⁸⁸ Draft article 11 read as follows:

"Duty of the affected State not to arbitrarily withhold its consent"

"1. Consent to external assistance shall not be withheld arbitrarily if the affected State is unable or unwilling to provide the assistance required.

"2. When an offer of assistance is extended pursuant to draft article 12 of the present draft articles, the affected State shall, without delay, notify all concerned of its decision regarding such an offer."

⁵⁸⁹ Draft article 12 read as follows:

"Right to offer assistance"

"In responding to disasters, States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations shall have the right to offer assistance to the affected State."

⁵⁹⁰ E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*,

vol. III, book II, Washington, D.C., Carnegie Institution of Washington, 1916, chap. I, pp. 114–115.

⁵⁹¹ Hyogo Declaration 2005, Report of the World Conference on Disaster Reduction, held in Kobe, Hyogo, Japan, 18–22 January 2005 (A/CONF.206/6 and Corr.1), chap. 1, resolution 1.

⁵⁹² For the text of these draft articles and commentaries thereto, as provisionally adopted by the Commission, see section C.2 below.

⁵⁹³ *Yearbook ... 2011*, vol. I, summary records of the 3102nd to 3105th meetings and 3107th meeting.

⁵⁹⁴ See chapter XIII below, paras. 403–405.

provision more clearly define the circumstances where an affected State could reject offers of assistance and ensure that it has the appropriate freedom to do so. Hence, the view was expressed that the right to offer assistance should not extend to assistance to which conditions were attached that were unacceptable to the affected State. Furthermore, the assistance offered had to be consistent with the provisions of the draft article and, in particular, should not be offered or delivered on a discriminatory basis.

280. Some members pointed to the difficulties in referring to the “right” to offer assistance, especially when it came to NGOs, since it implied that NGOs enjoyed the same rights as States. It was suggested that the provision merely indicate that “third actors may offer assistance”, thereby providing an authorization and not a right. Other suggestions included more clearly differentiating between assistance by non-affected States and intergovernmental organizations, and that provided by NGOs; as well as referring to NGOs “working with strictly humanitarian motives”.

281. It was also suggested that the provision avoid a reference to legal “rights” since offers of assistance from the international community were typically extended as part of international cooperation as opposed to an assertion of rights. It was recalled that, in many cases, the mere expression of solidarity was equally important as were offers of assistance. The view was also expressed that Article 2, paragraph 7, of the Charter of the United Nations limited the ability of the international community to offer assistance to affected States. In terms of a contrary view, the contemporary understanding of that provision of the Charter of the United Nations allowed for limitations and exceptions, especially in the context of the protection of human rights. It was also pointed out that draft article 12 should not be interpreted to imply permission to interfere in the internal affairs of the affected State: it merely reflected a right to offer assistance, which the affected State may refuse (subject to draft article 11).

282. In terms of a further view, draft article 12 was superfluous: the right of a State to offer assistance to another State that has faced a disaster followed from the notion of State sovereignty. In the absence of a specific rule of prohibition, all persons (both natural and legal) had the right to offer assistance to an affected State, and the provision, if it were retained, could be reformulated to reflect as much.

283. In terms of a further set of views, the provision could be recast as a positive duty on the international community to offer assistance. Other members were of the view that it would go too far to recognize a specific legal obligation on third States or organizations to give assistance. It was stated that the right of an affected State to seek international assistance was complemented by the duty on third States and organizations to consider such requests, and not necessarily the duty to accede to them. It was suggested that the right of the international community to offer assistance could be combined with an encouragement by the Commission to actually make such offers of assistance on the basis of the principles of cooperation and international solidarity.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

284. The Special Rapporteur recalled some suggestions that had been made on the consideration of existing practice in the process of developing proposals for draft articles on the present topic. He pointed out that by “practice” in the context of the progressive development of international law, the framers of the statute of the International Law Commission had also contemplated that which was reflected in law which was insufficiently developed on a given subject. Nevertheless, the debate had left the impression that some members used the term “practice” in a much wider, almost colloquial sense, when focusing on concrete instances of what was characterized as “bad” as opposed to “good” practice. In his view, a more elaborate recounting of the specific practice of States and other actors in this area would not have yielded different conclusions to that drawn in his report, and he endorsed the position taken by some members that the Commission ought to pay careful attention to texts adopted by States and by other actors such as the IFRC, which represented a distillation of practice by those with significant experience in the field. He also recalled that the Commission had, in 2008, welcomed any information from States concerning their practice under this topic, including examples of domestic legislation.⁵⁹⁵ To date, the Commission had received submissions from only three States.

285. It was also pointed out that, in addition to a handful of multilateral, mainly regional, agreements and a somewhat larger number of bilateral treaties on mutual assistance, the bulk of the available material on what might be termed the law of disaster relief was constituted by non-binding instruments, adopted primarily at the intergovernmental level but also by private institutions and entities. The very notion of a disaster relief law was an emerging one whose consolidation would depend in great measure on the work of progressive development being carried out by the Commission. In so doing, it was incumbent on the Commission to give due consideration to resolutions of the General Assembly like resolution 46/182 of 19 December 1991, which established the basic framework within which contemporary disaster relief activities were to be undertaken, as well as private codification efforts such as those undertaken by the Institute of International Law.

286. The Special Rapporteur recalled that the view had been expressed during the debate that his proposals had not adequately taken into account the concept of the “responsibility to protect”. In that regard, he recalled that in his preliminary report he had taken the position that the “appropriateness of extending the concept of responsibility to protect and its relevance to the present topic both require careful consideration. Even if the responsibility to protect were to be recognized in the context of protection and assistance of persons in the event of disasters, its implications would be unclear”.⁵⁹⁶ This position was subsequently separately taken by the Secretary-General who, in his 2009 report on implementing the responsibility to

⁵⁹⁵ *Yearbook ... 2008*, vol. II (Part Two), p. 16, para. 31.

⁵⁹⁶ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598, para. 55.

protect, had indicated that “[t]he responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility”.⁵⁹⁷ The Commission had subsequently endorsed this position both during its debate at its sixty-first session (2009),⁵⁹⁸ and that held at the present session.

287. Reference was further made to a number of drafting suggestions raised during the plenary debate, and which were to be considered by the Drafting Committee.

C. Text of the draft articles on the protection of persons in the event of disasters provisionally adopted so far by the Commission

1. TEXT OF THE DRAFT ARTICLES

288. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.⁵⁹⁹

PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

Article 1. Scope

The present draft articles apply to the protection of persons in the event of disasters.

Article 2. Purpose

The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

Article 3. Definition of disaster

“Disaster” means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

Article 4. Relationship with international humanitarian law

The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.

Article 5. Duty to cooperate

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

Article 6. Humanitarian principles in disaster response

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

Article 7. Human dignity

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

Article 8. Human rights

Persons affected by disasters are entitled to respect for their human rights.

Article 9. Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

Article 10. Duty of the affected State to seek assistance

To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate.

Article 11. Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known.

2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO

289. The text of the draft articles, with commentaries thereto, provisionally adopted by the Commission at its sixty-third session is reproduced below.

Article 6. Humanitarian principles in disaster response

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

Commentary

(1) Draft article 6 establishes the key humanitarian principles relevant to disaster response. The reference to “humanitarian” in the title of the draft article serves to indicate that the principles are considered by the Commission to constitute humanitarian principles that underlie disaster relief and assistance. On this basis, the Commission did not find it necessary to determine whether these principles are also general principles of international law, and noted that the principles do not apply to the exclusion of other relevant principles of international law. The Commission opted to enshrine the principles in the form of a draft article in recognition of their significance to the provision of disaster relief and assistance.

⁵⁹⁷ A/63/677, para. 10 (b).

⁵⁹⁸ *Yearbook ... 2009*, vol. II (Part Two), p. 137, para. 164.

⁵⁹⁹ For the commentaries to draft articles 1 to 5, see *Yearbook ... 2010*, vol. II (Part Two), para. 331. For the commentaries to draft articles 6 to 11, see section C.2 below.

(2) The principles of humanity, neutrality and impartiality are core principles recognized as foundational to humanitarian assistance.⁶⁰⁰ The principles are likewise fundamental to applicable laws in disaster relief efforts. By way of example, General Assembly resolution 46/182 notes that “[h]umanitarian assistance must be provided in accordance with the principles of humanity, neutrality, and impartiality” (annex, para. 2).

(3) The principle of humanity stands as the cornerstone of the protection of persons in international law. Situated as an element both of international humanitarian law and international human rights law, it informs the development of laws regarding the protection of persons in the event of disasters. Within the field of international humanitarian law, the principle is most clearly expressed in the requirement of humane treatment in common article 3 of the 1949 Geneva Conventions for the protection of war victims.⁶⁰¹ However, as the International Court of Justice affirmed in the *Corfu Channel* case, elementary considerations of humanity are also general and well-recognized principles of the international legal order, “even more exacting in peace than in war”.⁶⁰² Pictet’s commentary on the principles of the ICRC attributes three elements to the principle of humanity: to prevent and alleviate suffering; to protect life and health; and to assure respect for the individual.⁶⁰³ In the specific context of disaster relief, the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (Oslo Guidelines) and the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies affirm that the principle of humanity requires that “human suffering must be addressed wherever it is found”.⁶⁰⁴

(4) While the principle of neutrality is rooted in the context of an armed conflict, the Commission determined that it is nonetheless applicable in other branches of the law. In the context of humanitarian assistance, the principle of neutrality has acquired a more specific meaning that is reflected in draft article 6. In this setting the principle requires that the provision of assistance be independent of any given political, religious, ethnic, or ideological context. The Oslo Guidelines and the Mohonk Criteria both affirm that the assistance should be provided “without engaging in hostilities

⁶⁰⁰ See the discussion in the memorandum by the Secretariat on the protection of persons in the event of disasters (footnote 580 above), para. 11.

⁶⁰¹ See, for example, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I), art. 3, para. 1 (noting that “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”).

⁶⁰² *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 4, at p. 22.

⁶⁰³ J. Pictet, *The Fundamental Principles of the Red Cross proclaimed by the Twentieth International Conference of the Red Cross, Vienna, 1965: Commentary*, Geneva, Henry Dunant Institute, 1979, pp. 21–27; also available from www.icrc.org.

⁶⁰⁴ United Nations, Office for the Coordination of Humanitarian Affairs, Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (“Oslo Guidelines”), Rev. 1.1, November 2007, para. 20; and J. M. Ebersole, “The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance”, *Human Rights Quarterly*, vol. 17, No. 1 (February 1995), p. 196.

or taking sides in controversies of a political, religious or ideological nature”.⁶⁰⁵ As such, the principle of neutrality indicates the apolitical nature of disaster response, and affirms that humanitarian activities may not be used for purposes other than responding to the disaster at hand. The principle ensures that the interest of those persons affected by disasters are the primary concern of the affected State and any other relevant actors in disaster response. Respect for the principle of neutrality is central to facilitating the achievement of an adequate and effective response to disasters, as outlined in draft article 2. Neutrality can therefore be considered an operational mechanism to implement the ideal of humanity.

(5) The principle of impartiality encompasses three principles: non-discrimination, proportionality, and impartiality proper. For reasons discussed below, the principle of non-discrimination is articulated by the Commission not merely as an element of draft article 6, but also as an autonomous principle of disaster response. Non-discrimination is directed towards the removal of objective grounds for discrimination between individuals, such that the provision of assistance to affected persons is guided solely by their needs. The principle of proportionality stipulates that the response to a disaster be proportionate to the scope of that disaster and the needs of affected persons. The principle also acts as a distributive mechanism, enabling the provision of assistance to be delivered with attention given to the most urgent needs. Impartiality proper reflects the principle that no subjective distinctions should be drawn between individuals in the response to disasters. The commentary to the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) thus conceptualizes impartiality as “a moral quality which must be present in the individual or institution called upon to act for the benefit of those who are suffering”.⁶⁰⁶ By way of example, the draft international guidelines for humanitarian assistance operations provide that “[h]umanitarian assistance should be provided on an impartial basis without any adverse distinction to all persons in urgent need”.⁶⁰⁷ As a whole, the principle of impartiality requires that responses to disasters be directed towards full respect and fulfilment of the needs of those affected by disasters in a manner that gives priority to the needs of the particularly vulnerable.

(6) The principle of non-discrimination reflects the inherent equality of all persons and the determination that no adverse distinction may be drawn between them. Prohibited grounds for discrimination are non-exhaustive, and include ethnic origin, sex, nationality, political opinions, race and religion.⁶⁰⁸ The Commission

⁶⁰⁵ *Ibid.*

⁶⁰⁶ C. Pilloud *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC, 1987, para. 2800; in paragraph 2801 of the same commentary, in a footnote, the author cites the “Proclamation of the Fundamental Principles of the Red Cross”, adopted by resolution VIII of the 20th International Conference of the Red Cross, Vienna, 1965; and Pictet (footnote 603 above), pp. 33–51.

⁶⁰⁷ P. Macalister-Smith, *International Guidelines for Humanitarian Assistance Operations*, Heidelberg, Max Planck Institute for Comparative Public Law and International Law, 1991, p. 4, para. 6 (a).

⁶⁰⁸ See, *inter alia*, the 1949 Geneva Conventions for the protection of war victims, common art. 3, para. 1; the Universal Declaration of

determined that non-discrimination should be referred to as an autonomous principle in the light of its importance to the topic at hand. Such an approach has also been taken by the Institute of International Law in its 2003 resolution on humanitarian assistance, which stipulates that the offer and distribution of humanitarian assistance shall occur “without any discrimination on prohibited grounds”.⁶⁰⁹ The IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance likewise specify that assistance be provided to disaster-affected persons without “any adverse distinction (such as in regards to nationality, race, ethnicity, religious beliefs, class, gender, disability, age, and political opinions)”.⁶¹⁰

(7) The Commission noted that the principle of non-discrimination is not to be taken as excluding the prospect of “positive discrimination” as appropriate. The phrase “while taking into account the needs of the particularly vulnerable” in draft article 6 reflects this position. The Commission considered the term “vulnerable” to encompass both groups and individuals. For this reason the neutral expression “vulnerable” was preferred to a reference either to “groups” or to “persons”. The qualifier “particularly” was adopted by the Commission in recognition of the fact that those affected by disaster are by definition vulnerable. The specific phrasing of “particularly vulnerable” is drawn from Part I, section 4, paragraph 3 (a), of the IFRC Guidelines, which refers to the special needs of “women and particularly vulnerable groups, which may include children, displaced persons, the elderly, persons with disabilities, and persons living with HIV and other debilitating illnesses”.⁶¹¹ The qualifier is also mirrored in the resolution on humanitarian assistance adopted by the Institute of International Law, which refers to the requirement to take into account the needs of the “most vulnerable”.⁶¹²

Article 7. Human dignity

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

Commentary

(1) Draft article 7 addresses the principle of human dignity in the context of disaster response. The Commission recognizes human dignity as the core principle that informs

Human Rights, General Assembly resolution 217 A (III) of 10 December 1948, art. 2; the International Covenant on Civil and Political Rights, art. 2, para. 1; and the International Covenant on Economic, Social and Cultural Rights, art. 2, para. 2.

⁶⁰⁹ Resolution on humanitarian assistance adopted by the Institute of International Law on 2 September 2003 at its session held in Bruges, Belgium, art. II, para. 3 (Institute of International Law, *Yearbook*, vol. 70, Part II, Session of Bruges (2003), p. 269; available from www.idi-iil.org, “Resolutions”).

⁶¹⁰ IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, Geneva, 2008, Part I, sect. 4, para. 2 (b); available from www.ifrc.org/PageFiles/41203/introduction-guidelines-en.pdf.

⁶¹¹ *Ibid.*, art. 4, para. 3 (a).

⁶¹² Resolution on humanitarian assistance adopted by the Institute of International Law on 2 September 2003 at its session held in Bruges, art. II, para. 3 (Institute of International Law, *Yearbook* (see footnote 609 above), p. 269).

and underpins international human rights law. In the context of the protection of persons in the event of disasters, human dignity is situated as a guiding principle, both for any action to be taken in the context of the provision of relief and in the ongoing evolution of laws addressing disaster response.

(2) The principle of human dignity undergirds international human rights instruments and has been interpreted as providing the ultimate foundation of human rights law. Reaffirmation of “the dignity and worth of the human person” is found in the preamble to the Charter of the United Nations, while the preamble to the Universal Declaration of Human Rights declares “recognition of the inherent dignity ... of all members of the human family is the foundation of freedom, justice and peace in the world”.⁶¹³ Affirmation of the principle of human dignity can be found in the International Covenant on Civil and Political Rights,⁶¹⁴ the International Covenant on Economic, Social and Cultural Rights,⁶¹⁵ the International Convention on the Elimination of All Forms of Racial Discrimination,⁶¹⁶ the Convention on the Elimination of All Forms of Discrimination against Women,⁶¹⁷ the Convention against torture and other cruel, inhuman or degrading treatment or punishment⁶¹⁸ and the Convention on the rights of the child.⁶¹⁹ The principle is central, although not limited, to the field of international humanitarian law. The concept of personal dignity is recognized in common article 3, paragraph 1 (c) of the 1949 Geneva Conventions for the protection of war victims,⁶²⁰ articles 75 and 85 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I),⁶²¹ and article 4 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II).⁶²²

(3) The concept of human dignity also lies at the core of numerous instruments at the international level directed towards the provision of humanitarian relief in the event of disasters. The IFRC Guidelines state that “[a]ssisting actors

⁶¹³ See footnote 608 above.

⁶¹⁴ Preambular paragraphs and art. 10, para. 1.

⁶¹⁵ Preambular paragraphs and art. 13, para. 1.

⁶¹⁶ Preambular paragraphs.

⁶¹⁷ *Idem.*

⁶¹⁸ *Idem.*

⁶¹⁹ Preambular paragraphs; art. 23, para. 1; art. 28, para. 2; and arts. 37, 39 and 40.

⁶²⁰ The 1949 Geneva Conventions for the protection of war victims, common art. 3, para. 1 (c) (noting the prohibition on “outrages upon personal dignity, in particular humiliating and degrading treatment”).

⁶²¹ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), art. 75, para. 2 (b) (noting the prohibition on “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”); and art. 85, para. 4 (c) (noting that when committed wilfully and in violation of the Conventions or the Protocol, “practices of ‘apartheid’ and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination” are regarded as grave breaches of the Protocol).

⁶²² Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), art. 4, para. 2 (e) (noting the prohibition on “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”).

and their personnel should . . . respect the human dignity of disaster-affected persons at all times”.⁶²³ The General Assembly, in the preamble of its resolution 45/100 of 14 December 1990, holds that “the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity”. The Institute of International Law likewise reflects that a failure to provide humanitarian assistance to those affected by disasters constitutes “an offence to human dignity”.⁶²⁴

(4) The opening phrase of draft article 7, “[i]n responding to disasters”, reflects the substantive context in which the provision applies. While it is anticipated that the phrase is primarily directed towards the response and recovery phase, the reference should be read in the light of paragraph (5) of the commentary to draft article 2.⁶²⁵ The Commission chose the term “responding to” 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 precise formulation of the principle adopted by the Commission, namely the “inherent dignity of the human person”, is drawn from the preamble of the International Covenant on Economic, Social and Cultural Rights, and article 10, paragraph 1, of the International Covenant on Civil and Political Rights. This formulation has also been adopted in instruments such as the Convention on the rights of the child⁶²⁶ and the American Convention on Human Rights: “Pact of San José, Costa Rica”.⁶²⁷

(5) The phrase “States, competent intergovernmental organizations and relevant non-governmental organizations” provides an indication of the actors to which the provision is addressed. In its reference to “States”, the Commission recognizes the role played by both affected States and assisting States in disaster response activities. As a whole, the phrase accords with recognition that much of the activity in the field of disaster response occurs through organs of intergovernmental organizations, NGOs and other non-State entities such as the IFRC.⁶²⁸ The Commission determined that the current formulation maintained consistency with draft article 5, as opposed to a more general reference to “other relevant actors”.

(6) The Commission adopted the phrase “respect and protect” as a formula that accords with contemporary doctrine and jurisprudence in international human rights

law. The formula is used in a number of instruments that relate to disaster relief, including the Oslo Guidelines,⁶²⁹ the Mohonk Criteria,⁶³⁰ the Guiding Principles on Internal Displacement⁶³¹ and the Guiding Principles on the Right to Humanitarian Assistance.⁶³² In conjunction, the terms “respect and protect” connote a negative obligation to refrain from injuring the inherent dignity of the human person and a positive obligation to take action to maintain human dignity. By way of example, the duty of protection requires States to adopt legislation proscribing activities of third parties in circumstances that threaten a violation of the principle of respect for human dignity. The Commission considered that an obligation to “protect” should be commensurate with the legal obligations borne by the respective actors addressed in the provision. An affected State therefore holds the primary role in the protection of human dignity, by virtue of its primary role in the direction, control, coordination and supervision of disaster relief and assistance, reflected in draft article 9, paragraph 2.

Article 8. Human rights

Persons affected by disasters are entitled to respect for their human rights.

Commentary

(1) Draft article 8 seeks to reflect the broad entitlement to human rights protection held by those persons affected by disasters. A corresponding obligation on relevant actors to protect such rights is implicit in the draft article. The Commission recognizes an intimate connection between human rights and the principle of human dignity reflected in draft article 7, reinforced by the close proximity of the two draft articles.

(2) The general reference to “human rights” encompasses human rights obligations expressed in relevant international agreements and reflected in customary international law, as well as assertions of best practices for the protection of human rights included in non-binding texts on the international level. The Commission decided not to limit the provision to obligations “set out in the relevant international agreements”. The formulation adopted by the Commission indicates the broad field of human rights obligations, without seeking to specify, add to or qualify those obligations.

(3) The Commission considers that the reference to “human rights” incorporates both the substantive rights

⁶²³ IFRC, *Guidelines* (see footnote 610 above), Part 1, sect. 4, para. 1.

⁶²⁴ Resolution on humanitarian assistance adopted by the Institute of International Law on 2 September 2003 at its session held in Bruges, art. II, para. 1 (Institute of International Law, *Yearbook* (see footnote 609 above), p. 269).

⁶²⁵ *Yearbook ... 2010*, vol. II (Part Two), para. 331.

⁶²⁶ Convention on the rights of the child, art. 37 (c) (noting *inter alia* that “[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person”).

⁶²⁷ American Convention on Human Rights: “Pact of San José, Costa Rica”, art. 5, para. 2 (noting *inter alia* that “[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person”).

⁶²⁸ See *Yearbook ... 2006*, vol. II (Part Two), annex III, p. 211, para. 28.

⁶²⁹ Oslo Guidelines (see footnote 604 above), para. 20 (noting that “[t]he dignity and rights of all victims must be respected and protected”).

⁶³⁰ The Mohonk Criteria (see footnote 604 above), p. 196 (noting that “[t]he dignity and rights of all victims must be respected and protected”).

⁶³¹ E/CN.4/1998/53/Add.2, annex, Principle 26 (noting *inter alia* that “[p]ersons engaged in humanitarian assistance, their transport and supplies shall be respected and protected”).

⁶³² Guiding Principles on the Right to Humanitarian Assistance, adopted by the Council of the International Institute of Humanitarian Law in April 1993, Principle 10 (noting that “[h]umanitarian assistance can, if appropriate, be made available by way of ‘humanitarian corridors’ which should be respected and protected by competent authorities of the parties involved and if necessary by the United Nations authority”), *International Review of the Red Cross*, No. 297 (1993), p. 524.

and limitations that exist in the sphere of international human rights law. In particular, the provision contemplates an affected State's right of derogation where recognized under existing international human rights law.

(4) As clarified in the commentary to draft article 1, at paragraph (2), the scope *ratione personae* of the draft articles encompasses the activities of States and international organizations and other entities enjoying specific international legal competence in the provision of disaster relief and assistance in the context of disasters. The Commission recognizes that the scope and content of an obligation to protect the human rights of those persons affected by disasters will vary considerably between these actors. The neutral phrasing adopted by the Commission should be read with an understanding that distinct obligations will be held by affected States, assisting States, and various other assisting actors respectively.

(5) The reference at the beginning of draft article 8 to "persons affected by disasters" reaffirms the context in which the draft articles apply, and is not to be understood as implying that persons not affected by a disaster do not similarly enjoy such rights.

Article 9. Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

Commentary

(1) Draft article 9 is addressed to an affected State in the context of the protection of persons in the event of a disaster upon its territory. Paragraph 1 of draft article 9 reflects the obligation of an affected State to protect persons and provide disaster relief in accordance with international law. Paragraph 2 of draft article 9 affirms the primary role held by an affected State in the response to a disaster upon its territory. As a whole, draft article 9 is premised on the core principles of sovereignty and non-intervention respectively, as enshrined in the Charter of the United Nations,⁶³³ and recognized in numerous international instruments.⁶³⁴ In the context of disaster

⁶³³ Charter of the United Nations, Article 2, paragraph 1 ("The Organization is based on the principle of the sovereign equality of all its Members"); and Article 2, paragraph 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII").

⁶³⁴ See, for example, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, annex (noting *inter alia* that "[a]ll States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community"; that "[t]he use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention" and that "States shall conduct their international relations in the economic, social,

relief, General Assembly resolution 46/182 affirms that "[t]he sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations" (annex, para. 3).

(2) Paragraph 1 of draft article 9 affirms that the duty held by an affected State to ensure the protection of persons and the provision of disaster relief and assistance on its territory stems from its sovereignty. This conception of a bond between sovereign rights and concomitant duties upon a State was expressed by Judge Álvarez in a separate opinion in the *Corfu Channel* case:

By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States. Sovereignty confers rights upon States and imposes obligations on them.⁶³⁵

The Commission considered several formulations for this concept, including the phrases "in the exercise of its sovereignty" and "in the exercise of its sovereign rights and duties", before settling on the present text. The modifying phrase "by virtue of its sovereignty" emphasizes that the affected State, which benefits from the principle of non-intervention, is the party that holds the duty to protect persons located within its territory. The Commission determined that the term "duty" was more appropriate than that of "responsibility". It considered that the use of the term "responsibility" could give rise to confusion given its use as a term of art elsewhere in the Commission's work.

(3) Paragraph 2 of draft article 9 further reflects the primary role held by a State in disaster response. This position is rooted in the core principles of State sovereignty and non-intervention in international law. For the reasons expressed above, the Commission decided to adopt the word "role" rather than "responsibility" in articulating the position of an affected State. The adoption of the term "role" was informed by General Assembly resolution 46/182, which affirms *inter alia* that an affected State "has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory" (annex, para. 4). The use of the word "role" rather than "responsibility" was also considered to allow a margin of appreciation to States in the coordination of disaster response activities. Language implying an obligation upon States to direct or control disaster response activities may conversely be restrictive on States that preferred to take a more limited role in disaster response coordination or faced a situation of limited resources.

(4) The primacy of an affected State is also informed by the long-standing recognition in international law that the government of a State is best placed to determine the gravity of an emergency situation and to frame appropriate

cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention"). The International Court of Justice has held that "[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations" (*Corfu Channel case* (see footnote 602 above), p. 35).

⁶³⁵ *Corfu Channel case* (see footnote 602 above), p. 43. See also the opinion expressed by Max Huber, Arbitrator, in *Island of Palmas case (Netherlands v. U.S.A.)*, Award of 4 April 1928, UNRIIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 839: "Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States".

response policies. The affirmation in paragraph 2 that an affected State holds the primary role in the direction, control, coordination and supervision of disaster relief and assistance should be read in concert with the duty of cooperation outlined in draft article 5. In this context, draft article 9, paragraph 2, affirms that an affected State holds the primary position in cooperative relationships with other relevant actors that are contemplated in draft article 5.

(5) Reference to the “direction, control, coordination and supervision” of disaster relief and assistance is drawn from article 4, paragraph 8 of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations.⁶³⁶ The Commission considered that the formula from that Convention was gaining general currency in the field of disaster relief and assistance and represented a more contemporary construction.⁶³⁷ The formula reflects that a State exercises final control over the manner in which relief operations are carried out in accordance with international law.

(6) The Commission departed from the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations in deciding not to include a reference to “national law” in its articulation of the primary role of an affected State. In the context of the Convention, the reference to national law indicates that appropriate coordination requires consistency with an affected State’s domestic law. The Commission decided not to include this reference in the light of the fact that the internal law of an affected State may not in all cases regulate or provide for the primary position of a State in disaster response situations.

Article 10. Duty of the affected State to seek assistance

To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate.

Commentary

(1) Draft article 10 addresses the particular situation in which a disaster exceeds a State’s national response capacity. In these circumstances an affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant NGOs. The duty expounded in draft article 10 is a specification of draft article 9 and draft article 5. Paragraph 1 of draft article 9 stipulates that an affected State,

⁶³⁶ “Nothing in this Convention shall interfere with the right of a State Party, under its national law, to direct, control, coordinate and supervise telecommunication assistance provided under this Convention within its territory.”

⁶³⁷ See, for example, the ASEAN [Association of Southeast Asian Nations] Agreement on Disaster Management and Emergency Response, art. 3, para. 2 (noting that “[t]he Requesting or Receiving Party shall exercise the overall direction, control, co-ordination and supervision of the assistance within its territory”); and the Convention on assistance in the case of a nuclear accident or radiological emergency, art. 3 (a) (noting *inter alia* that unless otherwise agreed, “[t]he overall direction, control, co-ordination and supervision of the assistance shall be the responsibility within its territory of the requesting State”).

by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory. The draft article affirms the central position of obligations owed by States towards persons within their borders. The duty to cooperate also underlies an affected State’s duty to the extent that a disaster exceeds its national response capacity. Draft article 5 affirms that the duty to cooperate is incumbent upon not only potential assisting States but also affected States where such cooperation is appropriate. The Commission considers that such cooperation is both appropriate and required to the extent that an affected State’s national capacity is exceeded. In these circumstances, seeking assistance is additionally an element of the fulfilment of an affected State’s primary responsibilities under international human rights instruments and customary international law. The existence of the duty to seek assistance as set out in draft article 10 was supported by a majority of the members of the Commission, but opposed by others.

(2) The draft article stresses that a duty to seek assistance arises only to the extent that the national response capacity of an affected State is exceeded. As noted by the Special Rapporteur in his second report, not all disasters are considered to overwhelm a nation’s response capacity.⁶³⁸ The Commission therefore considers the present draft article only to be applicable to a subset of disasters as defined in draft article 3 of the present draft articles.

(3) It is to be noted that in the debate within the Commission concerning the formulation of draft article 10, some members of the Commission opposed the idea that affected States are under, or should be placed under, a legal duty to seek external assistance in cases of disaster. This opposition was premised on the view that, as it currently stands, international law does not place any such binding duty upon affected States. The members of the Commission who shared this perspective indicated that draft article 10 should be worded in hortatory terms to the effect that affected States “should” seek external assistance in cases where a disaster exceeds national response capacity.

(4) The Commission adopted the phrase “[t]o the extent that” in order to clarify that the national response capacity of an affected State is rarely conceptualized as sufficient or insufficient in absolute terms. An affected State’s national capacity may be exceeded in relation to one aspect of disaster relief operations, although the State remains capable of undertaking other operations. As a whole, the phrase “[t]o the extent that a disaster exceeds its national response capacity” encompasses the situation in which a disaster appears likely to exceed an affected State’s national response capacity. This flexible and proactive approach is in line with the fundamental purpose of the draft articles as expressed in draft article 2. The approach facilitates an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights. Recognition of the duty upon States in these circumstances reflects the Commission’s concern to enable the provision of timely and effective disaster relief assistance.

⁶³⁸ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615, para. 46.

(5) The Commission considers that the duty to seek assistance in draft article 10 derives from an affected State's obligations under international human rights instruments and customary international law. Recourse to international support may be a necessary element in the fulfilment of a State's international obligations towards individuals where an affected State considers its own resources inadequate to meet protection needs. While this may occur also in the absence of any disaster, a number of human rights are directly implicated in the context of a disaster, including the right to life, the right to food, the right to health and medical services, the right to the supply of water, the right to adequate housing, clothing and sanitation, and the right to be free from discrimination.⁶³⁹ The Commission notes that the Human Rights Committee has held that a State's duty in the fulfilment of the right to life extends beyond mere respect to encompass a duty to protect and fulfil the substantive right.⁶⁴⁰ The right to life is non-derogable under the International Covenant on Civil and Political Rights, even in the event of a "public emergency which threatens the life of a nation" (art. 4, para. 1)—which has been recognized to include a "natural catastrophe" by the Human Rights Committee in general comment No. 29.⁶⁴¹ Article 11, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights states, in pursuance of the right to food, that

[t]he States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The Committee on Economic, Social and Cultural Rights noted, in general comment No. 12 on the right to adequate food, that if a State party maintains that resource constraints make it impossible to provide access to food to those in need,

the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations ... A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.⁶⁴²

The Commission therefore notes that "appropriate steps" to be taken by a State include seeking international assistance where domestic conditions are such that the right to food cannot be realized. It is relevant that this step is engaged where a State itself asserts that it is unable to carry out its obligations.

⁶³⁹ See the preliminary report of the Special Rapporteur, *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598, p. 149, para. 26.

⁶⁴⁰ Human Rights Committee, 16th session (1982), general comment No. 6 on article 6 (Right to life), para. 5 (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, p. 93).

⁶⁴¹ Human Rights Committee, 72nd session (2001), general comment No. 29 on article 4 (Derogations from provisions of the Covenant during a state of emergency), para. 5 (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40 (A/56/40)*, vol. I, annex VI, p. 203).

⁶⁴² Committee on Economic, Social and Cultural Rights, general comment No. 12 (The right to adequate food (article 11 of the Covenant)), 11 May 1999, para. 17 (*Official Records of the Economic and Social Council, 2000, Supplement No. 2 (E/2000/22-E/C.12/1999/11)*, annex V, pp. 105–106).

(6) Specific references to the protection of rights in the event of disasters are made in the African Charter on the Rights and Welfare of the Child, and the Convention on the Rights of Persons with Disabilities. Under article 23 of the African Charter on the Rights and Welfare of the Child, States shall take "all appropriate measures" to ensure that children seeking or holding refugee status, as well as those who are internally displaced due to events including "natural disaster" are able to "receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties". The Convention on the Rights of Persons with Disabilities refers, in its article 11, to the obligation of States towards persons with disabilities in the event of disasters:

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

The Commission considers that the phrase "all necessary measures" may encompass recourse to possible assistance from the international community in the event that an affected State's national capacity is exceeded. Such an approach would cohere with the guiding principle of humanity as applied in the international legal system. The International Court of Justice affirmed in the *Corfu Channel* case (merits) that elementary considerations of humanity are considered to be general and well-recognized principles of the international legal order, "even more exacting in peace than in war".⁶⁴³ Draft article 6 affirms the core position of the principle of humanity in disaster response.

(7) The Commission considers that a duty to "seek" assistance is more appropriate than a duty to "request" assistance in the context of draft article 10. The Commission derives this formulation from the duty outlined in a resolution on humanitarian assistance adopted by the Institute of International Law at its Bruges session in 2003, which notes that

[w]henver the affected State is unable to provide sufficient humanitarian assistance to the victims placed under its jurisdiction or *de facto* control, it shall seek assistance from competent international organizations and/or from third States.⁶⁴⁴

Similarly, the international disaster response law guidelines of the IFRC provide as follows:

⁶⁴³ *Corfu Channel case* (see footnote 602 above) p. 22 (noting that "[t]he obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war").

⁶⁴⁴ Resolution on humanitarian assistance adopted by the Institute of International Law on 2 September 2003 at its session held in Bruges, art. III, para. 3 (Institute of International Law, *Yearbook* (see footnote 609 above), p. 271).

If an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons.⁶⁴⁵

In addition, the guiding principles annexed to General Assembly resolution 46/182 (para. 5) also appear to support an implicit duty on affected States to engage in international cooperation where an emergency exceeds their response capacity:

The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws.

(8) The alternative formulation of “request” is incorporated in the Oslo Guidelines, which note that “[i]f international assistance is necessary, it should be requested or consented to by the Affected State as soon as possible upon the onset of the disaster to maximize its effectiveness”.⁶⁴⁶ The Commission considers that a “request” of assistance carries an implication that an affected State’s consent is granted upon acceptance of that request by a third State. In contrast, the Commission is of the view that a duty to “seek” assistance implies a broader, negotiated approach to the provision of international aid. The term “seek” entails the proactive initiation by an affected State of a process through which agreement may be reached. Draft article 10 therefore places a duty upon affected States to take positive steps actively to seek out assistance to the extent that a disaster exceeds its national response capacity.

(9) The Commission considers that the Government of an affected State will be in the best position to determine the severity of a disaster situation and the limits of its national response capacity. The Commission considers that the assessment of the severity of a disaster by an affected State must be carried out in good faith. The principle of good faith is expounded in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which stipulates that “[e]very State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations”, “obligations under the generally recognized principles and rules of international law” and “obligations under international agreements valid under the generally recognized principles and rules of international law”.⁶⁴⁷ A good faith assessment of the severity of a disaster is an element of an affected State’s duty, by virtue of its sovereignty, to ensure the protection of persons and provision of disaster relief and assistance on its territory pursuant to draft article 9, paragraph 1.

(10) The phrase “as appropriate” was adopted by the Commission to emphasize the discretionary power of an affected State to choose from among various States, the United Nations, competent intergovernmental organizations and relevant NGOs the assistance that is

most appropriate to its specific needs. The term further reflects that the duty to seek assistance does not imply that a State is obliged to seek assistance from every source listed in draft article 10. The phrase “as appropriate” therefore reinforces the fact that an affected State has the primary role in the direction, control, coordination and supervision of the provision of disaster relief and assistance, as outlined in draft article 9, paragraph 2.

(11) The existence of a duty to seek assistance to the extent that national capacity is exceeded should not be taken to imply that the Commission does not encourage affected States to seek assistance in disaster situations of a lesser magnitude. The Commission considers cooperation in the provision of assistance at all stages of disaster relief to be central to the facilitation of an adequate and effective response to disasters, and a practical manifestation of the principle of solidarity. Even if an affected State is capable and willing to provide the required assistance, cooperation and assistance by international actors will in many cases ensure a more adequate, rapid and extensive response to disasters and an enhanced protection of affected persons.

Article 11. Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known.

Commentary

(1) Draft article 11 addresses consent of an affected State to the provision of external assistance. As a whole, draft article 11 creates for affected States a qualified consent regime in the field of disaster relief operations. Paragraph 1 of draft article 11 reflects the core principle that implementation of international relief assistance is contingent upon the consent of the affected State. Paragraph 2 stipulates that consent to external assistance shall not be withheld arbitrarily, while paragraph 3 of the draft article places a duty upon an affected State to make its decision regarding an offer of assistance known whenever possible.

(2) The principle that the provision of external assistance requires the consent of the affected State is fundamental to international law. Accordingly, paragraph 3 of the guiding principles annexed to General Assembly resolution 46/182 notes that “humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country”. The Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations stipulates that “[n]o telecommunication assistance shall be provided pursuant to this Convention without the consent of the requesting State Party” (art. 4, para. 5), while the ASEAN Agreement on

⁶⁴⁵ IFRC, *Guidelines* (see footnote 610 above), Part 1, sect. 3, para. 2.

⁶⁴⁶ Oslo Guidelines (see footnote 604 above), para. 58.

⁶⁴⁷ General Assembly resolution 2625 (XXV), annex.

Disaster Management and Emergency Response notes that “external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party” (art. 3, para. 1). Recognition of the requirement of State consent to the provision of external assistance comports with the recognition in draft article 9, paragraph 2, that an affected State has the primary role in the direction, control, coordination and supervision of disaster relief and assistance on its territory.

(3) The recognition, in paragraph 2, that an affected State’s right to refuse an offer is not unlimited reflects the dual nature of sovereignty as entailing both rights and obligations. This approach is reflected in paragraph 1 of draft article 9, which affirms that an affected State, “by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory”. On the other hand, some members of the Commission resisted the idea that the dual nature of sovereignty necessarily meant that the Commission should support the approach taken in draft article 11, paragraph 2. For these members of the Commission, draft article 11, paragraph 2, should not be drafted to include the mandatory “shall”; rather, the provision should indicate that “consent to external assistance should not be withheld arbitrarily”.

(4) The Commission considers that the duty of an affected State to ensure protection and assistance to those within its territory in the event of a disaster is aimed at preserving the life and dignity of the victims of the disaster and guaranteeing the access of persons in need to humanitarian assistance. This duty is central to securing the right to life of those within an affected State’s territory.⁶⁴⁸ The Human Rights Committee has interpreted the right to life as embodied in article 6 of the International Covenant on Civil and Political Rights to contain the obligation for States to adopt positive measures to ensure the enjoyment of this right.⁶⁴⁹ An offer of assistance that is met with refusal might thus under certain conditions constitute a violation of the right to life. The General Assembly reaffirmed in resolutions 43/131 of 8 December 1988 and 45/100 of 14 December 1990 that “the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity” (eighth and sixth preambular paragraphs, respectively).

(5) Recognition that an affected State’s discretion regarding consent is not unlimited is reflected in the Guiding Principles on Internal Displacement. The Guiding Principles, which have been welcomed by the former Commission on Human Rights and the General Assembly in unanimously adopted resolutions and described by the Secretary-General as “the basic international norm for protection” of internally displaced persons,⁶⁵⁰ note that

⁶⁴⁸ See the International Covenant on Civil and Political Rights, art. 6, para. 1.

⁶⁴⁹ Human Rights Committee, general comment No. 6 (see footnote 640 above), para. 5: “The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.”

⁶⁵⁰ A/59/2005, para. 210.

[c]onsent [to offers of humanitarian assistance] shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.⁶⁵¹

The Institute of International Law dealt twice with the question of consent in the context of humanitarian assistance. In its 1989 resolution entitled “The protection of human rights and the principle of non-intervention in the internal affairs of States”, article 5, paragraph 2, states in the authoritative French text:

*Les États sur le territoire desquels de telles situations de détresse [où la population est gravement menacée dans sa vie ou sa santé] existent ne refuseront pas arbitrairement de pareilles offres de secours humanitaires.*⁶⁵²

In 2003 the Institute of International Law revisited this issue, stipulating in its Bruges resolution in an article with the heading “Duty of affected States not arbitrarily to reject a bona fide offer of humanitarian assistance”:

Affected States are under the obligation not arbitrarily and unjustifiably to reject a bona fide offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal would endanger the fundamental human rights of the victims or would amount to a violation of the ban on starvation of civilians as a method of warfare.⁶⁵³

(6) The term “withheld” implies a temporal element to the determination of arbitrariness. Both the refusal of assistance and the failure of an affected State to make a decision known in accordance with draft article 11, paragraph 3, within a reasonable time frame may be deemed arbitrary. This view is reflected in General Assembly resolutions 43/131⁶⁵⁴ and 45/100,⁶⁵⁵ which both include the following preambular paragraphs:

Concerned about the difficulties [and obstacles] that victims of natural disasters and similar emergency situations may [experience/ encounter] in receiving humanitarian assistance,

Convinced that, in providing humanitarian assistance, in particular the supply of food, medicines or health care, for which access to victims is essential, rapid relief will avoid a tragic increase in their number.

The 2000 Framework Convention on civil defence assistance likewise reflects among the principles that States parties undertake to respect in terms of providing assistance in the event of a disaster that “[o]ffers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time” (art. 3 (e)).

⁶⁵¹ E/CN.4/1998/53/Add.2, Principle 25, para. 2.

⁶⁵² Resolution adopted by the Institute of International Law on 13 September 1989 at its session held in Santiago de Compostela, art. 5 (Institute of International Law, *Yearbook*, vol. 63, Part II, Session of Santiago de Compostela (1989), p. 345). Included in the French text is mandatory language, while the English translation reads as follows: “States in whose territories these emergency situations exist should not arbitrarily reject such offers of humanitarian assistance.” The explanatory text “où la population est gravement menacée dans sa vie ou sa santé” is drawn from article 5, paragraph 1 of that resolution.

⁶⁵³ Resolution on humanitarian assistance adopted by the Institute of International Law on 2 September 2003 at its session held in Bruges (Institute of International Law, *Yearbook* (see footnote 609 above), art. VIII, para. 1, p. 275).

⁶⁵⁴ General Assembly resolution 43/131, ninth and tenth preambular paragraphs.

⁶⁵⁵ General Assembly resolution 45/100, eighth and ninth preambular paragraphs.

(7) The term “arbitrary” directs attention to the basis of an affected State’s decision to withhold consent. The determination of whether the withholding of consent is arbitrary must be determined on a case-by-case basis, although as a general rule several principles can be adduced. First, the Commission considers that withholding consent to external assistance is not arbitrary where a State is capable of providing, and willing to provide, an adequate and effective response to a disaster on the basis of its own resources. Second, withholding consent to assistance from one external source is not arbitrary if an affected State has accepted appropriate and sufficient assistance from elsewhere. Third, the withholding of consent is not arbitrary if the relevant offer is not extended in accordance with the present draft articles. In particular, draft article 6 establishes that humanitarian assistance must take place in accordance with principles of humanity, neutrality and impartiality, and on the basis of non-discrimination. Conversely, where an offer of assistance is made in accordance with the draft articles and no alternative sources of assistance are available, there would be a strong inference that a decision to withhold consent is arbitrary.

(8) An affected State’s discretion to determine the most appropriate form of assistance is an aspect of its primary role in the direction, control, coordination and supervision of disaster relief and assistance under draft article 9, paragraph 2. This discretion must be exercised in good faith in accordance with an affected State’s international obligations.⁶⁵⁶ The Commission nonetheless encourages

⁶⁵⁶ See, for example, General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1 (noting *inter alia* that “[e]very State has the duty to fulfil in good faith the obligations assumed by it in

affected States to give reasons where consent to assistance is withheld. The provision of reasons is fundamental to establishing the good faith of an affected State’s decision to withhold consent. The absence of reasons may act to support an inference that the withholding of consent is arbitrary.

(9) In paragraph 3, the Commission opted for the phrase “make its decision regarding the offer known” to give the maximum flexibility to affected States in determining how best to respond to offers of assistance. It was recognized that a rigid duty formally to respond to every offer of assistance may place too high a burden on affected States in disaster situations. The Commission considers the current phrase to encompass a wide range of possible means of response, including a general publication of the affected State’s decision regarding all offers of assistance. The paragraph applies both to situations in which an affected State accepts assistance and to situations in which an affected State withholds its consent.

(10) The Commission considers the phrase “whenever possible” to have a very restricted scope. The phrase directs attention to extreme situations where a State is incapable of forming a view regarding consent owing to the lack of a functioning government or circumstances of equal incapacity. The Commission is further of the view that an affected State is capable of making its decision known in the manner it feels most appropriate absent the exceptional circumstances outlined in this paragraph.

accordance with the Charter of the United Nations”, “obligations under the generally recognized principles and rules of international law” and “obligations under international agreements valid under the generally recognized principles and rules of international law”).