

PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

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Third report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur

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CONTENTS

	<i>Page</i>
Multilateral instruments cited in the present report	373
Works cited in the present report	375
	<i>Paragraphs</i>
INTRODUCTION	1–13 376
<i>Chapter</i>	
I. THE PRINCIPLES OF HUMANITY, NEUTRALITY AND IMPARTIALITY	14–50 378
A. Neutrality	26–30 380
B. Impartiality	31–36 381
C. Humanity	37–50 382
<i>Draft article 6. Humanitarian principles in disaster response</i>	50 384
II. HUMAN DIGNITY	51–62 385
<i>Draft article 7. Human dignity</i>	62 387
III. THE RESPONSIBILITY OF THE AFFECTED STATE.....	63–101 387
A. Sovereignty and non-intervention	64–75 387
B. Primary responsibility of the affected State.....	76–101 389
1. Direction, control, coordination and supervision	79–89 389
2. Consent	90–101 391
<i>Draft article 8. Primary responsibility of the affected State</i>	96 392

Multilateral instruments cited in the present report

	<i>Source</i>
Geneva Convention of 22 August 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field (Geneva, 22 August 1864)	<i>International Red Cross Handbook</i> , 12th ed. (1983), p. 19.
Declaration of St. Petersburg of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime (St. Petersburg, 11 December 1868)	<i>Handbook of the International Red Cross and Red Crescent Movement</i> , 14th ed. (Geneva, 2008), p. 331.
Hague Conventions respecting the Laws and Customs of War on Land: Convention II (The Hague, 29 July 1899)	James Brown Scott, ed., <i>The Hague Conventions and Declarations of 1899 and 1907</i> , New York, Oxford University Press, 1915, p. 100.
Hague Conventions respecting the Laws and Customs of War on Land: Convention IV (The Hague, 18 October 1907)	<i>Ibid.</i>

Source

Hague Convention Relative to the Laying of Automatic Submarine Contact Mines: Convention VIII (The Hague, 18 October 1907)	<i>Ibid.</i>
Convention and Statute Establishing an International Relief Union (Geneva, 12 July 1927)	League of Nations, <i>Treaty Series</i> , vol. 135, No. 3115, p. 247.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, No. 1021, p. 277.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	<i>Ibid.</i> , vol. 75, Nos. 970–973, p. 31 <i>et seq.</i>
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	<i>Ibid.</i> , p. 31.
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	<i>Ibid.</i> , p. 85.
Geneva Convention relative to the Treatment of Prisoners of War	<i>Ibid.</i> , p. 135.
Geneva Convention Relative to the Protection of Civilian Persons in Time of War	<i>Ibid.</i> , p. 287.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977)	<i>Ibid.</i> , vol. 1125, No. 17512, p. 3.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977)	<i>Ibid.</i> , No. 17513, p. 609.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, No. 2889, p. 221.
Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (Vilnius, 3 May 2002)	<i>Ibid.</i> , vol. 2246, No. 2889, p. 110.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965). Opened for signature at New York on 7 March 1966.	<i>Ibid.</i> , vol. 660, No. 9464, p. 195.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 993, No. 14531, p. 3.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	<i>Ibid.</i> , vol. 1144, No. 17955, p. 123.
Treaty of amity and co-operation in Southeast Asia (Denpasar, Bali, 24 February 1976)	<i>Ibid.</i> , vol. 1025, No. 15063, p. 297.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	<i>Ibid.</i> , vol. 1249, No. 20378, p. 13.
African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)	<i>Ibid.</i> , vol. 1520, No. 26363, p. 217.
Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Ouagadougou, 10 June 1998)	Document OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997), reproduced in <i>Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR</i> , vol. 3, p. 1040.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	United Nations, <i>Treaty Series</i> , vol. 1465, No. 24841, p. 85.
Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Vienna, 26 September 1986)	<i>Ibid.</i> , vol. 1457, No. 24643, p. 133.
Agreement on cooperation across state frontiers to prevent or limit damage to persons or property or to the environment in the case of accidents (Stockholm, 20 January 1989)	<i>Ibid.</i> , vol. 1777, No. 31001, p. 223.
Convention on the Rights of the Child (New York, 20 November 1989)	<i>Ibid.</i> , vol. 1577, No. 27531, p. 3.
Agreement establishing the Caribbean Disaster Emergency Response Agency (Port of Spain, 26 February 1991)	<i>Ibid.</i> , vol. 2256, No. 40212, p. 53.
Inter-American Convention to Facilitate Disaster Assistance (Santiago, 7 June 1991)	OAS, <i>Official Documents</i> , OEA/Ser.A/49 (SEPF).
Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)	United Nations, <i>Treaty Series</i> , vol. 2105, No. 36605, p. 457.

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Inter-American Convention on Forced Disappearance of Persons (Belém do Pará, 9 June 1994)	OAS, <i>Official Documents</i> , OEA/Ser.A/55 (SEPF).
Convention on the law of the non-navigational uses of international watercourses (New York, 21 May 1997)	<i>Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49)</i> , vol. III, resolution 51/229, annex.
Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters (Sochi, 15 April 1998)	Available at: www.bsec-organization.org/documents/LegalDocuments/agreementmous/agr4/Documents/Emergencyagreement%20071116.pdf .
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Food Aid Convention, 1999 (London, 13 April 1999)	<i>Ibid.</i> , vol. 2073, No. A-32022, p. 135.
Framework Convention on civil defence assistance (Geneva, 22 May 2000)	<i>Ibid.</i> , vol. 2172, No. 38131, p. 213.
Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part (Cotonou, 23 June 2000)	<i>Official Journal of the European Communities</i> , No. L 317, vol. 43 (15 December 2000), p. 3.
Charter of Fundamental Rights of the European Union (Nice, 7 December 2000)	<i>Ibid.</i> , No. C 364, vol. 43 (18 December 2000), p. 1.
Arab Charter on Human Rights (Tunis, 23 May 2004)	<i>Boston University International Law Journal</i> , No. 24, p. 147.
ASEAN Agreement on Disaster Management and Emergency Response (Vientiane, 26 July 2005)	<i>ASEAN Documents Series 2005</i> , p. 157.
Convention on the Rights of Persons with Disabilities (New York, 13 December 2006)	United Nations, <i>Treaty Series</i> , vol. 2515, No. 44910, p. 3.
International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006)	<i>Ibid.</i> , vol. 2716, No. 48088, p. 3.
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Introduction*

1. At its sixty-first session, in 2009, the International Law Commission had before it the second report on the protection of persons in the event of disasters.¹ That report contained proposals for three draft articles setting the scope and purpose of the Commission’s draft, defining “disaster” and its relationship to armed conflict, and articulating the principle of cooperation, which is central to the undertaking.

2. The second report was considered by the Commission at its 3015th to 3019th meetings,² and all three draft articles were referred to the Drafting Committee. The Drafting Committee expanded the number of articles to five, reflecting the belief among members that the three articles submitted by the Special Rapporteur embodied five distinct concepts which merited separate treatment: the scope of the undertaking; its purpose; the definition of “disaster”; the relationship of the project with international humanitarian law; and the duty of cooperation. The Drafting Committee stipulated that it had adopted the fifth article, on the duty to cooperate, on the understanding that the Special Rapporteur would propose an article on the primary responsibility of the affected State, to be included in the set of draft articles in the future. These five articles were provisionally adopted by the Drafting Committee and submitted to the plenary in a comprehensive report presented by the Committee’s Chair on 30 July 2009. After further discussion, and owing to the lack of time for the preparation and adoption of the corresponding commentaries, the Commission took note of draft articles 1 to 5 at its 3029th meeting.³

Following the Commission’s standard practice, the text of the five draft articles was not reproduced in the annual report of the Commission to the General Assembly. Nevertheless, they were made available in a separate official document.⁴

3. In addition to endorsing the specific draft articles, the Commission also reached general agreement on certain aspects concerning the scope and substance of the topic. Members supported the conclusion of the Special Rapporteur that the concept of the “responsibility to protect” would not play a role in the Commission’s work on the topic.⁵ Additionally, it was understood that the Special Rapporteur could usefully continue his work by focusing primarily on States, without prejudice to specific provisions regarding non-State actors.⁶

4. In October and November 2009, at the sixty-fourth session of the General Assembly, the Sixth Committee considered the Special Rapporteur’s second report and the debate thereon held in the Commission, with particular attention being given to the first draft articles on the protection of persons in the event of disasters. Some States addressed directly the five articles as provisionally adopted by the Drafting Committee but, since their text had not been reproduced in the annual report, other States confined their comments largely to the three articles as originally proposed by the Special Rapporteur. States welcomed the progress made by the Commission in a short time and all who spoke continued to emphasize the importance and timeliness of the topic.

5. States expressed satisfaction with the dual-axis approach, by which the Commission would focus first on the rights and obligations of States *vis-à-vis* each other, and then on the rights and obligations of States *vis-à-vis*

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¹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615.

² *Ibid.*, vol. I.

³ *Ibid.*, vol. II (Part Two), para. 152.

⁴ A/CN.4/L.758, mimeographed.

⁵ *Yearbook ... 2009*, vol. II (Part Two), para. 164.

⁶ *Ibid.*, para. 167.

individuals.⁷ It was further emphasized that State-to-State relations remained an important feature of disaster relief.⁸

6. Most States expressed support for the Special Rapporteur's approach to the topic, which focused on the rights and needs of affected individuals.⁹ It was urged that the Commission refrain from attempting to enumerate the specific rights or groups of rights relevant to disaster relief,¹⁰ and some States invited the Commission to give due consideration to economic and social rights, which were the most likely to be affected in times of disaster.¹¹ Other States, however, expressed their preference for an approach based on needs, and the hope that the practical needs of affected persons would play a central role in the Commission's future work.¹² It was also noted that a "rights-based approach" implied that individuals were in a position to appeal for international relief, a concept that was in tension with the principles of sovereignty and non-intervention.¹³

7. Regarding the general scope of the topic, many States agreed with the view that the Commission should focus first on immediate response and long-term rehabilitation, leaving discussions of disaster preparedness and prevention to a later stage.¹⁴ However, some delegations emphasized the importance of disaster prevention, and suggested that this phase was quite relevant and should also be considered.¹⁵ With regard to the scope *rationae personae*, States agreed that the Commission could usefully focus on States, while not losing sight of other actors,¹⁶ though the view was expressed that the Commission should concentrate exclusively on the rights and obligations of States.¹⁷ Most States agreed that the responsibility to protect was not applicable to the present undertaking.¹⁸

8. Because State delegations made helpful remarks regarding the drafting and orientation of the five draft articles, it will be useful to discuss State comments on each article in turn.¹⁹ With respect to draft article 1, States agreed that the project's scope should be defined simply as "the protection of persons in the event of disasters",²⁰ and that the project's purpose should be articulated in a separate draft article.²¹ Some delegations, however, felt that "assistance", or "assistance and relief", might be more appropriate than "protection" in the context of disasters,²² a suggestion that implies changing the Commission's perspective on and, therefore, the title of the topic.

9. Many States saw the need for a separate article, such as draft article 2, addressing the purpose of the project.²³ The article's fusion of the rights- and needs-based approaches to disaster relief was endorsed by many States,²⁴ with a delegation noting that it "represents an elegant compromise" between those who would prefer an approach focused exclusively on needs, and those who argue that rights should be the central concern of disaster relief.²⁵ It was suggested that the article refer to a "timely and effective" response, instead of "adequate and effective".²⁶

10. The definition of "disaster" agreed upon in draft article 3 was well received by States.²⁷ Some States agreed with the determination that the definition should refer to an "event",²⁸ though the view was also expressed that a disaster should be understood in terms of its effects, rather than in terms of the factors provoking it.²⁹ States also noted that the definition should address damage to property and to the environment.³⁰ While some States argued that the

⁷ For example, Russian Federation, *Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee*, 20th meeting (A/C.6/64/SR.20), para. 45.

⁸ Austria, *ibid.*, para. 11.

⁹ Chile, *ibid.*, para. 28; Czech Republic, *ibid.*, para. 42; Russian Federation, *ibid.*, para. 45; Spain, *ibid.*, para. 49; Portugal, 21st meeting (A/C.6/64/SR.21), para. 82; Thailand, *ibid.*, para. 14; Ireland, 22nd meeting (A/C.6/64/SR.22), para. 15; and New Zealand, *ibid.*, para. 71. IFRC stated, "We would like to express our appreciation for the Commission's acknowledgment of the Red Cross and Red Crescent's traditional adherence to an approach to disaster response that is based on needs but informed by rights" (*ibid.*, para. 30).

¹⁰ Ireland, *ibid.*, 22nd meeting (A/C.6/64/SR.22), para. 15; and Russian Federation, 20th meeting (A/C.6/64/SR.20), para. 45.

¹¹ Chile, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 28; and Thailand, 21st meeting (A/C.6/64/SR.21), para. 14. But see the Netherlands, *ibid.*, para. 90, stating that the Commission, if it takes this approach, should be more specific about the rights involved.

¹² Myanmar, *ibid.*, 21st meeting (A/C.6/64/SR.21), para. 2; Netherlands, *ibid.*, para. 90; United States, *ibid.*, para. 101; United Kingdom, 20th meeting (A/C.6/64/SR.20), para. 38.

¹³ China, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 21.

¹⁴ China, *ibid.*, para. 22; Spain, *ibid.*, para. 48; Ireland, 22nd meeting (A/C.6/64/SR.22), para. 14; and Portugal, 21st meeting (A/C.6/64/SR.21), para. 83 (excluding the stage of prevention). See also France, *ibid.*, para. 20 (focus on the immediate response).

¹⁵ Chile, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 28; Russian Federation, *ibid.*, para. 46; Ghana, 22nd meeting (A/C.6/64/SR.22), para. 11; and Poland, 21st meeting (A/C.6/64/SR.21), para. 75.

¹⁶ Russian Federation, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 46; and Portugal, 21st meeting (A/C.6/64/SR.21), para. 82 (emphasizing non-State actors).

¹⁷ China, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 22.

¹⁸ China, *ibid.*; Czech Republic, *ibid.*, para. 43; Russian Federation, *ibid.*, para. 46; Ghana, 22nd meeting (A/C.6/64/SR.22), para. 12;

Islamic Republic of Iran, *ibid.*, para. 82; Ireland, *ibid.*, para. 14; Sri Lanka, 21st meeting (A/C.6/64/SR.21), para. 54; and Thailand, *ibid.*, para. 16; but see Poland, *ibid.*, para. 76 (arguing that the responsibility to protect should apply to disasters).

¹⁹ The articles referred to in the following discussion are those provisionally adopted by the Drafting Committee and contained in document A/CN.4/L.758, mimeographed.

²⁰ *Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee*, Chile, 20th meeting (A/C.6/64/SR.20), para. 28; and Finland (on behalf of the Nordic States), *ibid.*, para. 7.

²¹ Austria, *ibid.*, para. 12; Chile, *ibid.*, para. 28; and Hungary, 18th meeting (A/C.6/64/SR.18), para. 60.

²² Islamic Republic of Iran, *ibid.*, 22nd meeting (A/C.6/64/SR.22), para. 80; and United Kingdom, 20th meeting (A/C.6/64/SR.20), para. 39.

²³ Chile, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 28; Russian Federation, *ibid.*, para. 45; United Kingdom, *ibid.*, para. 39; and Ireland, 22nd meeting (A/C.6/64/SR.22), para. 14.

²⁴ Czech Republic, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 42; see also Finland (on behalf of the Nordic States), *ibid.*, para. 8 (noting that the Nordic States supported the rights-based approach to assistance, but could support the wording of draft article 2, which also emphasized needs).

²⁵ See Russian Federation, *ibid.*, para. 45.

²⁶ United Kingdom, *ibid.*, para. 39.

²⁷ See, for example, Chile, *ibid.*, para. 29; Finland (on behalf of the Nordic States), *ibid.*, para. 7; Russian Federation, *ibid.*, para. 47; and the Netherlands, 21st meeting (A/C.6/64/SR.21), para. 91.

²⁸ See Austria, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 15 (citing the International Charter on Space and Major Disasters); compare with China, *ibid.*, para. 23 (stating that the Commission should focus on disasters that "strike without warning and cause serious" damage).

²⁹ Russian Federation, *ibid.*, para. 47.

³⁰ Austria, *ibid.*, para. 16; Malaysia, 21st meeting (A/C.6/64/SR.21), para. 38; and Poland, *ibid.*, para. 73.

topic should focus primarily on natural disasters,³¹ most States agreed that the distinction between man-made and natural disasters was not a useful one.³² It was also suggested that the definition be limited to events that exceed the local response capacity.³³

11. It was widely agreed that armed conflicts should not be covered by the Commission's draft,³⁴ but States offered varying suggestions as to how to address that issue. Some States welcomed the Commission's approach in draft article 4,³⁵ but others suggested that a "without prejudice" clause would be more appropriate.³⁶ Some delegations also noted that other situations should also be excluded, such as riots and internal disturbances, as well as the law of consular assistance.³⁷ It was also suggested that the existence of an armed conflict should not in itself preclude the application of the draft articles.³⁸

12. Draft article 5 on the duty to cooperate received ample support in the Sixth Committee, with States noting that cooperation was a central principle of international law.³⁹ The list of relevant cooperative actors—including the United Nations, the International Red Cross and Red Crescent Movement and other international and non-governmental organizations—met with approval,⁴⁰ though

³¹ Islamic Republic of Iran, *ibid.*, 22nd meeting (A/C.6/64/SR.22), para. 80; Malaysia, 21st meeting (A/C.6/64/SR.21), para. 38; and Sri Lanka, *ibid.*, para. 54.

³² Chile, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 29; China, *ibid.*, para. 23; Finland (on behalf of the Nordic States), *ibid.*, para. 7; Ghana, 22nd meeting (A/C.6/64/SR.22), para. 11; Ireland, *ibid.*, para. 17; Poland, 21st meeting (A/C.6/64/SR.21), para. 73; and Thailand, *ibid.*, para. 15.

³³ China, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 23; and the Bolivarian Republic of Venezuela, 21st meeting (A/C.6/64/SR.21), para. 41.

³⁴ Austria, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 13; Russian Federation, *ibid.*, para. 47; and Spain, *ibid.*, para. 48.

³⁵ Finland (on behalf of the Nordic States), *ibid.*, para. 8; and Russian Federation, *ibid.*, para. 47.

³⁶ Chile, *ibid.*, para. 29; Greece, 21st meeting (A/C.6/64/SR.21), para. 46; Netherlands, *ibid.*, para. 91; Slovenia, *ibid.*, para. 70; Ghana, 22nd meeting (A/C.6/64/SR.22), para. 12; and Ireland, *ibid.*, para. 18.

³⁷ United Kingdom, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 39 (referring to consular assistance).

³⁸ France, *ibid.*, 21st meeting (A/C.6/64/SR.21), para. 23.

³⁹ Chile, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 30; Finland (on behalf of the Nordic States), *ibid.*, paras. 9 and 10; and France, 21st meeting (A/C.6/64/SR.21), para. 24; see also New Zealand, 22nd meeting (A/C.6/64/SR.22), para. 71 (the central principle underpinning disaster relief is cooperation); and Poland, 21st meeting (A/C.6/64/SR.21), para. 77. (While the duty to cooperate refers to a "formal framework of the protection of persons, solidarity refers to its substance". They complement each other in an indispensable way.) But see China, 20th meeting (cooperation as a moral value only) (A/C.6/64/SR.20), para. 24.

⁴⁰ See Chile, *ibid.*, para. 30; Finland (on behalf of the Nordic States), *ibid.*, para. 10; and Ireland, 22nd meeting (A/C.6/64/SR.22), para. 19.

some delegations noted that the duty to cooperate with the United Nations was different from the duty owed to other actors.⁴¹ Several States expressed hesitation, stating that the duty to cooperate as expressed in the draft article was currently too general, and required further clarification.⁴² Some delegations suggested that the duty to cooperate should be re-examined after other rules and principles had been articulated.⁴³ Finally, it was noted that draft article 5 referred only to obligations to cooperate that already existed under international law.⁴⁴

13. A number of delegations focused on the relationship between the duty to cooperate and an obligation to accept disaster relief. Some States urged that the principle of cooperation should not be understood as requiring a State to accept international assistance,⁴⁵ though others suggested that an affected State must cooperate with international actors if it is unwilling or unable to assist its own population.⁴⁶ In this connection, several States suggested that the Special Rapporteur articulate the primary responsibility of the affected State to protect persons on its territory.⁴⁷ It was also recommended that the Special Rapporteur address other principles relevant to disaster relief, such as humanity, neutrality, impartiality, sovereignty and non-intervention.⁴⁸

⁴¹ Czech Republic, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 42; France, 21st meeting (A/C.6/64/SR.21), para. 24; and Islamic Republic of Iran, 22nd meeting (A/C.6/64/SR.22), para. 82.

⁴² Austria, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 17; Islamic Republic of Iran, 22nd meeting (A/C.6/64/SR.22), para. 82; Japan, 23rd meeting (A/C.6/64/SR.23), para. 28; and the Netherlands, 21st meeting (A/C.6/64/SR.21), para. 91; see also Myanmar, *ibid.*, para. 3.

⁴³ Austria, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 17; and Russian Federation, *ibid.*, para. 47.

⁴⁴ France, *ibid.*, 21st meeting (A/C.6/64/SR.21), para. 24; and Ireland, 22nd meeting (A/C.6/64/SR.22), para. 19.

⁴⁵ China, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 24; United Kingdom, *ibid.*, para. 38; Islamic Republic of Iran, 22nd meeting (A/C.6/64/SR.22), para. 82; Myanmar, 21st meeting (A/C.6/64/SR.21), para. 3; see also Cuba, *ibid.*, para. 10 (noting that respect for the sovereignty and self-determination of States "must prevail") and the Bolivarian Republic of Venezuela, *ibid.*, para. 42. ("While the principles of sovereignty and non-intervention could not justify denial of the victims' access to assistance, such assistance should not be provided without the prior consent of the State.")

⁴⁶ Finland (on behalf of the Nordic States), *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 10; Greece, 21st meeting (A/C.6/64/SR.21), para. 48; and Poland, *ibid.*, para. 76.

⁴⁷ Czech Republic, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 42; and Sri Lanka, *ibid.*, 21st meeting (A/C.6/64/SR.21), para. 54; see also Romania, *ibid.*, 22nd meeting (A/C.6/64/SR.22), para. 25 (noting that it will be important to strike a balance between cooperation and the responsibility of affected States).

⁴⁸ China, *ibid.*, 20th meeting (A/C.6/64/SR.20), para. 24; Finland (on behalf of the Nordic States), *ibid.*, para. 10; United States, 21st meeting (A/C.6/64/SR.21), para. 101; and New Zealand, 22nd meeting (A/C.6/64/SR.22), para. 71.

CHAPTER I

The principles of humanity, neutrality and impartiality

14. Taking into account the concordant views expressed in the Commission and the Sixth Committee when considering the Special Rapporteur's second report, the Rapporteur will now proceed to identify in the present report, as already announced in his previous one, "the principles

that inspire the protection of persons in the event of disaster, in its aspect related to persons in need of protection".⁴⁹

⁴⁹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615 and Corr.1, para. 71.

15. Response to disasters, in particular humanitarian assistance, must comply with certain requirements to balance the interests of the affected State and the assisting actors. The requirements for specific activities undertaken as part of the response to disasters may be found in the humanitarian principles of humanity, neutrality and impartiality.

16. Keeping in mind that the purpose of a response to disasters, as stated in draft article 2 provisionally adopted by the Drafting Committee, is to meet the essential needs of the persons concerned, with full respect for their rights, the term “humanitarian response” is used here to indicate that its scope extends beyond what is generally understood by humanitarian assistance, which constitutes only the “minimum package of relief commodities”.⁵⁰

17. The principles of humanity, neutrality and impartiality are leading principles that come into play when it is a question of humanitarian response in disaster situations.⁵¹ Recent debates surrounding the reaffirmation, respect and implementation of the principles applicable to humanitarian response highlight the importance attached to including them in any work on the topic.⁵² As is pointed out in the 2009 report of the Secretary-General entitled “Strengthening of the coordination of emergency humanitarian assistance of the United Nations”, submitted to the General Assembly and the Economic and Social Council:

Respect for and adherence to the humanitarian principles of humanity, neutrality, impartiality and independence are therefore critical to ensuring the distinction of humanitarian action from other activities, thereby preserving the space and integrity needed to deliver humanitarian assistance effectively to all people in need (see General Assembly resolution 46/182).⁵³

18. Originally found in international humanitarian law⁵⁴ and in the fundamental principles of the Red Cross,⁵⁵ these humanitarian principles are widely used and accepted in a number of international instruments in the context of

⁵⁰ Slim, “Relief agencies and moral standing in war: principles of humanity, neutrality, impartiality and solidarity”, p. 346; see also Rey Marcos and de Curra-Lugo, *El debate humanitario*, p. 53.

⁵¹ Memorandum by the Secretariat, A/CN.4/590 and Add.1–3, para. 11, including references to relevant instruments, available on the website of the Commission.

⁵² See, for example, the discussions that took place in the substantive session of the Economic and Social Council, 20–22 July 2009 (press releases are available at www.un.org/en/ecosoc/julyhls/2009newsroom.shtml, accessed 7 December 2015). Also illustrative is the heading of a United Nations press release on the substantive session of the Council in July 2008 (ECOSOC/6362) which, in the French version, reads: “ECOSOC: Plusieurs États insistent sur le respect des principes d’humanité, de neutralité, d’impartialité et d’indépendance qui sous-tendent l’aide humanitaire”, available from www.un.org/News/fr-press/docs/2008/ECOSOC6362.doc.htm, accessed 7 December 2015.

⁵³ A/64/84-E/2009/87, para. 23.

⁵⁴ For instance, article 70, paragraph 1, of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) refers to “relief actions which are humanitarian and impartial in character and conducted without any adverse distinction”: and article 18, paragraph 2, of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) refers to “relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction”.

⁵⁵ Resolution VIII of the twentieth International Conference of the Red Cross (*Resolutions*, Vienna, 1965).

response to disasters.⁵⁶ Most notably, the instruments identified by the Secretariat in its preparatory study on the topic at hand illustrate their significance in disaster situations.⁵⁷ A more recent instrument, the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), states, in part:

Article 5, paragraph 7

States Parties shall take necessary steps to effectively organize relief action that is humanitarian and impartial in character.

Article 5, paragraph 8

States Parties shall uphold and ensure respect for the humanitarian principles of humanity, neutrality, impartiality and independence of humanitarian actors.

Article 6, paragraph 3

International organizations and humanitarian agencies shall be bound by the principles of humanity, neutrality, impartiality and independence of humanitarian actors, and ensure respect for relevant international standards and codes of conduct.⁵⁸

19. The Secretariat study has identified these principles in the context of “international rules relating to disaster relief”. For instance, it recalls expressly General Assembly resolutions 43/131, of 8 December 1988; 45/100, of 14 December 1990; and 46/182, of 19 December 1991.⁵⁹ In particular the reference to resolution 46/182, annex, should be emphasized. Its paragraph 2 contains the following phrase: “Humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality”. The General Assembly has thus developed a practice of listing these three principles together when referring to humanitarian assistance, including in situations of natural disasters.⁶⁰

20. With reference to General Assembly resolution 46/182, these principles also appear as “core principles” in the documents entitled *Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies*⁶¹ of 2003 and the *Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (Oslo Guidelines)* of 2006.⁶²

⁵⁶ For reference made to “the principles of international humanitarian law” applicable to assistance in all cases of disaster, see article 72, paragraph 2, of the Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its member States, of the other part. The Food Aid Convention, 1999, art. VIII (d), refers to the “humanitarian principles” applicable to the provision of food in emergency situations.

⁵⁷ *Yearbook ... 2008*, vol. II (Part One), Addendum 1, document A/CN.4/590 and Add.1–3, paras. 10–16.

⁵⁸ See also article 3, paragraph 1 (c) and (d) of the Convention.

⁵⁹ A/CN.4/590 and Add.1–3 (footnote 51 above), para. 11; see also paras. 10, 12 and 15, and footnote 36.

⁶⁰ For recent General Assembly resolutions, consider resolutions 63/139 and 63/141 of 11 December 2008; and 64/74 and 64/76, of 7 December 2009.

⁶¹ OCHA, *Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies*, paras. 22–24; see also paragraphs 2, 27, 28, 32 and 33.

⁶² OCHA, *Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (Oslo Guidelines)*, revised on 1 November 2007, paras. 1, 20, 22, 79, 80, 93 and 95.

21. Those Guidelines provide further references to instruments that include the same set of principles in this context, such as the statutes of the International Red Cross and Red Crescent Movement.⁶³ Another widely recognized instrument in the field of disaster response is the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief.⁶⁴ This Code of Conduct contains 10 principles—including those of humanity, impartiality and non-discrimination—that should guide the actions of the signatory organizations. At the time of writing, it had attracted 481 signatories.⁶⁵

22. Significantly, the international disaster response law guidelines of IFRC contain references to the three humanitarian principles.⁶⁶ However, it is worth noting that IFRC has inserted particular elements flowing from these principles which can be found in various instruments.⁶⁷ The relevant guideline 4, paragraph 2, of the Guidelines reads in full:

Assisting actors should ensure that their disaster relief and initial recovery assistance is provided in accordance with the principles of humanity, neutrality and impartiality, and in particular that:

(a) Aid priorities are calculated on the basis of need alone;

(b) It is provided without any adverse distinction (such as in regards to nationality, race, ethnicity, religious beliefs, class, gender, disability, age and political opinions) to disaster-affected persons;

(c) It is provided without seeking to further a particular political or religious standpoint, intervene in the internal affairs of the affected State, or obtain commercial gain from charitable assistance;

(d) It is not used as a means to gather sensitive information of a political, economic or military nature that is irrelevant to disaster relief or initial recovery assistance.

23. In the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ referred to “the purposes hallowed in the practice of the Red Cross” in the context of humanitarian assistance in order to “escape condemnation as an intervention in the internal affairs” of the affected State. The Court specified that these purposes included “to prevent and alleviate human suffering” and “to protect life and health and to ensure respect for the human being”. Moreover, humanitarian assistance must be “given without discrimination to all in need”.⁶⁸

24. In his commentary on the principles of the Red Cross, Pictet has made a distinction between what he

calls substantive principles and derived principles.⁶⁹ The substantive principles, as identified by Pictet, are humanity and impartiality, and neutrality was recognized as a derived principle “to translate the substantive principles into factual reality”.⁷⁰

25. Thus, response to disasters in all stages is conditioned on these humanitarian principles so as to preserve the legitimacy and effectiveness of that response. To achieve a better understanding of these principles, especially in the context of the protection of persons in the event of disasters, they will be touched upon below. With a view to ensuring greater coherence in the presentation of this report as a whole, they will be dealt with not necessarily in the order usually followed when reference is made to the three principles together.

A. Neutrality

26. “The Red Cross may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature” is the phrase used by ICRC to describe the principle of neutrality.⁷¹ It demonstrates not only its relevance to armed conflict situations but also to other disaster situations. It makes clear that neutrality implies abstention. Neutrality between belligerents may well come into play when considering that persons affected amidst armed conflict may fall victim to another disaster. The provisionally adopted draft article 3 does not exclude such a situation.⁷² In such a case, assisting actors are to remain neutral.

27. Furthermore, neutrality neither confers nor takes away legitimacy from any authority. Nor should humanitarian response be used to intervene in the domestic affairs of a State. As explained by an author:

However, the effect of [humanitarian relief activities] is the safeguarding of human life, and the protection of victims of natural disasters, of victims who cannot protect themselves or of victims in need of special protection. It is obvious that the principle of neutrality may not be interpreted as an action that fails to take account of respect for other fundamental human rights principles. This principle is clearly subordinate to the principle of respect for the sovereignty of States.⁷³

28. Hence, actions taken in response to disasters are neither partisan or political acts nor substitutes for them.⁷⁴ Rather, adherence to the principle of neutrality should facilitate an adequate and effective response. It is a means to an end: access to those whose essential needs are to be met providing at the same time a condition for the safety

⁶³ Together with the principles of independence, voluntary service, unity and universality, humanity, neutrality and impartiality constitute the seven fundamental principles codified in the statutes of the International Red Cross and Red Crescent Movement.

⁶⁴ Approved at the 26th International Conference of the International Red Cross and Red Crescent Movement, held in Geneva, 3–7 December 1995 (*International Review of the Red Cross*, vol. 36, No. 310 (1996), annex VI).

⁶⁵ www.ifrc.org/Global/Publications/disasters/code-of-conduct/codeconduct_signatories.pdf, accessed 7 December 2015.

⁶⁶ *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*.

⁶⁷ IFRC, *Annotations to the Draft Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, version of 26 October 2007, available at www.ifrc.org/docs/idrl/I1020EN.pdf, accessed 7 December 2015.

⁶⁸ *Merits, Judgment, I.C.J. Reports 1986*, p. 125, para. 243.

⁶⁹ Pictet, *The Fundamental Principles of the Red Cross Proclaimed by the Twentieth International Conference of the Red Cross, Vienna, 1965: Commentary*, pp. 12 and 13.

⁷⁰ *Ibid.*

⁷¹ Resolution VIII of the Twentieth International Conference of the Red Cross (*Resolutions*, Vienna, 1965).

⁷² See footnote 4 above.

⁷³ Patrnogic, “Protection de la personne humaine au cours des catastrophes naturelles”, p. 19.

⁷⁴ See, for example, International Institute of Humanitarian Law, “Guiding principles on the right to humanitarian assistance”. Preamble paragraph 5 states: “Stressing that humanitarian assistance, both as regards those granting and those receiving it, should always be provided in conformity with the principles inherent in all humanitarian activities; the principles of humanity, neutrality and impartiality, so that political considerations should not prevail over these principles” (*ibid.*, p. 521).

of those who bring relief. Equally, it obliges assisting actors to do everything feasible to ensure that their activities are not being used for purposes other than responding to the disaster in accordance with the humanitarian principles. As put by a commentator:

Returning to the essence of neutrality and allowing it a scope which encompasses its possible implications in peacetime, neutrality may therefore be understood as a duty to abstain from any act which, in a conflict situation, might be interpreted as furthering the interests of one party to the conflict or jeopardizing those of the other.⁷⁵

29. In disaster situations other than armed conflict,⁷⁶ the conclusion may be drawn that those responding to disasters should abstain from any act which might be interpreted as interference with the interests of the State. Conversely, the affected State must respect the humanitarian nature of the response activities and “refrain from subjecting it to conditions that divest it of its material and ideological neutrality”.⁷⁷ The interest of persons adversely affected by disasters, defined by needs and rights, are the primary concern of both the affected State and any assisting actor.

30. Neutrality neither lacks a moral standing nor is it impracticable. As such, the principle of neutrality provides the operational mechanism to implement the ideal of humanity. The principle of neutrality has, therefore, been recognized as a critical humanitarian principle by a number of actors, including donor States.⁷⁸ The Regulation of the European Union concerning humanitarian aid⁷⁹ provides a good example. It spells out the humanitarian aim and refers to the principles of non-discrimination and impartiality. Furthermore, the Regulation explicitly states that humanitarian aid “must not be guided by, or subject to, political considerations”.⁸⁰ The principle has also been reflected in various General Assembly resolutions.⁸¹ In line with the purpose of this topic as defined provisionally by the Drafting Committee,⁸² neutrality is, therefore, a key operational principle to ensure access to those adversely affected by disasters in an impartial manner.

B. Impartiality

31. Any response to disasters should be guided by meeting needs and fully respecting rights of those affected, giving priority to the most urgent cases of distress. The principle of impartiality is commonly understood as encompassing three distinct principles: non-discrimination,

proportionality and impartiality proper. These three distinct components will be briefly outlined below.

32. The modern origins of the principle of non-discrimination may be found in the development of international humanitarian law as well. Motivated by the need to provide relief for the wounded and sick in a non-discriminatory manner, the first Geneva Convention (the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field) of 1864 came into existence. It recognized the principle that, regardless of their nationality, all wounded and sick must be cared for. From then on, the principle of non-discrimination was further developed in international humanitarian law and later in human rights law as well. It reflects the equality of all human beings and that no adverse distinction may be made between them. Moreover, the prohibited grounds for discrimination were expanded and made non-exhaustive.⁸³ These grounds include non-discrimination as to ethnic origin, sex, nationality, political opinions, race or religion.⁸⁴ This is not to say that, in certain circumstances and depending on the special needs of certain groups of victims, preferential treatment may, and indeed must, be granted to them. Numerous examples may be given with reference to international humanitarian law and human rights law but illustrative is the special protection afforded to children.⁸⁵ All human rights instruments and indeed individual human rights provisions take into account the principle of non-discrimination either explicitly or implicitly. The principle has thus acquired the status of a fundamental rule of international human rights law.⁸⁶

33. The principle of non-discrimination also finds expression in the Charter of the United Nations. Article 1, paragraph 3, states as one of the purposes of the Organization:

To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all *without distinction as to race, sex, language, or religion**.

Similar wording is used in Article 55 (c) of the Charter.

34. In the context of disasters, some conventions have spelled out the principle of non-discrimination as a

⁷⁵ Plattner, “ICRC neutrality and neutrality in humanitarian assistance”, p. 165, cited in H. Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre*, Paris, 1970, p. 392.

⁷⁶ As evidenced by the draft articles provisionally adopted by the Drafting Committee, draft article 4 excludes situations of armed conflict from its scope.

⁷⁷ Stoffels, “Legal regulation of humanitarian assistance in armed conflict: achievements and gaps”, p. 544.

⁷⁸ Walker and Maxwell, *Shaping the Humanitarian World*, p. 139.

⁷⁹ Council Regulation (EC) No. 1257/96, of 20 June 1996, concerning humanitarian aid, *Official Journal of the European Communities*, vol. 39, No. L 163, 2 July 1996.

⁸⁰ *Ibid.*, preambular para. 10.

⁸¹ In particular, resolution 46/182 and subsequent resolutions adopted under the item, “Strengthening of the coordination of emergency humanitarian assistance of the United Nations” (see footnote 60 above).

⁸² See footnote 4 above.

⁸³ Exemplary is the Charter of Fundamental Rights of the European Union, whose article 21 reads: “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.

⁸⁴ See, *inter alia*, article 3 common to the Geneva Conventions for the protection of war victims; article 2 of the Universal Declaration of Human Rights; article 2, paragraph 1, of the International Covenant on Civil and Political Rights; and article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights.

⁸⁵ See, for example, article 77 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); article 4, paragraph 3, 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); and the Convention on the Rights of the Child.

⁸⁶ World Conference on Human Rights, Vienna Declaration and Programme of Action (A/CONF.157/24 (Part I), chap. III), para. 15.

general principle of the provision of disaster relief.⁸⁷ In the same vein, the Convention and Statute Establishing an International Relief Union makes it clear that it operates “for the benefit of all stricken people, whatever their nationality or their race, and irrespective of any social, political or religious distinction”.⁸⁸

35. The second component of the principle of impartiality is the principle of proportionality. The principle of proportionality recognizes that the response must be proportionate to the degree of suffering and urgency.⁸⁹ In other words, the response activities must be proportionate to the needs in scope and in duration.⁹⁰ While humanity and non-discrimination claim instant and full relief for everyone, the principle of proportionality acts as an essential distributive mechanism to put these principles into action when time and resources may not be readily available. This is, unfortunately, rather the rule than the exception in a disaster. Thus, a distinction may be made based upon the degree of need. The principle at hand finds expression, for instance, in a resolution adopted by the Institute of International Law in Bruges (Belgium) in 2003. Its article II, paragraph 3, reads:

Humanitarian assistance shall be offered and, if accepted, distributed without any discrimination on prohibited grounds, while taking into account the needs of the most vulnerable groups.⁹¹

36. The last of the three elements making up the principle of impartiality refers to the obligation not to make a subjective distinction (as opposed to the objective distinctions addressed by the principle of non-discrimination) between individuals based on criteria other than need. This is impartiality in a narrow sense. The Secretariat study has further elaborated on this point.⁹²

C. Humanity

37. Humanity is a long-standing principle in international law. According to Grotius, it has been present as a general principle for millennia.⁹³ In its contemporary sense, humanity is the cornerstone of the protection of persons in international law, as it serves as the point of articulation between international humanitarian law and the law of human rights. It is, in that sense, a necessary inspiration in the development of mechanisms for the protection of persons in the event of disasters.

⁸⁷ Framework Convention on civil defence assistance, art. 3 (c); and Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters, art. 3, para. 4. See also draft convention on expediting the delivery of emergency assistance (A/39/267/Add.2-E/1984/96/Add.2), art. 5, para. 1 (c). See further the Agreement between the Republic of China and the United States of America Concerning the United States Relief Assistance to the Chinese People (Nanking, 27 October 1947, United Nations, *Treaty Series*, vol. 12, No. 178, p. 11), art. II (d), referring to the principle of non-discrimination and in the same line noting that supplies may not be used for purposes other than relief for such time as need be.

⁸⁸ Art. 3, para. 1; here we can also identify the principle of neutrality as the only objective of relief is the “stricken people”.

⁸⁹ Pictet (footnote 69 above), p. 41.

⁹⁰ Stoffels (footnote 77 above), p. 540.

⁹¹ *Yearbook*, p. 269.

⁹² A/CN.4/590 and Add.1–3 (footnote 51 above), paras. 14 and 15.

⁹³ Grotius, *De Jure Belli ac Pacis*, book 3, chap. 11, paras. 9 and 10.

38. The principle of humanity gained its central status in the international legal regime with the development of international humanitarian law. The principle was expressed in the Declaration of St. Petersburg of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime,⁹⁴ and in the preamble to Hague Conventions respecting the Laws and Customs of War on Land: Convention II, adopted by the First Hague Peace Conference in 1899, from which the Martens Clause was derived.⁹⁵ Humanity is also one of the founding principles of both ICRC and IFRC.⁹⁶

39. The principle of humanity finds its most clear expression in the requirement to treat humanely civilians and persons *hors de combat* established by international humanitarian law. The obligation of humane treatment was present in the Lieber Code (art. 76),⁹⁷ and is set forth in subparagraph (1) (c) of common article 3 of the Geneva Conventions for the protection of war victims. Similarly, the obligation is present in article 12, second paragraph, of the First Geneva Convention (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field); article 12, second paragraph, of the Second Geneva Convention (Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea); article 13 of the Third Geneva Convention (Geneva Convention relative to the Treatment of Prisoners of War); and article 5 and the first paragraph of article 27 of the Fourth Geneva Convention (Geneva Convention Relative to the Protection of Civilian Persons in Time of War). Moreover, it is recognized by article 75, paragraph 1, of Protocol I (Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts); and article 4, paragraph 1, of Protocol II (Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts).

40. The principle of humane treatment, as established by international humanitarian law in common article 3 of the Geneva Conventions for the protection of war victims, is an expression of general values that guide the international legal system as a whole. The International Tribunal for the Former Yugoslavia underscored this link, when it held in the *Aleksovski* case that:

A reading of paragraph (1) of common Article 3 reveals that its purpose is to uphold and protect the inherent human dignity of the individual. It prescribes humane treatment without discrimination based on “race, colour, religion or faith, sex, birth, or wealth, or any other similar criteria”. Instead of defining the humane treatment which is guaranteed, the States parties chose to proscribe particularly odious forms of

⁹⁴ “Having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity” (first paragraph).

⁹⁵ “The High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.” See also the preamble of the Hague Conventions respecting the Laws and Customs of War on Land: Convention IV, 1907.

⁹⁶ See Pictet (footnote 69 above),

⁹⁷ Instructions for the Government of Armies of the United States in the Field (1863), in Schindler and Toman (eds.), *The Laws of Armed Conflicts: a Collection of Conventions, Resolutions and Other Documents*, p. 13.

mistreatment that are without question incompatible with humane treatment. The Commentary to Geneva Convention IV explains that the delegations to the Diplomatic Conference of 1949 sought to adopt wording that allowed for flexibility, but, at the same time, was sufficiently precise without going into too much detail. For “the more specific and complete a list tries to be, the more restrictive it becomes”. Hence, while there are four sub-paragraphs which specify the absolutely prohibited forms of inhuman treatment from which there can be no derogation, the general guarantee of humane treatment is not elaborated, except for the guiding principle underlying the Convention, that its object is the humanitarian one of protecting the individual *qua* human being and, therefore, it must safeguard the entitlements which flow therefrom.⁹⁸

41. Humanity as a legal principle is not limited to the obligation of humane treatment in armed conflict, but rather guides the international legal system both in war and in peace. The general applicability of humanity was made clear early on by ICJ, which held in the *Corfu Channel* case (merits) that:

The 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.⁹⁹

42. The same premise was confirmed by ICJ in subsequent decisions. In the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Court noted that common article 3 is a reflection of more general values, as such an article, in the Court’s words,

defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called “elementary considerations of humanity”.¹⁰⁰

43. Such elementary considerations of humanity provide the common ground shared by international humanitarian law and the law of human rights. For ICJ, this common ground implies that human rights are also applicable in the context of armed conflict. In its 1996 advisory opinion in the case of *Legality of the Threat or Use of Nuclear Weapons*, the Court observed that

the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.¹⁰¹

⁹⁸ International Tribunal for the Former Yugoslavia, *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement of 25 June 1999, para. 49.

⁹⁹ *Corfu Channel case, Judgment, I.C.J. Reports 1949*, p. 22.

¹⁰⁰ *Merits, Judgment, I.C.J. Reports 1986*, p. 113, para. 218.

¹⁰¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *I.C.J. Reports 1996*, p. 240, para. 25.

44. This view has since then become a central tenet of ICJ’s approach to the protection of persons under international law. In its 2004 advisory opinion in the case of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court confirmed that the protection of the humanity of individuals provides guidance to the international legal regime. Indeed, for the Court,

the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.¹⁰²

45. This approach is not restricted to advisory opinions. ICJ applied the same reasoning in its judgment on merits in 2005 in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. In that judgment, the Court applied the standard established in its 2004 advisory opinion in the case of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, thus:

The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

...

It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”, particularly in occupied territories.¹⁰³

46. Focus on humanity as the ultimate ground for both human rights and international humanitarian law has been also accepted by the Inter-American Court of Human Rights. In the *Bámaca-Velásquez v. Guatemala* case, the Inter-American Court held that

there is a similarity between the content of Article 3, common to the 1949 Geneva Conventions, and the provisions of the American Convention and other international instruments regarding non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman or degrading treatment).¹⁰⁴

Following such precedent, in the *Mapiripán Massacre* case, the Inter-American Court of Human Rights found State responsibility on the basis of a standard of diligence that specifically invoked common article 3 of the Geneva Conventions for the protection of war victims and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims

¹⁰² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *I.C.J. Reports 2004*, p. 178, para. 106.

¹⁰³ *Armed activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 242, para. 216.

¹⁰⁴ Inter-American Court of Human Rights, case of *Bámaca-Velásquez v. Guatemala*, Judgment of 25 November 2000, *Series C, No. 70*, para. 209.

of non-international armed conflicts (Protocol II).¹⁰⁵ Similarly, in the matter of the *Matter of the Peace Community of San José de Apartadó regarding Colombia*, the Inter-American Court also ordered provisional measures on the basis of both human rights law and international humanitarian law, after finding the existence of an armed conflict in the State.¹⁰⁶

47. Considering the aforementioned precedents, the Special Rapporteur concludes that the approach suggested by ICJ and other international tribunals is also applicable to the protection of persons in the event of disasters. Humanity is an established principle of international law, applicable to both armed conflicts and peace, and could helpfully guide the present effort. It is pivotal to international humanitarian law, and explains the application of human rights law in armed conflict. However, the Special Rapporteur also notes that, as regards the protection of persons in the event of disasters, the Commission has provided clear guidance in the sense that armed conflict is to be excluded from the subject matter to be covered in its current work.¹⁰⁷ Therefore, having noted that humanity may serve as a guiding principle, and following the Commission's direction, it becomes of importance to emphasize the role of such principle in a context other than armed conflict, serving thus indeed as the cornerstone of the protection of persons under international law.

48. The starting point for the protection of persons in the event of disasters has been encapsulated in the provisionally adopted draft article 3 ("Definition of disaster").¹⁰⁸ It is the widespread loss of life, great human suffering and distress, or large-scale material or environmental damage (in relation to the persons concerned) that justifies the Commission's inclusion of this topic in its programme of work.¹⁰⁹ A number of instruments relevant to the particular context of humanitarian response share the notion that:

human suffering must be addressed wherever it is found, with particular attention to the most vulnerable in the population, such as children, women and the elderly. The dignity and rights of all victims must be respected and protected.¹¹⁰

49. The International Red Cross and Red Crescent Movement has defined humanity as an endeavour "to prevent and alleviate human suffering wherever it may be found ... to protect life and health and to ensure respect for the human being".¹¹¹ That this principle seems already to take

into account needs and rights may also be implicit in Pictet's commentary that the principle extends to a person's "life, liberty and happiness—in other words everything which constitutes his [...] existence".¹¹² The principle of humanity thus not only sees to a material or physical quest but extends to rights, too.¹¹³ In accordance with the purpose as spelled out in the provisionally adopted draft article 2,¹¹⁴ response to the three stages of a disaster focuses on the "essential needs" of the persons adversely affected by disasters with "full respect for their rights". Both aspects can be found in a number of documents.¹¹⁵ Pictet has attributed three elements to the principle of humanity: to prevent and alleviate suffering, to protect life and health, and to assure respect for the individual.¹¹⁶ Protection thus serves to uphold the human dignity.¹¹⁷ In a sense, the embodiment of the principle of humanity in one of the draft articles to be adopted for the present topic validates the fundamental ideal of the Martens Clause.¹¹⁸ The notion of humanity, or rather its recognition as an objective and a principle of international law, can be found in numerous conventions,¹¹⁹ General Assembly resolutions,¹²⁰ and in the practice of courts and tribunals.¹²¹ The principle of humanity thus serves as a constant reminder of the purpose of the topic under consideration.

50. In the light of the foregoing, the Special Rapporteur proposes the following draft article 6 on the humanitarian principles in disaster response.

**"Draft article 6. Humanitarian principles
in disaster response**

"Response to disasters shall take place in accordance with the principles of Humanity, Neutrality and Impartiality."

¹¹² Pictet (footnote 69 above), p. 26.

¹¹³ This has led one scholar to conclude that "without recognizing humanitarianism's concern for all types of rights, humanitarian reductionists actually minimize the rights of those they seek to help" (Slim (footnote 50 above), p. 345).

¹¹⁴ See footnote 4 above.

¹¹⁵ For instance, Human Rights Council resolution S-11/1 (A/HRC/S-11/2), where, in preambular para. 13, it is stated in relevant part that, "after the conclusion of hostilities, the priority *in terms of human rights** remains the provision of assistance to ensure the relief and rehabilitation of persons affected by the conflict" and in its preambular paragraph 14 examples of humanitarian assistance are enumerated (safe drinking water, sanitation, food and medical and health-care services) in response to the needs of internally displaced persons. Interestingly, the Human Rights Council qualified these types of assistance only as "*basic** humanitarian assistance". See also the Mohonk Criteria (footnote 110 above).

¹¹⁶ Pictet (footnote 69 above), pp. 21–27.

¹¹⁷ Thürer characterizes humanity as follows: "The principle of humanity is rooted in the idea of human dignity, linking it with the constitutional law of modern States, based on the rule of law, and with international human rights law" (Thürer, "Dunant's pyramid: thoughts on the 'humanitarian space'", p. 56; see chapter II below).

¹¹⁸ See footnote 95 above.

¹¹⁹ In particular, human rights and humanitarian law treaties.

¹²⁰ In particular, General Assembly resolution 46/182 and subsequent resolutions adopted under the item "Strengthening of the coordination of emergency humanitarian assistance of the United Nations"; see A/CN.4/590 and Add.1–3 (footnote 51 above), paras. 10–15, and footnotes 53 and 60 above.

¹²¹ See, for instance, the *Corfu Channel case (United Kingdom v. Albania)*, Merits, *I.C.J. Reports 1949*, p. 11, in which the Court noted the "elementary considerations of humanity"; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, *I.C.J. Reports 1986*, p. 13, para. 218; and the *Aleksovski case* (see footnote 98 above), para. 49.

¹⁰⁵ Inter-American Court of Human Rights, case of the *Mapiripán Massacre v. Colombia*, Judgement of 15 September 2005, *Series C, No. 134*, para. 114.

¹⁰⁶ Inter-American Court of Human Rights, Order of the Inter-American Court of Human Rights in the *Matter of the Peace Community of San José de Apartadó regarding Colombia*, Provisional Measures, 2 February 2006, para. 6.

¹⁰⁷ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615 and Corr.1, para. 6.

¹⁰⁸ See footnote 4 above.

¹⁰⁹ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598, chapters I and II.

¹¹⁰ Ebersole, "The Mohonk criteria for humanitarian assistance in complex emergencies: task force on ethical and legal issues in humanitarian assistance", p. 196. The Mohonk Criteria were established as part of the World Conference on Religion and Peace. The Criteria were distributed among humanitarian actors and States, and were generally well received. See also footnote 186 below and the references in A/CN.4/590 and Add.1–3 (footnote 51 above), para. 12.

¹¹¹ See footnote 71 above.

CHAPTER II

Human dignity

51. The principle of humanity in international humanitarian law is intimately linked to the notion of dignity. The humanitarian principle of humanity is often phrased in terms of dignity; thus, common article 3, paragraph 1 (c), of the Geneva Conventions for the protection of war victims prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment”; article 75 of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”; article 85 of Protocol I prohibits “practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination”; and article 4 of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”.

52. Dignity has been interpreted as providing the ultimate foundation of human rights law,¹²² ever since the preamble of the Charter of the United Nations, which declares:

We the people of the United Nations, determined:

...

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

The preamble to the 1948 Universal Declaration of Human Rights¹²³ in turn declares:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

...

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedoms.

53. From those early origins, dignity has been present as an inspiration of all major universal human rights instruments. Thus, articles 1, 22 and 23, paragraph 3, of the same 1948 Universal Declaration of Human Rights refer to dignity. Similarly, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial

Discrimination, all refer in their preambles to dignity as a source and inspiration of the rights provided therein. The same can be said about the preambles of the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child.

54. Dignity is also present beyond the preamble of universal human rights instruments. Thus, the notion is included in articles 28, 37 and 40 of the Convention on the Rights of the Child, and in article 19 of the International Convention for the Protection of All Persons from Enforced Disappearance, among many others. It operates as a founding notion and general principle in the Convention on the Rights of Persons with Disabilities,¹²⁴ as well as informing the operational aspects of the Convention.¹²⁵

55. Dignity is included in the preambles of most regional human rights instruments, including the American Convention on Human Rights; the Inter-American Convention on Forced Disappearance of Persons; the 2004 revised Arab Charter on Human Rights; the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances; and the Charter of Fundamental Rights of the European Union.

56. Human dignity has also inspired the opinions of many members of ICJ. Writing separately in the 1971 *South West Africa* case, Vice-President Ammoun noted that:

It is not by mere chance that in Article 1 of the Universal Declaration of the Rights of Man there stands, so worded, this primordial principle or axiom: “All human beings are born free and equal in dignity and rights”. From this first principle flow most rights and freedoms.

...

As is plain from the texts of its many resolutions, what decided the United Nations to penalize South Africa's conduct was much less the non-compliance over reports and petitions than the flagrant violation of the most essential principles of humanity, principles protected by the sanction of international law: equality, of which apartheid is the negation; freedom, which finds expression in the right of peoples to self-determination; and the dignity of the human person, which has been profoundly injured by the measures applied to non-White human beings.¹²⁶

¹²⁴ General Assembly resolution 61/106, annex I, art. 3 (establishing as a general principle the “inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons”) and art. 1 (purpose is to promote full and equal enjoyment of fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity).

¹²⁵ Arts. 16, 24 and 25.

¹²⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, advisory opinion, *I.C.J. Reports 1971*, p. 16.

¹²² See, for example, Henkin, “International human rights as ‘Rights’”, p. 269.

¹²³ General Assembly resolution 217 (III), of 10 December 1948.

Dissenting in the 1966 *South West Africa* judgment, Judge Tanaka also invoked the principle of human dignity.¹²⁷ Likewise, in addressing in the judgment on preliminary objections in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the question of succession to the Convention on the Prevention and Punishment of the Crime of Genocide, Judge Weeramantry stressed that individual dignity represents “one of the principal concerns of the contemporary international legal system”¹²⁸ and argued that “human rights and humanitarian treaties involve no loss of sovereignty or autonomy of the new State, but are merely in line with general principles of protection that flow from the inherent dignity of every human being which is the very foundation of the United Nations Charter”.¹²⁹ The dignity of the human person is also stressed as a central concern in separate and dissenting opinions in several other cases before the Court.¹³⁰

57. The notion of dignity has also been applied widely by the European Court of Human Rights. Thus, in the *Tyrer* case, a certain form of corporal punishment was deemed contrary to human dignity¹³¹ and, since then, several other decisions have referred expressly to the same idea.¹³² Even when pondering the right to life, the European Court of Human Rights held:

The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental

decrepitude which conflict with strongly held ideas of self and personal identity.¹³³

58. Human dignity also plays a fundamental role in the constitutions of many nations.¹³⁴ For example, the Constitution of Germany holds, “The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority”;¹³⁵ and the constitution of South Africa notes that the nation is founded on human dignity and “affirms the democratic values of human dignity, equality, and freedom”.¹³⁶ Many constitutions express similar principles.¹³⁷ Even where the value of dignity is not expressed in a nation’s fundamental rights documents, the concept is often invoked in that State’s constitutional jurisprudence.¹³⁸

59. The concept of human dignity also stands at the centre of many instruments developed by the international community to guide humanitarian relief operations. The Mohonk Criteria holds that: “Everyone has the right to request and receive humanitarian aid necessary to sustain life and dignity”.¹³⁹ In its resolution on humanitarian assistance adopted in Bruges, Belgium, in 2003, the International Law Institute noted: “Leaving the victims of disaster without humanitarian assistance constitutes a threat to human life and an offence to human dignity and therefore a violation of fundamental human rights”.¹⁴⁰ Furthermore, in the Guiding Principles on Internal Displacement, the concept of dignity guides provisions relating to displacement, fundamental rights and return and resettlement.¹⁴¹ The Guidelines recently adopted by IFRC likewise oblige assisting actors to “respect the human dignity of disaster-affected persons at all times”.¹⁴²

¹²⁷ *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 308 and 312. (“[A]ll human beings are equal before the law and have equal opportunities without regard to religion, race, language, sex, social groups, etc. As persons they have the dignity to be treated as such. This is the principle of equality which constitutes one of the fundamental human rights and freedoms which are universal to all mankind... The Respondent probably being aware of the unreasonableness in such hard cases, tries to explain it as a necessary sacrifice which should be paid by individuals for the maintenance of social security. But it is unjust to require a sacrifice for the sake of social security when this sacrifice is of such importance as humiliation of the dignity of the personality.”)

¹²⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595 (separate opinion by Judge Weeramantry).

¹²⁹ *Ibid.*, p. 645.

¹³⁰ See, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 255 (separate opinion of Judge Elaraby); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 433 (dissenting opinion of Judge Weeramantry, arguing that the use of nuclear weapons is illegal in any circumstances because it “contradicts the fundamental principle of the dignity and worth of the human person”); compare with *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 32 (recounting Mexico’s contention that its nationals had been “subjected to criminal proceedings without the fairness and dignity to which each person is entitled”); see generally McCrudden, “Human dignity and judicial interpretation of human rights”, pp. 682 and 683.

¹³¹ ECHR, *Tyrer v. United Kingdom, Series A, No. 26*.

¹³² See, *inter alia*, ECHR, *Bock v. Germany* (1990), *Series A, No. 150*; *S.W. v. United Kingdom, Series A, No. 335-B*; *C.R. v. United Kingdom* (1995), *Series A, No. 335-C*; *Ribitsch v. Austria* (1995), *Series A, No. 336*; and *Goodwin v. United Kingdom* (2002), 2002–VI.

¹³³ ECHR, *Pretty v. United Kingdom* (2002), 2002-III, para. 65.

¹³⁴ See generally Chaskalson, “Human dignity as a constitutional value”.

¹³⁵ Art. 1 (1).

¹³⁶ Art. 7, para. 1; see also arts. 1 and 10.

¹³⁷ See, for example, Basic Laws of Israel, Human Dignity and Liberty, art. 1 (“The purpose of this Basic Law is to protect human dignity and liberty.”); Constitution of Brazil, art. 1 (III); Constitution of Hungary, art. 54, para. 1 (“In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights.”); Constitution of Nigeria, arts. 17 and 34; Constitution of China, art. 38 (“The personal dignity of citizens of the People’s Republic of China is inviolable.”); Constitution of Colombia, art. 1 (declaring that the State is founded in the respect for human dignity); Constitution of Thailand, chap. 1, art. 4. See also Constitutional Proclamation of Egypt (“having realized that man’s humanity and dignity are the torches that guide and direct the course of the enormous development of mankind towards its supreme ideals”); Constitution of India, preamble (“assuring the dignity of the individual”).

¹³⁸ This is the case, for example, in the United States; see, for example, *Roper, Superintendent, Potosi Correctional Center v. Simmons* (*United States Reports*, vol. 543, p. 551, 2005, rejecting *Miranda v. Arizona*, 384 U.S. 436 (1966), noting the connection between human dignity and the principle against self-incrimination). Similarly, in Canada, justices often invoke the principle to deal with serious deprivations of rights; see, for example, *Kindler v. Canada* (1992), *Canada Supreme Court Reports*, part 1, 1991, vol. 2, p. 793 (Judge Cory, dissenting).

¹³⁹ Ebersole (footnote 110 above), p. 196. See also Hardcastle and Chua, “Humanitarian assistance: towards a right of access to victims of natural disasters” (offering similar language); Guiding Principles on the Right to Humanitarian Assistance, principle 3 (a), adopted by the Council of the International Institute of Humanitarian Law (1993).

¹⁴⁰ *Yearbook*, p. 268.

¹⁴¹ E/CN.4/1998/53/Add.2, annex.

¹⁴² Guideline 4.1, *Guidelines* (footnote 66 above), p. 12.

60. In his fifth report on the expulsion of aliens, in 2009, submitted to the Commission at its last session, the Special Rapporteur, Kamto, discussed the concept of dignity and proposed a draft article, later revised, on the obligation to respect the dignity of persons being expelled.¹⁴³ The Commission is yet to take a position on that proposal.

61. The Special Rapporteur concludes that dignity embodies the evolution beyond a mere contractual understanding of the protection of persons under international

¹⁴³ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/611 and Corr.1, Fifth report on the expulsion of aliens, draft article 10, p. 143; and document A/CN.4/617, p. 170, Draft articles on protection of the human rights of persons who have been or are being expelled, as restructured by the Special Rapporteur, Mr. Maurice Kamto, in the light of the plenary debate during the first part of the sixty-first session, draft article 9.

law, and points to a true international community, based on the respect of human beings in their dignity.¹⁴⁴ Such a notion naturally inspires also the protection of persons in the event of disasters, and should guide the efforts of the Commission in the present undertaking.

62. In the light of the foregoing, the Special Rapporteur proposes the following draft article on human dignity:

“Draft article 7. Human dignity

“For the purposes of the present draft articles, States, competent international organizations and other relevant actors shall respect and protect Human Dignity.”

¹⁴⁴ See Simma, “From bilateralism to community interest in international law”.

CHAPTER III

The responsibility of the affected State

63. The Commission, having established that the individual, as a bearer of rights and as a person with essential needs, stands at the centre of its work on the topic (see draft article 2), the Special Rapporteur will now consider the role and responsibility of the affected State towards the persons found within its territory. The inquiry will highlight the fact that the territorial State (i.e. the affected State), and not a third State or organization, has the primary responsibility to protect disaster victims on its territory. In doing so, the Special Rapporteur will address a central concern previously expressed by several members of the Commission.¹⁴⁵

A. Sovereignty and non-intervention

64. In determining the role and responsibility of the affected State, mention must be made of the principles of State sovereignty and non-intervention. Although both principles are well established in international law, their restatement is convenient for the purposes of the present report.

65. The principle of State sovereignty is rooted in the fundamental notion of sovereign equality, a concept that de Vattel illustrated by noting that nations are “free, independent, and equal,”¹⁴⁶ and that “a dwarf is as much a man as a giant is; a small republic is no less a sovereign State than the most powerful kingdom”.¹⁴⁷ This understanding implies the more specific notions of independence and territorial sovereignty, whereby, within its own territory, a State can exercise its functions to the exclusion of all others.¹⁴⁸ Thus understood, sovereignty is regarded as a

fundamental principle in the international order,¹⁴⁹ and its existence and validity have been recognized by States in numerous international instruments.

66. Suffice it to mention the Charter of the United Nations, which enshrines the principle of the sovereign equality of States in the following terms:

Article 2

The Organization and its Members, in pursuit of the purposes stated in Article 1, shall act in accordance with the following principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

67. Subsequently, members of the United Nations have reiterated the importance of this principle. In the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, Member States reaffirmed “the basic importance of sovereign equality and [stressed] that the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations”. Furthermore, the operative language of this declaration proclaimed that, “All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community”.¹⁵⁰

68. International tribunals have widely recognized State sovereignty as a fundamental principle of international law. In 1928, in the *Island of Palmas* case, Max Huber noted that “[i]nternational law has established this principle of the exclusive competence of the State in regard to its own territory as the point of departure in settling most questions that concern international relations”.¹⁵¹ ICJ

¹⁴⁵ See, for example, *Yearbook ... 2009*, vol. II (Part Two), paras. 162 and 167.

¹⁴⁶ 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, p. 7, para. 21.

¹⁴⁷ *Ibid.*, para. 18.

¹⁴⁸ Permanent Court of Arbitration, *Island of Palmas* (Netherlands/United States of America), award of 4 April 1928 (UNRIAA, vol. II (Sales No. 1949.V.1), p. 829).

¹⁴⁹ *Corfu Channel* case (see footnote 99 above), p. 4.

¹⁵⁰ General Assembly resolution 2625 (XXV) of 24 October 1970, annex, 12th preambular paragraph, the principle of sovereign equality of States, first paragraph.

¹⁵¹ *Island of Palmas* case (see footnote 148 above).

stated in 1949, in the *Corfu Channel* case, that “between independent States respect for territorial sovereignty is an essential foundation of international relations”.¹⁵² These statements tend to characterize sovereignty as a general principle of law. Subsequently, ICJ made clear that State sovereignty is also part of customary international law.¹⁵³

69. The concepts of sovereign equality and territorial sovereignty are widely invoked in the context of disaster response. In the guiding principles annexed to General Assembly resolution 46/182 of 19 December 1991, the most significant on the subject, the Assembly held:

The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, 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.¹⁵⁴

Previous efforts to draft multilateral treaties on the subject of disaster response have invoked sovereignty as a central principle.¹⁵⁵ Likewise, the Framework Convention on civil defence assistance provides: “All offers of assistance shall respect the sovereignty, independence and territorial integrity of the Beneficiary State ...”.¹⁵⁶ The agreement recently concluded by ASEAN likewise contains such a statement.¹⁵⁷

70. It is also worth noting that the Commission, in its work on the non-navigational uses of international watercourses, has stated in a general way the relationship between sovereignty and the duty of cooperation among States. The Commission considered that the sovereign equality of States informs the manner in which they must cooperate for common ends, noting that “Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit ...”.¹⁵⁸ This provision points in the direction to be followed when considering the relationship between sovereignty and draft article 5 as provisionally adopted by the Drafting Committee.¹⁵⁹

¹⁵² *I.C.J. Reports 1949*, p. 35.

¹⁵³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 111, para. 212 (noting that the concept of sovereignty “extends to the internal waters and territorial sea of every State and to the air space above its territory”).

¹⁵⁴ Guiding principle 3.

¹⁵⁵ Draft convention on expediting the delivery of emergency assistance (A/39/267/Add.2-E/1984/96/Add.2) (“Respect for the sovereignty of the Receiving State and non-interference in its internal affairs”); see also the Convention establishing an International Relief Union, art. 4 (“Action ... in any country is subject to the consent of the Government thereof”).

¹⁵⁶ Art. 3 (b). It is notable, however, that direct references to sovereignty are lacking in several major treaties, including the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency.

¹⁵⁷ ASEAN Agreement on Disaster Management and Emergency Response (“The sovereignty, territorial integrity and national unity of the Parties shall be respected, in accordance with the Charter of the United Nations and the Treaty of Amity and Cooperation in Southeast Asia, in the implementation of this Agreement”) (art. 3, para. 1).

¹⁵⁸ Draft article 8 on the law of the non-navigational uses of international watercourses (*Yearbook ... 1994*, vol. II (Part Two), p. 111); see also Convention on the law of the non-navigational uses of international watercourses, art. 8.

¹⁵⁹ See footnote 4 above.

71. In connection with the principle of State sovereignty, the principle of non-intervention serves to ensure that the sovereign equality of States is preserved.¹⁶⁰ In this sense, the Charter of the United Nations declares in its Article 2, paragraph 7 that:

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.

72. In direct reference to intervention by States in the internal affairs of other States, the General Assembly has emphasized:

The strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security.¹⁶¹

In addition, as was stated by the Assembly, non-intervention implies: “No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”¹⁶²

73. This principle has likewise been recognized as a rule of customary international law by ICJ, which stated in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, that “though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law”.¹⁶³ The Court, in the *Corfu Channel* case of 1949, had foreshadowed this conclusion.¹⁶⁴

74. From the firmly established principles of international law mentioned above, it is clear that a State affected by a disaster has the freedom to adopt whatever measures it sees fit to ensure the protection of the persons found within its territory. In addition, as a consequence, no other State may legally intervene in the process of response to a disaster in a unilateral manner: third parties must instead seek to cooperate with the affected State in accordance with article 5, as provisionally adopted by the Drafting Committee.¹⁶⁵

75. The correlating principles of sovereignty and non-intervention presuppose a given domestic sphere, or a *domaine réservé*, over which a State may exercise its

¹⁶⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 106, para. 202.

¹⁶¹ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, preamble (General Assembly resolution 2625 (XXV) of 24 October 1970, annex, eighth preambular paragraph).

¹⁶² Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, General Assembly resolution 2131 (XX) of 21 December 1965, para. 1.

¹⁶³ *Merits, Judgment, I.C.J. Reports 1986*, p. 106, para. 202.

¹⁶⁴ *I.C.J. Reports 1949*, p. 35.

¹⁶⁵ See footnote 4 above.

exclusive authority. This sovereign authority remains central to the concept of statehood, but it is by no means absolute. When it comes to the life, health and bodily integrity of the individual person, areas of law such as international minimum standards, humanitarian law and human rights law demonstrate that principles such as sovereignty and non-intervention constitute a starting point for the analysis, not a conclusion. Moreover, as some jurists have argued, the concept of sovereignty itself places obligations on States. Already in 1949, Judge Álvarez, in his separate opinion in the *Corfu Channel* case, explained:

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.¹⁶⁶

B. Primary responsibility of the affected State

76. International law has long recognized that the Government of a State is best positioned to gauge the gravity of emergency situations, and to implement responsive policies. One example may be seen in the “margin of appreciation” given by the European Court of Human Rights to domestic authorities in determining the existence of a “public emergency”. Most recently, the Court held in 2009 that “the national authorities are in principle better placed than the international judge to decide” on the presence of such an emergency.¹⁶⁷ The law of internal armed conflicts provides another example that is perhaps more directly relevant to the present undertaking. Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), governing situations of non-international armed conflict, reflects “the principle that States are primarily responsible for organizing relief”, and that “relief societies, such as the Red Cross and Red Crescent play an auxiliary role”.¹⁶⁸ This understanding provides a useful starting point in the context of the present topic. As far as disasters are concerned, the principles of sovereignty and non-intervention find their expression in the acknowledgement that the State affected by the disaster has the primary responsibility for the protection of persons on its territory.¹⁶⁹

77. The General Assembly has, numerous times, reaffirmed the primacy of the affected State in disaster response.¹⁷⁰ In the above-mentioned guiding principles annexed to General Assembly resolution 46/182, the Assembly held that:

¹⁶⁶ *I.C.J. Reports 1949*, p. 43.

¹⁶⁷ *A. and Others v. the United Kingdom*, No. 3455/05, ECHR 2009, para. 173.

¹⁶⁸ Sandoz, “Protocol II”, in *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para. 4871. This section of the commentary refers to article 18 (1) of Additional Protocol II, which holds that relief societies may offer their services to the national Government, implying that the Government has a right to refuse. The Protocol does, however, contemplate that, in some situations, relief actions must take place (see *ibid.*, para. 4885).

¹⁶⁹ This has also been understood as the principle of “subsidiary function”. See the comments of the delegation of France to the General Assembly concerning resolution 46/182 (A/46/PV.39, p. 72).

¹⁷⁰ See, for example, General Assembly resolutions 38/202, of 20 December 1983, para. 4; 43/131, of 8 December 1988, para. 2; and 45/100, of 14 December 1990, para. 2 (affirming “the sovereignty of affected States and their primary role in the initiation, organization, coordination and implementation of humanitarian assistance within their respective territories”).

Each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory.¹⁷¹

More recently, the General Assembly reaffirmed this principle in its resolution 63/141, of 11 December 2008, on international cooperation on humanitarian assistance,¹⁷² and in resolution 64/251, of 22 January 2010, following the earthquake in Haiti.

78. Two general consequences flow from the primacy of the affected State in disaster response. First is the recognition that the affected State bears the ultimate responsibility for protecting disaster victims on its territory and that it has the primary role in facilitating, coordinating and overseeing relief operations on its territory. The other general conclusion is that international relief operations require the consent of the affected State.¹⁷³ The remainder of this section shall consider each element in some detail.

1. DIRECTION, CONTROL, COORDINATION AND SUPERVISION

79. A prototypical articulation of the primary role of the affected State may be found in the draft Convention on Expediting the Delivery of Emergency Assistance¹⁷⁴. The draft Convention holds that:

The receiving State shall have, within its territory, responsibility for facilitating the coordination of operations to meet the situation created by the disaster.¹⁷⁵

The draft Convention, then, highlights the facilitative role of the State receiving emergency aid. The provision does not emphasize that this role is primary, nor does it clearly state that the affected nation has the foremost obligation to deliver humanitarian assistance and to protect persons on its territory. Moreover, it does not directly address the State’s role in initiating, supervising, organizing and controlling operations, although the draft treaty, read as a whole, may make it clear that these aspects of disaster response are primarily within the prerogative of the affected State.

80. Subsequent multilateral instruments modify the formula articulated by the draft Convention on Expediting the Delivery of Emergency Assistance, focusing on the supervisory role of the affected State. For example, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency¹⁷⁶ states:

¹⁷¹ Guiding principle 4.

¹⁷² Fourth preambular paragraph (“Emphasizing that the affected State has the primary responsibility in the initiation, organization, coordination and implementation of humanitarian assistance within its territory and in the facilitation of the work of humanitarian organizations in mitigating the consequences of natural disasters”).

¹⁷³ This is also stated by the General Assembly in guiding principle 3 annexed to resolution 46/182 (“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”).

¹⁷⁴ A/39/267/Add.2-E/1984/96/Add.2.

¹⁷⁵ Art. 3, para. 2. Note that the draft convention emphasizes “respect for the sovereignty of the receiving State and non-interference in its internal affairs” (art. 3, para. 1 (a)). Also, the convention’s scope of application may be read to indicate that the treaty would have applied only when assistance operations had begun, and not to the initiation phase (art. 4).

¹⁷⁶ Art. 3 (a).

The overall direction, control, coordination and supervision of the assistance shall be the responsibility within its territory of the requesting State.

Similar formulations were employed by the Agreement establishing the Caribbean Disaster Emergency Response Agency,¹⁷⁷ by the Inter-American Convention to Facilitate Disaster Assistance,¹⁷⁸ and by the Convention on the Transboundary Effects of Industrial Accidents.¹⁷⁹ The provisions in these instruments clarify the State's unique and sovereign role in controlling disaster assistance on its territory. The State is not only a conduit for international cooperation and coordination; it also exercises final control over the manner in which relief operations are carried out.

81. A plethora of bilateral agreements, concluded in the same time period as the above conventions, similarly describe the role of the State affected by a natural or man-made disaster. Because of the bilateral nature of these treaties, they focus almost exclusively on the operational aspects of disaster relief, giving little mention to the broader principles of sovereignty and non-intervention. One typical treaty provision states:

The coordinating body of the requesting State shall be responsible for directing the operations. It shall establish guidelines for and possible limits of the operations assigned to the emergency teams of the other State without, however, intervening in operational arrangements.¹⁸⁰

A similar treaty concluded among the Nordic States held, in relevant part, "The authorities of the State seeking assistance shall have full responsibility for directing operations at the site of the accident".¹⁸¹ Bilateral treaties on disaster response continue to stress that the responsibility for operational coordination and direction lies with the State requesting assistance.¹⁸²

82. The Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, covering the provision of telecommunications assistance, adopts language similar to that in the Convention on Assistance in the Case of a Nuclear

¹⁷⁷ Art. 16, para. 1 ("the overall direction, control, coordination and supervision of assistance despatched to a requesting State shall be the responsibility within its territory of the requesting State").

¹⁷⁸ Art. IV (a), available from www.oas.org/juridico/english/treaties/a-54.html (accessed 7 December 2015).

¹⁷⁹ Annex X.

¹⁸⁰ Spain and Argentina: Agreement on cooperation on disaster preparedness and prevention, and mutual assistance in the event of disasters (Madrid, 3 June 1988), art. XI (United Nations, *Treaty Series*, vol. 1689, No. 29123).

¹⁸¹ Art. 3, para. 2, Agreement on cooperation across state frontiers to prevent or limit damage to persons or property or to the environment in the case of accidents, concluded among Denmark, Finland, Norway and Sweden.

¹⁸² See, for example, France and Italy: Convention on the prediction and prevention of major hazards and on mutual assistance in the event of natural or man-made disasters (Paris, 16 September 1992), art. 7 (United Nations, *Treaty Series*, vol. 1962, No. 33532, p. 369); Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Belarus on cooperation in the field of prevention and elimination of consequences of catastrophes, natural disasters and serious accidents (Vilnius, 16 December 2003), art. 5 (*ibid.*, vol. 2339, No. 41934, p. 203); Treaty between the Federal Republic of Germany and the Czech Republic concerning mutual assistance in the event of disasters or serious accidents (Berlin, 19 September 2000), art. 8 (*ibid.*, vol. 2292, No. 40860, p. 291).

Accident or Radiological Emergency and its contemporaries, but it does so in the form of a without-prejudice clause. The treaty states:

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.¹⁸³

This phrasing is significant, because it indicates that the right of an affected State to oversee disaster response on its territory is a pre-existing one, inherent either in the general principles of sovereignty and non-intervention or in customary international law, and that the treaty need not grant this right explicitly to the States parties. The second innovation of the Tampere Convention provision is the reference to national law, indicating that an affected State properly exercises control over relief operations when it does so in accordance with its own laws.

83. The ASEAN Agreement on Disaster Management and Emergency Response offers a unique articulation of the primary role of the affected State. The Agreement invokes the principles of sovereignty and non-intervention, the Charter of the United Nations and the Treaty of Amity and Cooperation in Southeast Asia, and notes that "each affected Party shall have the primary responsibility to respond to disasters occurring within its territory. But the treaty also contains a provision similar to the Tampere Convention and the Convention on Nuclear Accidents, holding that "The Requesting or Receiving Party shall exercise the overall direction, control, coordination and supervision of the assistance within its territory" (art. 3, para. 2).

84. The primary responsibility of the affected State also plays a founding role in many draft principles and guidelines developed by humanitarian actors and independent experts. Some instruments prepared by the International Red Cross and Red Crescent Movement discuss the principle of primary responsibility in much the same way as the above-mentioned treaties. The Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief states that "overall planning and coordination of relief efforts is ultimately the responsibility of the host government".¹⁸⁴ More recently, the *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* of IFRC stated in article 3, paragraph 1: "Affected States have the primary responsibility to ensure disaster risk reduction, relief and recovery assistance in their territory". The Guidelines further elaborate on this principle in article 3, paragraph 3, in terms similar to the ASEAN Agreement and others:

Affected States have the sovereign right to coordinate, regulate and monitor, disaster relief and recovery assistance provided by assisting actors on their territory, consistent with international law.

These provisions offer strong evidence that the primary responsibility of the affected State is a principle endorsed both by States and by humanitarian actors.

85. A range of international instruments also stress that the State has the primary responsibility for providing aid

¹⁸³ Art. 4, para. 8.

¹⁸⁴ Code of conduct (footnote 64 above), annex VI p. 125.

and protection. For example, IFRC notes in its Principles and Rules for disaster relief:¹⁸⁵

Prevention of disasters, assistance to victims and reconstruction are first and foremost the responsibility of the public authorities. The International Federation of Red Cross and Red Crescent Societies... will actively offer assistance to disaster victims through the agency of the National Society in a spirit of cooperation with the public authorities.

This provision clearly focuses on the humanitarian elements of the State's responsibility, as opposed to the operational concerns considered above. However, provisions such as this one also clearly establish that the affected State, not a third party, is generally expected to initiate and sustain relief operations after a disaster, and that any assistance from non-governmental or international actors should be considered auxiliary to the State's efforts.

86. Other instruments take an approach similar to the Principles of the Red Cross and Red Crescent. The Mohonk Criteria on Complex Emergencies, for example, hold that:

Primary responsibility for the protection and well-being of civilian populations rests with the government of the state or the authorities in control of the territory in which the endangered persons are located.¹⁸⁶

The Criteria also note that insurgent groups and militias should be held to the same obligations as governments in this regard. Like the Red Cross Principles, the Criteria emphasize the State's function in providing humanitarian aid, but, where the Red Cross focuses on preventing and responding to a disaster, the Criteria emphasize the protection and dignity of affected individuals.

87. The above approach is also reflected in the Guiding Principles on the Right to Humanitarian Assistance of 1993 of the International Institute of Humanitarian Law, which emphasize that the "primary responsibility to protect and assist the victims of emergencies" rests with the territorial State. Likewise, the Guiding Principles on Internal Displacement emphasize the provision of assistance:

National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.¹⁸⁷

88. Recent instruments regarding disaster response tend to meld the operational approach of the treaty instruments with the humanitarian focus of the Mohonk Criteria and similar documents. The Humanitarian Charter of the Sphere Project,¹⁸⁸ first published in 2000, accomplishes this by implying that the primacy of the affected State

arises not only from classically Westphalian principles of sovereignty and non-intervention, but also from the right of all peoples to dignity and self-determination:

We recognize that it is firstly through their own efforts that the basic needs of people affected by calamity or armed conflict are met, and we acknowledge the primary role and responsibility of the state to provide assistance when people's capacity to cope has been exceeded.¹⁸⁹

The approach of the Sphere Project reminds the reader that local initiation and oversight of disaster assistance is closely associated with the autonomy and dignity of the affected population.

89. The resolution on humanitarian assistance adopted by the Institute of International Law in Bruges, Belgium, in 2003 offers a more explicit combination of the humanitarian and operational aspects of this principle. The Institute stated:

The affected State has the duty to take care of the victims of disaster in its territory and has therefore the primary responsibility in the organization, provision and distribution of humanitarian assistance. As a result, it has the duty to take the necessary measures to prevent the misappropriation of humanitarian assistance and other abuses.¹⁹⁰

The Institute provision thus links the primary responsibility of the affected State to the right of all peoples to humanitarian assistance in the event of a disaster. Other instruments have instead focused on the principle of international cooperation.¹⁹¹ The Bruges resolution is useful in that it focuses both on the State's role as an organizer and facilitator, and on the State's responsibilities in the actual provision of assistance. Such an approach may provide a useful point of departure for the Commission's work.

2. CONSENT

90. In formulating a draft article on the primary responsibility of the affected State, the Special Rapporteur also finds it necessary to deal with the requirement that humanitarian aid be provided only with the consent of the affected State. The foregoing discussion focused on what may be termed the "internal" aspects of the State's responsibilities, highlighting the State's role in managing, organizing and providing relief within its territory. On the other hand, the consent requirement is of a primarily "external" character, governing the affected State's relationships with other international actors in the wake of a disaster.

"The cornerstone of the handbook is the Humanitarian Charter, which is based on the principles and provisions of international humanitarian law, international human rights law, refugee law and the *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief*. The Charter describes the core principles that govern humanitarian action and reasserts the right of populations affected by disaster, whether natural or man-made (including armed conflict), to protection and assistance. It also reasserts the right of disaster-affected populations to life with dignity." (p. 5)

¹⁸⁹ *Ibid.*, p. 20, para. 2.1.

¹⁹⁰ *Yearbook*, p. 268.

¹⁹¹ See Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters (A/CONF.206/6 and Corr.1, chap. I, resolution 2) ("Taking into account the importance of international cooperation and partnerships, each State has the primary responsibility for its own sustainable development and for taking effective measures to reduce disaster risk, including for the protection of people on its territory, infrastructure and other national assets from the impact of disasters" (para. 13 (b))).

¹⁸⁵ Principle 3.1, 26th International Conference of the International Red Cross and Red Crescent Movement, held in Geneva, 3–7 December 1995, *International Review of the Red Cross*, No. 310 (January–February 1996), annex IV, p. 103.

¹⁸⁶ Ebersole (footnote 110 above), p. 197. The term "complex emergency" is understood to refer to "a humanitarian crisis which may involve armed conflict and which may be exacerbated by natural disasters" (*ibid.*, p. 194, footnote 7). See also footnote 110 above.

¹⁸⁷ E/CN.4/1998/53/Add.2, annex, principle 3, para. 1. See also principle 25, para. 1 ("The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities").

¹⁸⁸ The Sphere Project, *Humanitarian Charter and Minimum Standards in Disaster Response* (2d ed., Geneva, 2004). The project explains its basis in existing law as follows:

91. The requirement of consent played a central role in the first major treaty on disaster relief. The Convention and Statute Establishing an International Relief Union held:

Action by the International Relief Union in any country is subject to the consent of the Government thereof.¹⁹²

This provision, though no longer in force, provides a useful starting point for the investigation. The phrase “subject to” implies that State consent continues to be required for the duration of the relief operation. In other words, the approval of the affected State is required for the initiation of international assistance, and, should the affected State at any time withdraw its consent, relief operations must cease. While this provision was limited to actions taken by the International Relief Union, subsequent instruments would make clear that consent is required for all international relief efforts.

92. The consent requirement also appears in analogous treaty provisions in the law of armed conflict. In the context of international armed conflicts, Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), for example, holds that relief actions “shall be undertaken, subject to the agreement of the Parties concerned” when the civilian population is inadequately supplied.¹⁹³ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), governing non-international conflicts, states that, if the civilian population is suffering “undue hardship”, relief actions “shall be undertaken subject to the consent of the High Contracting Party concerned”.¹⁹⁴

93. The consent requirement is present in several multilateral treaties governing disaster relief. For example, the Tampere Convention (art. 4, para. 5) states:

No telecommunication assistance shall be provided pursuant to this Convention without the consent of the requesting State Party. The requesting State Party shall retain the authority to reject all or part of any telecommunication assistance offered pursuant to this Convention in accordance with the requesting State Party’s existing national law and policy.

As with the Convention and Statute Establishing an International Relief Union, the Tampere Convention does not establish that consent is always required for disaster relief, but only that assistance may not be provided in accordance with that Convention without the receiving State’s approval. The second sentence, concerning the State’s right to reject assistance, is a helpful one, but it is language that may be more usefully considered in a subsequent report by the Special Rapporteur dealing directly with offers and acceptance of relief.

94. The Framework Convention on civil defence assistance offers a more restrictive version of the consent requirement than that articulated in the Tampere Convention. Article 3 (a) of the Framework Convention provides:

Only assistance requested by the Beneficiary State or proposed by the Supporting State and accepted by the Beneficiary State may take place.

¹⁹² Art. 4.

¹⁹³ Art. 70, para. 1.

¹⁹⁴ Art. 18, para. 2.

This provision purports to govern all actions by a disaster response or prevention unit belonging to one State, taken for the benefit of another (see art. 1 (d)). Thus, the provision indicates that, among States party to that Convention, no international assistance may take place without the consent of the territorial State. The ASEAN Agreement on Disaster Management and Emergency Response includes a similar provision (in art. 3, para. 1), stating that “external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party”.

95. Other multilateral conventions do not contain an explicit reference to the consent rule, because they purport to govern only the provision of assistance that is expressly accepted by the receiving State. This is the case with the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, which contemplates (in art. 2) a detailed request for assistance, which is considered in good faith by other States parties. The Inter-American Convention to Facilitate Disaster Assistance explicitly limits its scope only to situations in which “a state party furnishes assistance in response to a request from another state party, except as they otherwise agree” (art. 1).

96. Given the foregoing, the Special Rapporteur is of the opinion that the primary responsibility of the affected State, as expressed through its operational control of disaster relief and through the consent requirement, constitutes a general rule governing humanitarian assistance. Therefore, it is possible to propose the following draft article:

“Draft article 8. Primary responsibility of the affected State

“1. The affected State has the primary responsibility for the protection of persons and provision of humanitarian assistance on its territory. The State retains the right, under its national law, to direct, control, coordinate and supervise such assistance within its territory.

“2. External assistance may be provided only with the consent of the affected State.”

97. The first sentence of this article describes the primary responsibility of the State in a manner that references the overarching theme of the Commission’s undertaking, which is the protection of the individual person. It echoes statements in the Bruges resolution of the Institute of International Law and in General Assembly resolution 46/182, that the affected State has the primary responsibility to “take care” of victims on its territory, but it chooses the term “protection”, in reference to draft article 1 as provisionally adopted by the Drafting Committee. Protection is also highlighted in the Guiding Principles on the Right to Humanitarian Assistance of 1993. The reference to provision of humanitarian assistance recalls the Principles and Rules for Red Cross and Red Crescent Disaster Relief, the Bruges resolution and other instruments discussed above, and it serves to emphasize that this article will focus primarily on the initiation and governance of relief operations.

98. The second sentence of paragraph 1 stresses the operational aspects of the State's authority over aid operations. The terms "direct, control, coordinate and supervise" are found in a host of international instruments,¹⁹⁵ and together they constitute a well-settled understanding of the State's primary role in disaster relief. The Special Rapporteur is of the opinion that these four verbs are suitably general in scope, and that they imply the more specific terms used by other instruments, such as "facilitate", "monitor" and "regulate".¹⁹⁶ General Assembly resolution 46/182 notes that the affected State also has the primary role in the initiation of assistance; this aspect of the State's responsibility is considered in paragraph 2 of the draft article. In addition, the draft article incorporates the phrase "under its national law" from the Tampere Convention. This wording serves to emphasize that the appropriate way for the affected State to exercise its operational control is through its own legal system.

99. Taken together, paragraph 1 reflects the "internal" aspect of sovereignty and the primary responsibility of the affected State. The provision highlights the State's roles as a provider of humanitarian assistance and as a manager of relief operations. The Special Rapporteur is of the opinion that these two roles belong in the same provision, for they are mutually reinforcing. As

¹⁹⁵ For example, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (art. 3 (a)); the Agreement establishing the Caribbean Disaster Emergency Response Agency (art. 16); the Inter-American Convention to Facilitate Disaster Assistance (art. IV); the Tampere Convention (art. 4, para. 8); and the ASEAN Agreement on Disaster Management and Emergency Response (art. 3, para. 2).

¹⁹⁶ For example, the Bruges resolution of the Institute of International Law (art. III, para. 1) ("organization, provision and distribution") (*Yearbook*, p. 268); and the Guidelines of IFRC, guideline 3, para. 3 ("coordinate, regulate and monitor").

the guideline from the Sphere Project's Humanitarian Charter implies, local and domestic control over disaster management and rehabilitation programmes constitutes an important element of the collective right to self-determination, as well as the individual dignity on which this undertaking is founded.

100. Paragraph 2 refers to the "external" aspect of the State's primary responsibility, namely the requirement of consent. This provision takes its basic structure from General Assembly resolution 46/182, but, where the Assembly said that assistance "should" take place with the State's consent, this provision establishes a clear requirement. The phrase "external assistance" is taken from the ASEAN Agreement on Disaster Management and Emergency Response, and reflects the fact that this provision does not purport to govern the State's relationship with humanitarian actors established within its own borders.

101. As with the other general provisions submitted by the Special Rapporteur, much of the subsequent work on this topic will involve drafting specific provisions that define or qualify the primary role of the affected State. For example, many bilateral treaties require that a host State provide detailed guidelines to foreign actors, setting out the tasks it is willing to assign to these parties.¹⁹⁷ Others provide specific guidance involving the relationship between the supervising body of the affected State and foreign assisting personnel.¹⁹⁸ These and other related questions will be the subject of future reports.

¹⁹⁷ See, for example, the Agreement between the Government of the Republic of Latvia and the Government of the Republic of Lithuania on the mutual support in the event of natural disasters and other large-scale accidents (United Nations, *Treaty Series*, vol. 2267, No. 40379, p. 135).

¹⁹⁸ See, for example, the Agreement establishing the Caribbean Disaster Emergency Response Agency.