

Protection of Persons in the Event of Disasters

Statement of the Chairman of the Drafting Committee

3 June 2016

Mr. Chairman,

It is my pleasure, today, to introduce the second report of the Drafting Committee for the sixty-eighth session of the International Law Commission. The report, which is to be found in document A/CN.4/L.871, contains the draft preamble and texts and titles of the entire set of draft articles on the protection of persons in the event of disasters, adopted by the Drafting Committee, and which the Drafting Committee recommends for adoption by the Commission, on second reading.

Before commencing, allow me (also on behalf of my predecessor Chairs of the Drafting Committee) to pay tribute to the Special Rapporteur, Mr. Eduardo Valencia-Ospina, whose constructive approach, flexibility and patience once again greatly facilitated the work of the Drafting Committee. I also thank the other members of the Committee for their active participation and significant contributions. Furthermore, I wish to thank the Secretariat for its valuable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

Mr. Chairman,

The Drafting Committee held 11 meetings on the topic, from 11 to 24 and 26 May 2016, and proceeded on the basis of a revised proposal, prepared by the Special Rapporteur, taking into account the comments and suggestions made during the Plenary debate on the topic. I should mention that the proposal of the Special Rapporteur included the possible merger of particular draft articles, thereby affecting the overall numbering. I will, accordingly indicate the

corresponding first reading draft article number or numbers for each draft article adopted on second reading.

The second general point to be made is that the Drafting Committee also sought to achieve greater coherence throughout the draft articles, including through more fully integrating the definitions in draft article 3 and the concept of disaster risk reduction, which, if you recall, was introduced relatively late during the first reading after several provisions had already been adopted.

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Draft preamble

Mr. Chairman,

I draw your attention to the draft preamble to the draft articles, which was prepared on the basis of the proposal of the Special Rapporteur. I wish to record that while I am introducing the draft preamble before the specific draft articles adopted this year, the Drafting Committee actually considered the preamble after considering the entire set of draft articles, and thereby had the benefit of its work on the substance of the draft articles, before considering the draft preamble.

The Drafting Committee proceeded on the basis of a revised proposal for a draft preamble, presented by the Special Rapporteur, which contained seven preambular paragraphs. The Drafting Committee settled on a draft preamble with five preambular paragraphs, as presented in the report of the Drafting Committee.

The first preambular paragraph recalls the mandate of the General Assembly under Article 13, paragraph 1, subparagraph (a) of the Charter of the United Nations.

The second preambular paragraph calls attention to the frequency and severity of natural and human-made disasters, and their damaging impact. The initial version included a reference to the fact that the occurrence of such events was “increasing”, but the Drafting Committee decided against including such an assertion.

The third preambular paragraph deals with the question of the essential needs of the persons affected by disasters, and reiterates the need for the rights of those persons to be respected in the circumstances covered by the draft articles. The Drafting Committee did not accept a suggestion also to make reference to human dignity in the preamble, because a separate autonomous provision on human dignity has been included in the text itself, as draft article 4.

The fourth preambular paragraph recalls the fundamental value of solidarity in international relations, and the importance of strengthening international cooperation in respect of all phases of a disaster, both of which are key concepts underlying the topic.

The final preambular paragraph stresses the principle of the sovereignty of States, and reaffirms the primary role of the affected State in the provision of disaster relief assistance, which is a core element of the draft articles. The Drafting Committee considered a number of different formulations for the provision, including the phrase “by virtue of their sovereignty” and “sovereign equality of States”, but decided on the present formulation referring directly to “the sovereignty of States”. The reference to sovereignty provides the background against which the entire draft articles are to be understood, and thereby usefully contributes to the balance in the draft articles. The Drafting Committee also considered including a reference to “function and” before “role”, but decided on the current language which mirrors the language adopted in draft article 10.

I wish to also record that the Drafting Committee did not include a proposed preambular paragraph recalling the mandate of the Commission under its Statute, which was not typically done in its proposals for preambles. It also decided against including a proposed preambular paragraph preserving the continued application of the rules of customary international law to questions not regulated by the draft articles. This was done in light of the Drafting Committee’s decision on what is now draft article 18, on the relationship to other rules of international law, to which I will return to in due course.

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Draft article 1

Mr. Chairman,

Draft article 1 deals with the scope of application of the draft articles. The Drafting Committee made no changes to the formulation as adopted on first reading, which it considered as having been generally supported in the Commission.

The title of draft article 1 is “[S]cope”, which was the title adopted on first reading.

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Draft article 2

Mr. Chairman,

Draft article 2 deals with the purpose of the draft articles. The Drafting Committee supported the retention of a separate provision on the topic. The text of the formulation is presented substantially in the form adopted on first reading, also as draft article 2. The only substantive change has been the inclusion of a reference to the “reduction of the risk of disasters”.

The Drafting Committee initially considered a formulation where the reference to risk reduction appeared before response as “reduction of risk of, and response to, disasters”. However, it decided to change the order of the two phases being referred to so as to avoid an interpretation that what is also being called for is the reduction of the response to disasters. The formulation also serves to confirm that the main emphasis of the draft articles is on the provision of adequate and effective response to disasters, while at the same time indicating that the dimension of the reduction of the risk of disasters is also dealt with. Needless to say that the formulation “reduction of the risk of disasters” is a term of art that is well-established, and is resorted to also in draft article 9. It also serves to recognize the key role played by risk reduction (as evidenced by the recently adopted Sendai Framework for Disaster Risk Reduction)

With the addition of the new phrase in the draft article, the Drafting Committee modified the first reading reference to “that meets” to “so as to meet” in order to streamline the text, thereby making it clearer that the adequate and effective action in responding to disasters and in reducing the risk of future disasters is aimed directly at achieving the goal of meeting the essential needs of the persons concerned, while fully respecting their rights. The concluding phrase “so as to meet the essential needs of the persons concerned, with full respect for their rights” is intended to apply to both the response and reduction phrases. Accordingly, the “persons concerned” in a response context would be those individual affected by the disaster, and in the risk reduction context, those potentially affected by a future disaster.

The Drafting Committee decided to retain the phrase “with full respect for their rights” at the end of the draft article. The phrase appeared in the first reading text as an acknowledgment of the fact that reference should be made to both the “needs” and “rights” approaches. The Drafting Committee considered a suggestion that the reference to “full” was superfluous and not reflecting the fact that, under some treaties, the possibility of derogation of human rights is established. Nonetheless the Commission decided against deleting the word “full” out of the concern that such a change could be interpreted as the Commission envisaging a diminished role for human rights in the present context, in relation to that articulated in the first reading text, which was not the case. Furthermore, the reference to “rights” is to be understood as being broader than just human rights, and needs to be read in the context of draft article 5, which envisages the specific applicability of human rights in accordance with international law. This will be explained in the commentary.

The title of the draft article remains “[P]urpose”, as was adopted on first reading.

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Draft article 3

Mr. Chairman,

I turn now to draft article 3, dealing with the use of terms. From the outset, I wish to draw the Commission's attention to the fact that the Drafting Committee is proposing that the definition of disaster, which appeared in a separate draft article in the first reading, be merged with the other definitions in what was former draft article 4. If you recall, the possibility of such merger was anticipated during the first reading, but left to the second. It was also recommended in the comments received, and supported during the Plenary debate. Accordingly, the definition of "disaster" is now to be found in subparagraph (a), with the consequence that the subsequent subparagraphs have been renumbered.

Subparagraph (a)

Concerning the substance of the definition of "disaster", in subparagraph (a), the Drafting Committee focused on the suggestions for modifications to the first reading formulation, as reflected in the revised proposal of the Special Rapporteur.

The first suggestion was to insert the reference to a calamitous "physical" event. The Special Rapporteur had done so in order to address concerns, expressed in the Plenary debate, that the first reading formulation was too broad and could capture other events, such as the collapse of stock markets and other financial shocks which could also lead to the consequences mentioned in the provision. This concern was especially acute owing to the fact that the Special Rapporteur had also proposed the inclusion of "economic" damage, as one of the envisaged consequences of the disaster covered by the present draft articles. The Drafting Committee decided not to accept the proposal to include a reference to "physical", out of the concern that it would introduce an element of imprecision, as it was not always clear whether the events contemplated could easily be characterized as physical or not, thereby, unintentionally, limiting the scope of application of the draft articles.

The Special Rapporteur also proposed the inclusion of the reference to "displacement" as one of the consequences of the disaster. The Drafting Committee decided to add the adjective

“mass” to “displacement”, which conforms to the use that has been made of adjectives before all other listed consequences to denote their magnitude. This was done in order to indicate that the Commission envisages displacement on a massive scale, to maintain the high threshold for the application of the present draft articles, which is intended by the definition of “disaster”. Accordingly, the phrase “great human suffering and distress, mass displacement” would reflect the impact on the persons affected by the disaster.

Finally, the Special Rapporteur proposed the inclusion of a reference to “economic” damage caused by a disaster; that had been suggested in some of the comments received from governments and international organizations. However, the Drafting Committee felt it was not necessary to include such additional specification because the aspects of economic loss caused by disasters were already covered by the reference to “material” damage. The addition of “economic” could, accordingly, raise questions as to the intended scope of the term “material”, and its relationship with the more general reference to “economic”. Furthermore, the focus is meant to be on immediate damage caused by the event. The concern was that “economic loss” also implied long-term loss, including structural damage to the economy, which was not within the scope of the draft articles. Such position aligned with the approach taken on first reading whereby the Commission took the view that the draft articles do not cover economic loss in general. Accordingly, the proposal to include the word “economic” was not accepted. The commentary, to the extent it may not already have done so, will clarify that the concept of “material” is meant to also cover economic loss, which is also implied by the concluding phrase “thereby seriously disrupting the functioning of society”. It will also make it clear that the draft articles do not apply to events leading exclusively to widespread economic loss.

Subparagraph (b)

Subparagraph (b) deals with the definition of “affected State” which is central to the entire draft articles. Of all the definitions adopted on first reading, it was the one that was subject to greatest reformulation. The key issue of attention in the Drafting Committee was the extension of the meaning of “affected State” to also include the scenario where the disaster occurred in territory under its jurisdiction or control”. If you recall, this possibility was introduced at first reading, on the inspiration of the 2001 articles on the prevention of transboundary harm from

hazardous activities. It is worth recalling that in the commentary adopted on first reading, the Commission had acknowledged the possibility of two States being “affected States”, the State on whose territory the disaster occurred, and the State exercising jurisdiction or control over that territory.

The concern of the Drafting Committee was to refine the formulation so as to limit the number of possible States which could be considered “affected States”, and thereby also clarifying which States would be “affected States” for purposes of the draft articles. In its view, it was important to avoid unintended interpretations, such as those referred to in some of the comments, for example, that the text, as adopted on first reading, meant that States of nationality could potentially be considered “affected States”, for purposes of the draft articles, if their nationals happened to be on the territory where the disaster occurred.

The Drafting Committee considered several reformulations with a view to making the territorial link clearer. It is worth recalling that this was done solely for purposes of delimiting the scope of application of the draft articles, and is without prejudice to the possibility that a State may enjoy jurisdiction over its nationals in other territories for purposes of the application of other rules of international law, including in international human rights treaties.

The first refinement was to change the phrase “in the territory” to “in whose territory” in order to make it clearer that it is the State in the territory of which the disaster occurred which is being referred to. The removal of the definite article “the” also had the benefit of indicating that there might be situations where a disaster occurs on the territories of multiple States, each of which would be an “affected State” in its own right.

The earlier reference to “or otherwise under the jurisdiction or control” has been simplified to read “or in territory under whose jurisdiction or control”, which was seen as a clearer reflection of what was intended, and had the benefit of removing the words “or otherwise”, the meaning of which could cause confusion.

The first reading concluding phrase “affected by a disaster” has been replaced by “a disaster takes place”, in order to bring the formulation in line with the definition of “disaster”. On the one hand, the Drafting Committee was conscious of the possibility that if the definition of “affected State” only linked to the effects component of the definition of disaster, namely where its effects are felt, then a number of other States could be considered “affected States”. On the other hand, a focus on only the territorial component, namely where the event took place, could

unnecessarily exclude the possibility of a neighbouring State (or States) who suffer the consequences of the disaster even though the event did not, strictly speaking, take place on their territory (or territory under their jurisdiction or control). The Drafting Committee, accordingly, was of the view that the definition of “affected State” needed to take into account the fact that the definition of disaster, in subparagraph (a), was a composite, covering both the event and its effects. In the end, the best way of doing so was simply to refer to where “a disaster takes place”, which is meant to make the extent of the definition of “affected State” subject to the definition of “disaster”. The effect of this was also to import into the definition of “affected State” the high threshold found in the definition of “disaster”.

Subparagraph (c)

The only change introduced by the Drafting Committee in what is now subparagraph (c), on the definition of the “assisting State”, was the deletion of the reference to “at its request”, which was considered superfluous, in light of the existing reference to consent. It was also the view of the Drafting Committee that the substantive point was best dealt with in the various provisions of the draft articles, and not in the use of terms. At the same time, the Drafting Committee recognized that it was important to provide an indication that assistance is to be understood as being by definition with the consent of the affected State, as provided for in draft article 13, on the consent of the affected State. Hence, it was deemed useful to keep the reference to consent in the subparagraph, in order to provide the appropriate orientation.

Subparagraph (d)

Subparagraph (d) reflects the evolution of the definition of “other assisting actor”. The Drafting Committee worked on the basis of the proposal of the Special Rapporteur for a revised formulation. It decided to retain the reference to non-governmental organizations in the draft article, and discussed the possibility of distinguishing further between international organizations and non-governmental organizations, but decided that drawing such a distinction was best left for the substantive articles in which the phrase being defined appeared. The Drafting Committee also

considered a proposal to change the qualifier “relevant” to “capable” non-governmental organizations, but decided against doing so.

The newly adopted formulation departs from the first reading text in that it removes the reference to “individual external to the affected State”. If you recall, in his summing up of the debate, the Special Rapporteur had recommended such deletion since the rights and obligations envisaged for States and international organizations could not, as such, be extended to other entities or individuals. The Drafting Committee agreed with the position of the Special Rapporteur when coming to individuals. One possible solution it considered was to indicate that the list provided in the subparagraph was not exhaustive by introducing the term “includes” (which left open the possibility of other actors). However, the Drafting Committee decided against such an approach, in order to retain the same approach in each of the definitions which all adopt the same word “means”. A reference to the possibility of individuals providing assistance will be referred to in the commentary.

However, it decided to retain the reference to “entity” in order to cover the activities of entities like the International Federation of the Red Cross and Red Crescent Societies. The Drafting Committee even considered the possibility of including the fuller reference to “components of the Red Cross and Red Crescent Movement”, as found in draft article 7, but decided to retain the shorter reference to “other entity”, since the Red Cross may not be the only entities, which are not strictly-speaking non-governmental organizations, which may be involved in the provision of assistance.

The deletion of the phrase “external to the affected State” should not be understood as a change of mind on the part of the Drafting Committee, on the exclusion from the scope of the draft articles of internal actors, such as domestic non-governmental organizations. It simply decided to leave the point to be reflected in the commentary.

Subparagraph (e)

Subparagraph (e) deals with the definition of “external assistance”. The Drafting Committee accepted the proposal of the Special Rapporteur to delete the reference to “disaster risk reduction”, which appeared in the first reading text. If you recall, this was done because the term “other assisting actor” appears in the draft articles in the specific context of disaster

response. The earlier reference to risk reduction introduced a certain confusion, which has now been clarified.

Other than the deletion just referred to, the provision was adopted in the version approved on first reading.

Subparagraph (f)

Subparagraph (f) deals with the definition of “relief personnel”. Here too, the only amendment, in relation to the first reading formulation, was the removal of the reference to “disaster risk reduction”, since “relief personnel” are by definition involved in relief activities undertaken during the response phase.

It should be recalled that the Special Rapporteur had, in his report, proposed the addition of a reference to the question of the criterion for the use of military assets. He subsequently withdrew the proposal, during his summing up of the debate in Plenary, but on the understanding that the matter was best dealt with in the context of the relevant substantive provision, namely draft article 15, on the facilitation of external assistance.

Subparagraph (g)

Subparagraph (g) covers the definition of “equipment and goods”. In addition to the deletion of the reference to disaster risk reduction, on the same grounds as was done in subparagraphs (e) and (f), a reference to “telecommunications equipment”, which had been proposed in the comments received, was added to the text.

The title of draft article 3 remains “[Uu]se of terms”, as was adopted for the corresponding draft article in the first reading text.

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Draft article 4

Mr. Chairman,

I turn now to draft article 4, on human dignity. The first issue confronted by the Drafting Committee was whether it should appear in the draft articles as an autonomous provision, or whether it was more appropriately placed in the preamble. The Drafting Committee decided that since the notion of respecting and protecting the human dignity of affected persons was so central to the draft articles, it warranted being retained in a separate provision. Another suggestion considered was to merge the draft article with what is now draft article 5 on human rights. The Drafting Committee did not pursue the proposal, as the same outcome was attained by locating the two draft articles one after the other. There was also merit in keeping the two provisions separate so as to indicate that they were not to be treated on the same level.

If you recall, the Special Rapporteur, in summing up the debate in Plenary, proposed that the formulation be aligned with the adopted in the draft articles on the expulsion of aliens, which only made reference to the “obligation to respect”, without mentioning protection. Hence, the reference to “protect” would be deleted. The Drafting Committee, however, decided against this approach, and preferred to retain the first reading formula consisting of both “respect and protect”, in recognition that it reflects a standard formulation for references to “human dignity”.

The difficulty, however, was linking the reference to protection to the entities involved, namely States and other assisting actors, which was in the first reading text, and the Special Rapporteur’s subsequent proposals. While such a reference in the context of States was appropriate, the matter was less clear in the context of “other assisting actors”, where different legal approaches exist as to non-State entities owing obligations, under international law, to protect the human dignity of an affected person. The solution was to find a formulation that removed a specification of the entities doing the respecting and protecting. The draft article, therefore, was cast in the passive voice, focusing only on the respect and protection of the dignity of the human person.

The reference to the phrase “in the event of disasters” at the end, which tracks the formulation contained in draft article 1, serves the function of confirming that, in accordance

with the purpose of the draft articles in draft article 2, the provision applies both to the response to disasters and to disaster risk reduction.

The Drafting Committee also decided not to qualify the draft article by specifying that the persons involved are those in the affected State, which might be viewed as diminishing what is a fundamental concept central to the present draft articles.

The title of draft article 4 is “[H]uman dignity”, which was the formulation the Commission had adopted on first reading.

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Draft article 5

Mr. Chairman,

I turn now to draft article 5, concerning the human rights of persons affected by disasters. Two main changes were implemented in the version adopted on second reading.

First, the first reading formula “respect for” has been expanded to “the respect for and protection of”. If you recall, the Special Rapporteur had proposed aligning the draft articles with the terminology typically found in international human rights treaties. He had initially also proposed the inclusion of the word “fulfilment”, but withdrew his suggestion in light of the views expressed during the Plenary debate. The Drafting Committee then worked on the basis of a revised proposal of the Special Rapporteur, which retained the concepts of respect and protection. Such approach was accepted by the Committee, which further refined the text to the present formula.

The Drafting Committee considered whether the formulation could be aligned with that adopted for draft article 4, on human dignity, in particular by including the formulation “in the event of disasters”. The Drafting Committee, in the end, decided that such parallelism was not strictly necessary.

The second issue was how to depict the reference to human rights. The first reading text has simply referred to “their human rights”, which the Special Rapporteur had retained in the

proposal contained in his eighth report. However, in response to several interventions during the Plenary debate, the Special Rapporteur proposed revising the formula to read “rights under international human rights law”. The idea was to make a reference to the entire body of international human rights law, including the possibility of suspension and derogation, which would continue to regulate the position in the context of a disaster.

The Drafting Committee, however, did not think it necessary to make a specific reference to international human rights law. It was felt that the first reading formulation was more all-encompassing because it included the possibility of human rights protection under national law (such as provided in the constitutional law of many States). The Drafting Committee also did not think it wise to endorse the existence or not of any particular “body” of law, as a formal matter.

It should be recalled that the first reading commentary already indicated that the general reference to “their human rights” encompassed both substantive rights and limitations that exist in the sphere of international human rights law, in particular the affected State’s right of derogation under existing treaties. Nonetheless, the Drafting Committee further decided to make the point clearer by adding the qualifier phrase “in accordance with international law”, which was inspired by a similar provision in the draft articles on the expulsion of aliens. The new reference was introduced as a reminder that the draft articles operate within the framework of the rules of international law, which, as already indicated, may envisage the possibility of suspension and derogation. The reference was also deemed useful since it also recalled that there may be other rules of international law, such as those dealing with refugees and internally displaced persons, relevant to the situations covered by the draft articles.

The Drafting Committee decided to retain the title of draft article 5 as “[H]uman rights”, as had been adopted on first reading.

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Draft article 6

Mr. Chairman,

Draft article 6 deals with the applicable humanitarian principles. The Drafting Committee decided to adopt the formulation as agreed on first reading. Nonetheless, it is worth recalling for the record the various suggestions for modifications that were made. If you recall, the Special Rapporteur, in his eighth report, proposed the insertion of references to the “no-harm” and “independence” principles. However, in light of the views expressed during the Plenary debate, the Special Rapporteur presented a revised proposal which no longer made any reference to either addition, thereby reverting to the first-reading text.

The Drafting Committee agreed with the Special Rapporteur’s proposal, including retaining the reference to the principle of “neutrality”. The Drafting Committee did not intend for the principle to be understood in the sense applied in the context of armed conflict, but rather along the lines of the understanding, provided in the commentary to the first reading text, that the principle has acquired a more specific meaning within the context of humanitarian assistance, namely that the “provision of assistance be independent of any given political, religious, ethnic, or ideological context”. The Drafting Committee also decided to retain the structure of the relationship between impartiality and non-discrimination, which was carefully negotiated during the first reading, so that the essence of impartiality, in the present draft articles, is non-discrimination.

The Drafting Committee further considered the possibility, on the basis of a proposal made in the Plenary, of including a reference to “applying a gender-based perspective”. The Committee also considered the alternative “gender-sensitive”, but decided against including any such indication in the draft article itself, as the legal implications of doing so, and the relationship with the other listed principles, was unclear. Furthermore, the Drafting Committee was concerned that making such a reference within the draft article would open the compromise text to the inclusion of references to other sensibilities. It decided to maintain the approach taken during the first reading, which was to capture many such considerations within the umbrella reference to “particularly vulnerable”. The commentary will, nonetheless, elaborate on the

significance of applying a gender-based approach. It will also clarify that the position of women is not necessarily to be dealt with under the reference to “particularly vulnerable”, but rather in the discussion on the principle of non-discrimination.

The title of draft article 6 remains “[H]umanitarian principles”, as was adopted on first reading. If you recall, the Special Rapporteur had proposed, in his eighth report, to change the title to “Principles of humanitarian response”, but withdrew his proposal following the concerns raised in the Plenary debate.

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Draft article 7

Mr. Chairman,

I turn now to draft article 7 on the duty to cooperate. The first issue to cover has to do with the scope *ratione materiae* of the provision. The Special Rapporteur, in the revised proposal presented to the Drafting Committee, recommended incorporating into the present draft article, as a second paragraph, former draft article 10, as adopted on first reading, on cooperation for disaster risk reduction. However, the Drafting Committee decided that it was not necessary to include such a specific reference, since once the two paragraphs were placed next to each other it became clear that the first was broad enough to encapsulate cooperation during the pre-disaster phase for disaster risk reduction. In other words, the effective deletion of what appeared as draft article 10, on first reading, should not be understood as the Drafting Committee changing its mind, but rather as a function of the second-reading process of integrating the various provisions, which were adopted over several years during the first reading. The further effect of such streamlining is that the forms of cooperation in the context of the response phase is covered by draft article 8, and the types of disaster risk reduction measures, envisaged in the international cooperation envisaged in draft article 7, are detailed in paragraph 2 of draft article 9.

This is also clarified by a modification made to the opening phrase of the draft article. The earlier reference to “in accordance with the present draft articles”, has been aligned to the French version, so that it now reads: “In the application of the present draft articles”. The modification was also motivated by the need to provide a clearer link to the purpose of the cooperation being envisaged. The Drafting Committee also considered inserting the formula “for the purpose of the present draft articles”, but decided against doing so.

A series of modifications were made to align the text with the formulation adopted in other draft articles. In particular, the new reference to “other assisting actors”, at the end, serves to import the definition of that concept, contained in draft article 3, subparagraph (d), which includes a competent intergovernmental organization, a relevant non-governmental organization or entity. Accordingly, the draft article was streamlined with the deletion of such express references (as had appeared in the first reading version). One exception to this was made. The Drafting Committee was of the view that the important role played by the Red Cross Movement, in international cooperation in the context of the situations covered by the draft articles, warranted retaining an express reference to it, even though it is technically one of “entities” envisaged in the definition of “other assisting actor”, in draft article 3. The first-reading formulation was changed to “Red Cross and Red Crescent Movement”, which was specifically requested by the entity in question. I wish to confirm that these changes were simply meant as drafting refinements, and were not intended to limit the scope of the cooperation being envisaged.

I should also recall, for the record, that the Special Rapporteur had, in the proposal in his eighth report, recommended including a specific reference to the Emergency Response Coordinator. The reference no longer appeared in the revised version of the draft article placed before the Drafting Committee. The Committee agreed that such reference was necessarily covered by the reference to the United Nations, and would be dealt with in the commentary

The Drafting Committee also considered a proposal to replace the phrase “as appropriate” with “within their capacity”, so as to strengthen the obligation to cooperate. However, it decided not to do so, as the reference to “as appropriate” was not meant to qualify the level of cooperation being envisaged, but rather the entities with whom the cooperation should take place in any particular disaster, and, as such, continues to qualify the entire draft article. The effect is to modulate the nature of cooperation being envisaged, depending on which entities are involved

in the cooperation. The Drafting Committee also looked at locating the qualifier “as appropriate” elsewhere in the draft articles, but decided against doing so.

The title of draft article 7 is “[D]uty to cooperate”, which is the formulation adopted on first reading.

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Draft article 8

Mr. Chairman,

I turn now to draft article 8, which deals with the forms of cooperation in the specific context of disaster response. The provision, as adopted on second reading, is substantively the same as that adopted on first reading. The first reading opening phrase: “For the purposes of the present draft articles” was deleted, because it was no longer considered necessary in light of the fact that the reference to “cooperation” has been expanded to specify “in the response to disasters”. This latter change was done so as to align the text clearer with the understanding reached for draft article 7, namely that draft article 8 expands on the duty to cooperate, in the specific context of the response to disasters.

The Drafting Committee further considered the possibility of adding a reference, among the forms of cooperation, to the provision of financial support. It, however, decided not to include the reference for fear of reopening the consensus text reached on first reading, on the understanding that the position described in the commentary adopted on first reading would be maintained, namely that the list of forms in the draft article is not exhaustive, and that other forms exist, including the provision of financial assistance.

The title of draft article 8 has been modified to read “[F]orms of cooperation in the response to disasters”, which reflects the understanding as to the scope draft article reached at the present session, as just described.

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Draft article 9

Mr. Chairman,

I turn now to draft article 9, which deals with the duty to reduce the risk of disasters. If you recall, the Special Rapporteur had proposed the addition of new language referring to the creation of new risk and reduction of existing risk. However, since the proposal had not met with general approval during the Plenary debate, the Special Rapporteur's submitted a revised proposal reverting to the formulation adopted on first reading.

The Drafting Committee considered proposals made in the Plenary to add a qualification to the envisaged obligation, by adding a reference to "taking into account the means at their disposal", so as to anticipate the variance in the capacities of States. The Drafting Committee decided against doing so, out of the concern that making such specific reference in the present draft article could create an unintended *a contrario* interpretation in relation to other draft articles, such as draft article 7, where no such qualification was introduced. The Drafting Committee decided that the matter was to be covered by a combination of the explanation in the commentary, as adopted on first reading, together with a streamlining of the first reading text whereby the reference to "necessary" was removed, so as to limit the possible interpretation that the provision required the taking of all measures. Accordingly, the reference to "taking appropriate measures" is meant to indicate the relative nature of the obligation. The Drafting Committee also recalled the understanding reached, on first reading, that the duty being envisaged was one of conduct and not result, in other words not to completely prevent or mitigate a disaster, but rather to reduce the risk of harm potentially caused thereby. Therefore, some flexibility is inherent to the concept of disaster risk reduction itself. The commentary will reinforce this point.

In the second paragraph, the Drafting Committee considered a proposal to refer also to the reduction of vulnerability, but decided against doing so for fear of introducing confusion. The reduction of vulnerability, and the strengthening of resilience, are not risk reduction measures

per se, but rather the goal of the measures envisaged in paragraph 2. The Drafting Committee therefore adopted the text of paragraph 2 in the version adopted on first reading.

The title of draft article 9 is “[R]eduction of the risk of disasters”, which was proposed by the Special Rapporteur, in his eighth report, and which no longer refers to a “duty”. This reflects the flexible nature of the obligation contained in the draft article.

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Draft article 10

Mr. Chairman,

I turn now to draft article 10, which deals with the role of the affected State. The only modifications made were to paragraph 1. The first, was the inclusion of the additional reference to “or in territory under its jurisdiction or control” at the end, which was inserted to align the text with the expanded scope of the term “affected State” in draft article 3, subparagraph (b). It is to be recalled that this disparity, in the first reading text, between the provision dealing with the role of the affected State, and the definition of “affected State”, which is to be ascribed to the fact that the latter was adopted several years after the former, had been noted in some of the comments received.

A consequence of the decision of the Drafting Committee to insert the expanded understanding of an affected State, referring to territory under jurisdiction or control, was that the reference in the first reading text to the affected State having a duty “by virtue of its sovereignty” no longer fully accorded with the legal position. In particular, the Drafting Committee was concerned that referring to such situations as a function of the exercise of sovereignty would be difficult to sustain. At the same time, the Drafting Committee was conscious of the fact that the phrase “by virtue of its sovereignty” had been key to the compromise reached on first reading, through which the emphasis was placed on the bond between sovereign rights and concomitant duties. Various options were considered by way of reconciling both the need to reflect the expanded scope of the draft article, and the need to refer to sovereignty in the standard case of

protection of persons on the territory of the affected State. One idea was to include an additional paragraph 1 *bis*, dealing solely with the question of protection of persons in territory under the jurisdiction or control of the affected State.

In the end, the Drafting Committee did indeed decide to delete the phrase “by virtue of its sovereignty” in paragraph 1. However, such decision should not be understood as the Drafting Committee changing its mind on the origin of the duty on the affected State in relation to the protection of persons on its own territory. Instead, it was simply motivated by the need to accommodate the expanded definition of affected State, as already discussed. The commentary will make this clear and will retain the important clarifications about the sovereignty of the affected State made in the commentary on first reading. It should also be recalled that a reference to the principle of sovereignty has been included in the draft preamble, which qualifies the entire draft articles. This also took care of another proposal to refer to both the duty and the right of the affected State. In the same way as it was difficult to refer to sovereignty in the expanded paragraph 1, a reference to a State acting by way of “right” with regards to territory under its jurisdiction or control introduced legal complexity.

The Drafting Committee retained paragraph 2 in the form adopted on first reading, with a technical modification so that “relief and assistance” now reads “relief assistance”.

The title of draft article 10 is “role of the affected State”, which is the title as was adopted on first reading. I wish to place on the record that the Special Rapporteur, in his revised proposal, recommended that the title be presented as “[f]unction of the affected State”, in order to take into account the views mentioned in the Plenary debate, that the content of the draft article dealt with the function of the affected State. The Committee also considered various other proposals that made reference, *inter alia*, to the “duty” of the affected State. However, none found favour with the Drafting Committee, which, in the end, settled for the first reading formulation.

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Draft article 11

Mr. Chairman,

I turn now to draft article 11, which deals with the duty of the affected State to seek external assistance.

Three changes were made to the text. The first relates to the inclusion of the new qualifier “manifestly” before “exceeds its national response capacity”, in order to insert a threshold requirement. I wish to recall that the Special Rapporteur, in his eighth report, had, in response to some of the comments received, proposed a more subjective standard whereby the affected State would itself “determine that a disaster exceeded its national response capacity”. However, in light of the opposition expressed in the Plenary debate, the Special Rapporteur modified his proposal to reflect the more objective reference to “manifestly”. Such proposal, which met with support in the Plenary debate, was retained by the Drafting Committee.

The second change involved the streamlining of the reference to the other potential assisting actors, which, in the first reading version, were spelt out in full, as “competent intergovernmental organizations and relevant non-governmental organizations”. On second reading, the Drafting Committee sought to integrate the various terms defined in draft article 3, including that on “other assisting actor”. In other words, the new reference at the end of the paragraph to “other potential assisting actors” is meant to be read in light of definition in draft article 3. Of course, such actors are referred to as other “potential” assisting actors, because they are not yet providing assistance, but might potentially do so.

With the change to the language referring to assisting actors, the phrase “as appropriate” was no longer best placed at the end of the draft article. Accordingly, the Drafting Committee moved it earlier, after “from”, to qualify the list of potential assisting actors from which the affected State should seek assistance. The Drafting Committee also decided that the word “among” was no longer necessary, since the new location of the words “as appropriate” now serves substantially the same function as the word “among” had served in the first reading text..

I wish to point out that the agreement on draft article 11 was also reached on the understanding that an appropriate provision be included in the draft articles on the obligations of potentially assisting States. I will return to this point in the context of draft article 12.

The title of draft article 11 is “[D]uty of the affected State to seek external assistance”, which is the formulation that was adopted on first reading.

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Draft article 12

Mr. Chairman,

I turn now to draft article 12, on the question of offers of external assistance. I wish to make two preliminary points. First, you may recall that the corresponding provision adopted on first reading, was adopted later in the sequence of draft articles, as draft article 16. The Drafting Committee decided to move the provision higher, after draft article 11 on the duty of the affected State to seek external assistance, and before draft article 13 on the consent of the affected State to offers of external assistance. The second point, is that this is the only provision that includes new text, not based on that adopted on first reading. The provision is now organized in two paragraphs, the first being based on the text of draft article 16, as adopted on first reading, and the second is a new paragraph.

Regarding paragraph 1, the first reading phrase: “[I]n responding to disasters” was amended to read: “[I]n the event of disasters”, so as to avoid the confusion between the concept of “response”, which has a technical meaning in the draft articles, and the more colloquial reference to offer assistance as a response to the existence of a disaster. The second change refers to the word “may”. The first reading text had rendered the provision as “have the right to offer”, and the Special Rapporteur has proposed retaining that formulation. The Drafting Committee decided, however, to change the reference to “may”, as an express reference to acting on the basis of right introduced complexity, *inter alia*, in relation to assistance being offered by other potential assisting actors, which, according to the definition in draft article 3 includes non-governmental actors (thereby also eliminating the need for the additional sentence which appeared in the first reading text).

As already indicated, paragraph 2 is new. The Drafting Committee decided to include it on the basis of a proposal made by the Special Rapporteur following on concerns raised in the Plenary debate that the draft articles did not sufficiently cover the obligations of potentially assisting States and other assisting actors. The inclusion of this paragraph was, accordingly, motivated by a desire to introduce a greater balance within the text, by providing a parallel obligation to that in draft article 13, paragraph 3, namely the obligation of the affected State to make known its decision regarding an offer made to it in a timely manner. Various formulations were considered by the Drafting Committee before it settled on the text currently before you.

Paragraph 2 has three components. First, the seeking of external assistance by the affected State triggers the application of the provision. While, in draft article 11, the duty on the affected State is a general duty to “seek” assistance, this paragraph deals with the scenario where specific assistance is sought by the affected State “by means of a request addressed to” the enumerated list of potential assisting actors. The Drafting Committee understood such specification to be important since it limited the application of the provision to specific requests, and not general appeals for assistance.

Second, the provision refers to the constellation of addressees of a request for assistance, including other States, the United Nations and other potentially assisting actors, which is a cross-reference to the definition in draft article 3. The United Nations was singled out for special mention given the central role it plays in receiving requests for assistance.

Third, the Drafting Committee proposes fixing an obligation on the addressee or addressees of the specific request, which is structured in two parts, namely to give due consideration to the request, and secondly, to inform the affected State of its or their reply thereto. Both obligations are qualified by the term “expeditiously”, which is a reference to timeliness. The reference to the obligation to give “due consideration to the request” was drawn from similar wording in draft article 19, of the draft articles on diplomatic protection, adopted in 2006. The word “due” is meant less in the sense of timeliness, which is already covered by the notion of expeditious, and more as a reference to the substance of the request.

The Drafting Committee also considered aligning the language with that of the obligation on the affected State, in draft article 13. However, it recognized that the position of an affected State, in the wake of a disaster falling within the scope of the present draft articles, was different

from that of an assisting State or other assisting entity, which justified formulating a different obligation.

The title of draft article 12 remains “[O]ffers of external assistance”. The reference to “offers” in the title is meant to be understood broadly, to cover not only the making of offers, but also offers made in response to a request.

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Draft article 13

Mr. Chairman,

I turn now to draft article 13, on the consent of the affected State to external assistance. Paragraphs 1 and 2 were adopted without change to the first reading text.

As regards paragraph 2, the proposal of the Special Rapporteur had also made reference to the arbitrary “withdrawal” of consent. The Drafting Committee decided not to include the reference to withdrawal for fear or reopening of what had been a delicately balanced provision, adopted on first reading.

Concerning paragraph 3, I wish to record the fact that the Special Rapporteur had in his eighth report proposed the inclusion of a reference to the making of a “good faith” offer of assistance. However, in response to views expressed in the Plenary that the reference was superfluous, the revised version submitted by the Special Rapporteur, considered by the Drafting Committee, no longer included the reference.

Two changes were made to paragraph 3. First, the word “extended” in the first reading version was replaced by “made”, out of the concern that “extended” could be misunderstood as referring to extension in time. The second change is the addition of the phrase “in a timely manner”, at the end of the paragraph, which was proposed by the Special Rapporteur, in his eighth report, and supported in the Plenary debate. The Drafting Committee decided to accept the additional qualification, in order to emphasize the importance of receiving timely responses, in the context of the occurrence of a disaster. It should, however, be kept in mind that the

requirement is subject to the general qualification “whenever possible”, which the Committee understood as retaining the general flexibility built in to the provision.

The title of draft article 13 is “[C]onsent of the affected State to external assistance”, which is the formulation adopted on first reading.

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Draft article 14

Mr. Chairman,

The title and text of draft article 14, entitled “[C]onditions on the provision of external assistance”, were adopted in the same rendering as was done on first reading.

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Draft article 15

Mr. Chairman,

Draft article 15 deals with the facilitation of external assistance. The text remains substantially the same as that adopted, on first reading, with a technical modification in paragraph 1, subparagraph (a). As part of the process of integrating the provision on use of terms, in draft article 3, the phrase “civilian and military relief personnel”, which had appeared in the first reading text, has now been rendered as “relief personnel”, which imports, by reference, the definition contained in draft article 3, subparagraph (f).

The title remains “[F]acilitation of external assistance”, as was adopted on first reading.

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Draft article 16

Mr. Chairman,

I turn now to draft article 16, which deals with the question of protection of relief personnel and their equipment and goods. The provision has been adopted substantially in the same form as was done on first reading, including with the same understanding of the flexibility retained by the word “appropriate”, which also refers to the question of the possibility of the affected State to perform the envisaged actions. This will be elaborated in the commentary.

The only changes made to the text were the harmonization of the reference to territory, which has been done throughout the draft articles, namely the introduction of the phrase “or in territory under its jurisdiction or control”, and the introduction of the words “and of” before “equipment and goods”.

The title of draft article 16 remains that adopted on first reading “[P]rotection of relief personnel, equipment and goods”.

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Draft article 17

Mr. Chairman,

I turn now to draft article 17, concerning the question of termination of external assistance. This provision was the subject of extensive discussion in the Drafting Committee. If you recall, the Special Rapporteur had proposed, in his eighth report, that a further precision be added to the draft article by adding an express reference to the right of the actors concerned to terminate external assistance at any time.

The Drafting Committee proceeded on the basis of a revised proposal, presented by the Special Rapporteur, which took into account the views expressed in the Plenary. The Committee considered a number of proposals, including making an express reference to prohibiting the arbitrary withdrawal of consent to the provision of relief assistance.

In the end, the Drafting Committee settled on a combination of the revised proposal of the Special Rapporteur, as refined by the Committee, together with much of the formulation adopted on first reading. The draft article is composed of three sentences:

The first sentence confirms the basic right of the actors concerned, namely the affected State, the assisting State, the United Nations, or other assisting actor, to terminate external assistance at any time. This formulation was based on the proposal of the Special Rapporteur. It is understood that the reference to termination of assistance includes both in whole or partial termination. The Drafting Committee did not raise the possibility directly in the text, since it was understood that the possibility of termination in whole assumes also that of termination in part.

The second sentence is the text of the last sentence of draft article 19, as adopted on first reading, establishing the requirement of notification, with the precision that the word “wishing” has been refined to read “intending”. The second sentence has been further streamlined to refer to “any such State or actor”.

The third sentence reproduces, in substance, the text of the first sentence of the first reading version, requiring consultation between the actors involved. The formulation was updated, with the reference to “as appropriate” being introduced earlier so that it applies to affected States, the United Nations and other assisting actor. This is meant to clarify that the anticipated consultation takes place between the assisting State, on the one hand, and, on the other hand, any other actor (whether an assisting State, the United Nations or other assisting actor) providing the assistance.

The Drafting Committee also added an express reference to the United Nations among the potential assisting actors, given its central role in the provision of relief assistance.

The title of draft article 17 remains “[T]ermination of external assistance”, as was adopted on first reading.

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Draft article 18

Mr. Chairman,

I turn now to draft article 18, on the relationship of the draft articles to other rules of international law. The provision is the successor to draft articles 20 and 21, as adopted on first reading.

The Drafting Committee proceeded on the basis of a proposal, presented by the Special Rapporteur, which merged both provisions into a single draft article. The Drafting Committee accepted the general approach of having only one provision to deal with the relationship with both other applicable rules, and the rules of humanitarian law, but preferred to separate them into separate paragraphs.

Paragraph 1, accordingly, deals with the relationship of the draft articles with other applicable rules of international law, such as existing treaties dealing with response to disasters, or disaster risk reduction. The Drafting Committee adopted substantially the same approach as that taken on first reading in draft article 20, in that it agreed to depict the relationship in the form of a “without prejudice” clause. The Committee did, however, simplify the text so that the first reading reference to “special or other rules of international law applicable in the event of disasters”, has been replaced by the formula “other applicable rules of international law”, which relate to both regional and bilateral treaties applicable to the protection of persons of disasters. The formulation is presented intentionally flexibly, without referring to such other rules as being “special” in relation to the draft articles, since that may or may not be the case depending on their content.

Paragraph 2 deals with the specific question of the relationship with the rules of international humanitarian law. If you recall, this matter was the subject of extensive discussion in the comments and observations received. Draft article 21 of the first reading text excluded the application of the draft articles to the extent that the rules of international law applied. In response to the comments and suggestions made, the Special Rapporteur, in his eighth report, had proposed depicting the relationship in the form of a “without prejudice” clause, as had been done with the relationship to other applicable rules. In his subsequent revised proposal, the

Special Rapporteur, proposed presenting the rules of international humanitarian law as a subcategory of special rules of international law in a general without prejudice clause.

The Drafting Committee, however, decided to retain, in substance, the approach taken on first reading of indicating the relationship of the present draft articles to the rules of international humanitarian law, as opposed to providing a simple saving clause. The Drafting Committee drew inspiration from article 55 of the 2001 articles on the responsibility of States for internationally wrongful acts, in depicting the relationship with the rules of international humanitarian law in the formulation “do not apply to the extent that the response to a disaster is governed” by such rules. From this outcome, the draft articles could conceivably apply in contexts of armed conflict, to the extent that the rules of international humanitarian law do not apply. This would also allow for the parallel application of the draft articles in the context of “complex” emergencies. The commentary and the text of the draft article will be aligned, and a reference to the position taken in draft article 18 will also be included in the commentary on the definition of “disaster” in draft article 3, subparagraph (a), by way of further delineating the scope of application of that provision.

For the record, the Drafting Committee did not include a reference to disaster risk reduction in paragraph 2, since risk reduction measures are taken, by definition, in advance of the onset of a disaster, and would not implicate the rules of international humanitarian law.

The title of draft article 18 remains that adopted on first reading, namely “[R]elationship to other rules of international law”, which was adopted on the understanding that the reference to “other rules” includes *lex specialis*.

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Mr. Chairman,

This concludes my introduction of the first report of the Drafting Committee for this session. As I stated at the beginning of my statement, the Drafting Committee recommends that

the Commission adopt the articles on the topic “Protection of persons in the event of disasters” that are before you, on second reading.

Thank you.