

Chapter VI

PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

A. Introduction

50. The Commission, at its fifty-ninth session (2007), decided to include the topic “Protection of persons in the event of disasters” in its programme of work and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur.²⁹⁸ At the same session, the Commission requested the Secretariat to prepare a background study, initially limited to natural disasters, on the topic.²⁹⁹

51. At its sixtieth session (2008), the Commission had before it the preliminary report of the Special Rapporteur,³⁰⁰ tracing the evolution of the protection of persons in the event of disasters and identifying the sources of the law on the topic, as well as the previous efforts towards codification and development of the law in the area. It also presented in broad outline the various aspects of the general scope with a view to identifying the main legal questions to be covered and advancing tentative conclusions without prejudice to the outcome of the discussion that the report aimed to trigger in the Commission. The Commission also had before it a memorandum by the Secretariat,³⁰¹ focusing primarily on natural disasters and providing an overview of existing legal instruments and texts applicable to a variety of aspects of disaster prevention and relief assistance, as well as of the protection of persons in the event of disasters.

52. The Commission considered, at its sixty-first session (2009), the second report of the Special Rapporteur,³⁰² analysing the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis* and issues relating to the definition of “disaster” for the purposes of the topic, as well as undertaking a consideration of the basic duty to cooperate. The report contained proposals for three draft articles. The Commission also had before it written replies submitted by the United Nations Office for the Coordination of Humanitarian Affairs and by the International Federation of Red Cross and Red Crescent Societies to the questions addressed to them by the Commission in 2008.

²⁹⁸ At its 2929th meeting, on 1 June 2007 (see *Yearbook ... 2007*, vol. II (Part Two), para. 375). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex III to the report of the Commission (see *Yearbook ... 2006*, vol. II (Part Two), para. 257 and pp. 206–216).

²⁹⁹ *Yearbook ... 2007*, vol. II (Part Two), para. 386.

³⁰⁰ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598.

³⁰¹ A/CN.4/590 and Add.1–3 (mimeographed; available from the Commission’s website, documents of the sixtieth session).

³⁰² *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615.

53. At its sixty-second session (2010), at the 3057th meeting, held on 4 June 2010, the Commission provisionally adopted draft articles 1 (Scope), 2 (Purpose), 3 (Definition of disaster), 4 (Relationship with international humanitarian law) and 5 (Duty to cooperate), which had been considered at the previous session. The Commission also had before it the third report of the Special Rapporteur,³⁰³ providing an overview of the views of States on the work undertaken by the Commission, a consideration of the principles that inspire the protection of persons in the event of disasters, and a consideration of the question of the responsibility of the affected State. Proposals for three further draft articles were made in the report.

54. At its sixty-third session (2011), at the 3102nd meeting, held on 11 July 2011, the Commission provisionally adopted draft articles 6 (Humanitarian principles in disaster response), 7 (Human dignity), 8 (Human rights) and 9 (Role of the affected State), which had been considered at the previous session. The Commission also had before it the fourth report of the Special Rapporteur,³⁰⁴ containing, *inter alia*, a consideration of the responsibility of the affected State to seek assistance where its national response capacity is exceeded, the duty of the affected State not to arbitrarily withhold its consent to external assistance and the right to offer assistance in the international community. Proposals for a further three draft articles were made in the report. The Commission provisionally adopted draft articles 10 (Duty of the affected State to seek assistance) and 11 (Consent of the affected State to external assistance) at the 3116th meeting, held on 2 August 2011, but was unable to conclude its consideration of draft article 12 owing to a lack of time.

55. At its sixty-fourth session (2012), the Commission had before it the fifth report of the Special Rapporteur,³⁰⁵ providing an overview of the views of States on the work undertaken by the Commission, a brief discussion of the Special Rapporteur’s position on the Commission’s question in Chapter III, section C, of its 2011 annual report,³⁰⁶ and further elaboration of the duty to cooperate. The report also contained a discussion of the conditions for the provision of assistance and the question of the termination of assistance. Proposals for an additional three draft articles were made in the report. At its 3152nd meeting, on 30 July 2012, the Commission took note of draft articles 5 *bis* and 12 to 15, as provisionally adopted by the Drafting Committee.³⁰⁷

³⁰³ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/629.

³⁰⁴ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/643.

³⁰⁵ *Yearbook ... 2012*, vol. II (Part One), document A/CN.4/652.

³⁰⁶ *Yearbook ... 2011*, vol. II (Part Two).

³⁰⁷ A/CN.4/L.812 (mimeographed; available from the Commission’s website, documents of the sixty-fourth session).

B. Consideration of the topic at the present session

56. At the present session, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/662), dealing with aspects of prevention in the context of the protection of persons in the event of disasters, including disaster risk reduction, prevention as a principle of international law and international cooperation on prevention. The report further provided an overview of national policy and legislation. Proposals for the following two draft articles were made in the report: draft articles 5 *ter* (Cooperation for disaster risk reduction)³⁰⁸ and 16 (Duty to prevent).³⁰⁹

57. The Commission considered the sixth report at its 3175th to 3180th meetings, from 8 to 16 July 2013.

58. At its 3180th meeting, on 16 July 2013, the Commission referred draft articles 5 *ter* and 16 to the Drafting Committee.

59. At the 3162nd meeting, on 10 May 2013, the Commission adopted the report of the Drafting Committee on draft articles 5 *bis* and 12 to 15, which had been considered at the previous session. The Commission further adopted the report of the Drafting Committee on draft articles 5 *ter* and 16 at the 3187th meeting, held on 26 July 2013 (sect. C.1 below).

60. At its 3190th and 3191st meetings, on 2 and 5 August 2013, the Commission adopted the commentaries to draft articles 5 *bis*, 5 *ter* and 12 to 16 (sect. C.2 below).

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

1. TEXT OF THE DRAFT ARTICLES

61. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.³¹⁰

PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

Article 1. Scope

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

Article 2. Purpose

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

³⁰⁸ Draft article 5 *ter* read as follows:

“Cooperation for disaster risk reduction

“Cooperation shall extend to the taking of measures intended to reduce the risk of disasters.”

³⁰⁹ Draft article 16 read as follows:

“Duty to prevent

“1. States shall undertake to reduce the risk of disasters by adopting appropriate measures to ensure that responsibilities and accountability mechanisms be defined and institutional arrangements be established, in order to prevent, mitigate and prepare for such disasters.

“2. Appropriate measures shall include, in particular, the conduct of multi-hazard risk assessments, the collection and dissemination of loss and risk information and the installation and operation of early warning systems.”

³¹⁰ For the commentaries to draft articles 1 to 5, see *Yearbook ... 2010*, vol. II (Part Two), para. 331. For the commentaries to draft articles 6 to 11, see *Yearbook ... 2011*, vol. II (Part Two), para. 289.

Article 3. Definition of disaster

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

Article 4. Relationship with international humanitarian law

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

Article 5. Duty to cooperate

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

Article 5 bis. Forms of cooperation

For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources.

Article 5 ter. Cooperation for disaster risk reduction

Cooperation shall extend to the taking of measures intended to reduce the risk of disasters.

Article 6. Humanitarian principles in disaster response

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

Article 7. Human dignity

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

Article 8. Human rights

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

Article 9. Role of the affected State

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

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

Article 10. Duty of the affected State to seek assistance

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

Article 11. Consent of the affected State to external assistance

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

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

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

Article 12. Offers of assistance

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

Article 13. Conditions on the provision of external assistance

The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

Article 14. Facilitation of external assistance

1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:

(a) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

(b) goods and equipment, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

Article 15. Termination of external assistance

The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actors wishing to terminate shall provide appropriate notification.

Article 16. Duty to reduce the risk of disasters

1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.

2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIFTH SESSION

62. The text of the draft articles, together with commentaries, provisionally adopted by the Commission at the sixty-fifth session, is reproduced below.

Article 5 bis. Forms of cooperation

For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources.

Commentary

(1) Draft article 5 *bis* seeks to clarify the various forms that cooperation between affected States, assisting States, and other assisting actors may take in the context of the protection of persons in the event of disasters. Cooperation

is enshrined in general terms in draft article 5 as a guiding principle and fundamental duty with regard to the present topic, as it plays a central role in disaster relief efforts. The essential role of cooperation lends itself to a more detailed enunciation of the kinds of cooperation relevant in this context. The present draft article is therefore designed to further elaborate on the meaning of draft article 5, without creating any additional legal obligations.

(2) The list of the forms of cooperation in draft article 5 *bis*—humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources—is loosely based on the second sentence of paragraph 4 of draft article 17 of the final draft articles on the law of transboundary aquifers, adopted by the Commission at its sixtieth session (2008),³¹¹ which expands upon the general obligation to cooperate in article 7 of those draft articles by describing the cooperation necessary in emergency situations. The second sentence of paragraph 4 of draft article 17 reads as follows:

Cooperation may include coordination of international emergency actions and communications, making available emergency response personnel, emergency response equipment and supplies, scientific and technical expertise and humanitarian assistance.³¹²

As this provision had been specifically drafted with reference to a related context—namely, the need for cooperation in the event of an emergency affecting a transboundary aquifer—the Commission felt that its language was a useful starting point for the drafting of draft article 5 *bis*. However, the text of article 5 *bis* was tailored to appropriately reflect the context and purpose of the present draft articles, and to ensure that it took into account the major areas of cooperation dealt with in international instruments addressing disaster response. Similar language is contained in the Association of Southeast Asian Nations (ASEAN) Declaration on Mutual Assistance on Natural Disasters, of 26 June 1976, which states that “Member Countries shall, within their respective capabilities, cooperate in the—(a) improvement of communication channels among themselves as regards disaster warnings; (b) exchange of experts and trainees; (c) exchange of information and documents; and (d) dissemination of medical supplies, services and relief assistance”.³¹³ In a similar vein, in explaining the areas in which it would be useful for the United Nations to adopt a coordinating role and encourage cooperation, General Assembly resolution 46/182 calls for coordination with regards to “specialized personnel and teams of technical specialists, as well as relief supplies, equipment and services ...”.³¹⁴

(3) The beginning of draft article 5 *bis* states that the forms of cooperation are outlined “[f]or the purposes of the present draft articles”. Therefore, draft article 5 *bis*, which is to be read in the light of the other draft articles, is oriented towards the purpose of the topic as a whole as stated in draft article 2, namely “to facilitate an adequate

³¹¹ *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54.

³¹² *Ibid.*, p. 22.

³¹³ ASEAN, *Documents Series 1976*.

³¹⁴ General Assembly resolution 46/182, 19 December 1991, annex, para. 27.

and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights". In the context of the present topic, the ultimate goal of the duty to cooperate, and therefore of any of the forms of cooperation referred to in draft article 5 *bis*, is the protection of persons affected by disasters.

(4) While the draft article highlights specific forms of cooperation, the list is not meant to be exhaustive, but is instead illustrative of the principal areas in which cooperation may be appropriate according to the circumstances. The non-exhaustive nature of the list is emphasized by the use of the word "includes", and its equivalent in the other official languages. The Commission determined that the highlighted forms are the main areas in which cooperation may be warranted, and that the forms are broad enough to encapsulate a wide variety of cooperative activities. Cooperation may, therefore, include the activities mentioned, but is not limited to them; other forms of cooperation not specified in the present draft article are not excluded, such as financial support; technological transfer covering, among other things, satellite imagery; training; information-sharing; and joint simulation exercises and planning.

(5) As draft article 5 *bis* is illustrative of possible forms of cooperation, it is not intended to create additional legal obligations for either affected States or assisting actors to engage in certain activities. The forms which cooperation may take will necessarily depend upon a range of factors, including, *inter alia*, the nature of the disaster, the needs of the affected persons and the capacities of the affected State and assisting actors involved. As with the principle of cooperation itself, the forms of cooperation in draft article 5 *bis* are meant to be reciprocal in nature, as cooperation is not a unilateral act, but rather one that involves the collaborative behaviour of multiple parties.³¹⁵ The draft article is therefore not intended to be a list of activities in which an assisting State may engage, but rather areas in which harmonization of efforts through consultation on the part of both the affected State and assisting actors may be appropriate.

(6) Moreover, cooperation in the areas mentioned must be in conformity with the other draft articles. For example, as with draft article 5, the forms of cooperation touched upon in draft article 5 *bis* must be consistent with draft article 9, which grants the affected State, "by virtue of its sovereignty", the primary role in disaster relief assistance. Cooperation must also be in accordance with the requirement of consent of the affected State to external assistance (draft art. 11), as well as the recognition that the affected State may place appropriate conditions on the provision of external assistance, particularly with respect to the identified needs of persons affected by a disaster and the quality of the assistance (draft art. 13). Cooperation is also related to draft article 14, which recognizes the role of the affected State in facilitating prompt and effective assistance to persons affected by a disaster. As such, and since draft article 5 *bis* does not create any additional legal obligations, the relationship between the affected State, assisting State, and other assisting actors with regards to the above forms of cooperation will be in accordance with the other provisions of the present draft articles.

³¹⁵ *Yearbook ... 2010*, vol. II (Part Two), para. 331, at paragraph (6) of the commentary to draft article 5.

(7) Humanitarian assistance is intentionally placed first among the forms of cooperation mentioned in draft article 5 *bis*, as the Commission considers this type of cooperation of paramount importance in the context of disaster relief. The second category—coordination of international relief actions and communications—is intended to be broad enough to cover most cooperative efforts in the disaster relief phase, and may include the logistical coordination, supervision and facilitation of the activities and movement of disaster response personnel and equipment and the sharing and exchange of information pertaining to the disaster. Though information exchange is often referred to in instruments that emphasize cooperation in the pre-disaster phase as a preventive mode to reduce the risk of disasters,³¹⁶ communication and information are also relevant in the disaster relief phase to monitor the developing situation and to facilitate the coordination of relief actions among the various actors involved. A number of instruments deal with communication and information sharing in the disaster relief context.³¹⁷ The mention of "making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources" refers to the provision of any and all resources necessary for disaster response operations. The reference to "personnel" may entail the provision of and cooperation between medical teams, search and rescue teams, engineers and technical specialists, translators and interpreters, or other persons engaged in relief activities on behalf of one of the relevant actors—affected State, assisting State or other assisting actors. The term "resources" covers scientific, technical and medical expertise and knowledge, as well as equipment, tools, medicines or other objects that would be useful for relief efforts.

(8) Draft article 5 *bis* presents a list of the possible forms of cooperation in the disaster relief, or post-disaster, phase. As such, the content of the draft article is without prejudice to any applicable rule on cooperation in the pre-disaster phase, including disaster prevention, preparedness and mitigation.

Article 5 *ter*. Cooperation for disaster risk reduction

Cooperation shall extend to the taking of measures intended to reduce the risk of disasters.

Commentary

(1) While draft article 5 *bis* concerns the various forms which cooperation may take in the disaster relief or

³¹⁶ See, for example, ASEAN Agreement on Disaster Management and Emergency Response, 26 July 2005, art. 18, para. 1.

³¹⁷ See, for example, Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, art. 3 (calling for "the deployment of terrestrial and satellite telecommunication equipment to predict, monitor and provide information concerning natural hazards, health hazards and disasters", and "the sharing of information about natural hazards, health hazards and disasters among the States Parties and with other States, non-State entities and intergovernmental organizations, and the dissemination of such information to the public, particularly to at-risk communities"); and the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief ("Oslo Guidelines"), para. 54 (United Nations, Office for the Coordination of Humanitarian Affairs, Revision 1.1, November 2007). See also the discussion in the memorandum by the Secretariat on the protection of persons in the event of disasters (A/CN.4/590 [and Add.1-3]) (footnote 301 above), paras. 158-173.

post-disaster phase of the disaster cycle, draft article 5 *ter* indicates that the scope of application *ratione temporis* of the duty to cooperate, enshrined in general terms in draft article 5, also covers the pre-disaster phase. Thus, while draft article 5 *bis* deals with the response to a disaster, draft article 5 *ter* addresses the reduction of disaster risk.

(2) This provision qualifies the cooperation referred to as being related to the “taking of measures intended to reduce the risk of disasters”. This phrase is to be understood in the light of both paragraphs of draft article 16, in particular its paragraph 2, which envisages a series of measures that are specifically aimed at the reduction of disaster risk.

(3) Draft article 5 *ter* has been provisionally adopted on the understanding that adoption was without prejudice to its final location in the set of draft articles, including, in particular, its being incorporated at the same time as draft article 5 *bis* into a newly revised draft article 5. These are matters that have been left in abeyance for adjustment during the finalization of the first reading of the draft articles.

Article 12. Offers of assistance

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

Commentary

(1) Draft article 12 acknowledges the interest of the international community in the protection of persons in the event of disasters, which is to be viewed as complementary to the primary role of the affected State enshrined in draft article 9. It is an expression of the principle of solidarity underlying the whole set of draft articles on the topic and, in particular, of the principle of cooperation embodied in draft articles 5 and 5 *bis*.

(2) Draft article 12 is only concerned with “offers” of assistance, not with the actual “provision” thereof. Such offers, whether made unilaterally or in response to a request, are essentially voluntary and should not be construed as recognition of the existence of a legal duty to assist. Nor does an offer of assistance create for the affected State a corresponding obligation to accept it. In line with the fundamental principle of sovereignty informing the whole set of draft articles, an affected State may accept in whole or in part, or not accept, offers of assistance from States or non-State actors in accordance with article 11.³¹⁸

The requirement that offers of assistance be made “in accordance with the present draft articles” implies, among other consequences, that such offers cannot be discriminatory in nature nor be made subject to conditions that are unacceptable to the affected State.

³¹⁸ For the views expressed on draft article 12, see *Yearbook ... 2011*, vol. II (Part Two), paras. 278–283. See also *ibid.*, para. 44, and the fifth report of the Special Rapporteur, *Yearbook ... 2012*, vol. II (Part One), document A/CN.4/652, paras. 55–78.

(3) Offers of assistance which are consistent with the present draft articles cannot be regarded as interference in the affected State’s internal affairs. This conclusion accords with the statement of the Institute of International Law in its 1989 resolution on the protection of human rights and the principle of non-intervention in the internal affairs of States:

An offer by a State, a group of States, an international organization or an impartial humanitarian body such as the International Committee of the Red Cross, of food or medical supplies to another State in whose territory the life or health of the population is seriously threatened cannot be considered an unlawful intervention in the internal affairs of that State.³¹⁹

(4) Draft article 12 addresses the question of offers of assistance to affected States made by third actors by mentioning in two separate sentences those most likely to be involved in such offers after the occurrence of a disaster. States, the United Nations and other competent intergovernmental organizations are listed in the first sentence while the second concerns non-governmental organizations. The Commission decided to use different wording in each of the two sentences. In the first sentence it opted for the phrasing “have the right to offer assistance” for reasons of emphasis. States, the United Nations and other intergovernmental organizations are not only entitled but also encouraged to make offers of assistance to the affected State. When referring to non-governmental organizations in the second sentence, the Commission adopted instead the wording “may also offer assistance” to stress the distinction, in terms of nature and legal status, that exists between the position of those organizations and that of States and intergovernmental organizations.

(5) The second sentence of draft article 12 recognizes the important role played by those non-governmental organizations which, because of their nature, location and expertise, are well placed to provide assistance in response to a particular disaster. The position of non-governmental, and other, actors in carrying out relief operations is not a novelty in international law. The Geneva Conventions of 1949 already provided that, in situations of armed conflict:

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.³²⁰

Similarly, Protocol II additional to the 1949 Geneva Conventions provides as follows:

Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.³²¹

³¹⁹ Institute of International Law, *Yearbook*, vol. 63, Part II, Session of Santiago de Compostela (1989), 8th Commission. “The protection of human rights and the principle of non-intervention in the internal affairs of States” (13 September 1989), art. 5, p. 345 (the resolution is available from the Institute’s website: www.idi-iil.org/).

³²⁰ See, for example, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I), art. 3, para. 2.

³²¹ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), art. 18, para. 1.

The important contribution of non-governmental organizations, working with strictly humanitarian motives, in disaster response was stressed by the General Assembly in its resolution 43/131 of 8 December 1988, entitled “Humanitarian assistance to victims of natural disasters and similar emergency situations”, in which the Assembly, *inter alia*, invited all affected States to “facilitate the work of [such] organizations in implementing humanitarian assistance, in particular the supply of food, medicines and health care, for which access to victims is essential” (para. 4) and appealed “to all States to give their support to [those] organizations working to provide humanitarian assistance, where needed, to the victims of natural disasters and similar emergency situations” (para. 5).

Article 13. Conditions on the provision of external assistance

The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

Commentary

(1) Draft article 13 addresses the establishment of conditions by affected States on the provision of external assistance on their territory. It affirms the right of affected States to place conditions on such assistance, in accordance with the present draft articles and applicable rules of international and national law. The article indicates how such conditions are to be determined. The identified needs of the persons affected by disasters and the quality of the assistance guide the nature of the conditions. It also requires the affected State, when formulating conditions, to indicate the scope and type of assistance sought.

(2) The draft article furthers the principle enshrined in draft article 9, which recognizes the primary role of the affected State in the direction, control, coordination and supervision of disaster relief and assistance on its territory. By using the phrasing “may place conditions”, which accords with the voluntary nature of the provision of assistance, draft article 13 acknowledges the right of the affected State to establish conditions for such assistance, preferably in advance of a disaster’s occurrence but also in relation to specific forms of assistance by particular actors during the response phase. The Commission makes reference to “external” assistance because the scope of the provision covers the assistance provided by third States or other assisting actors, such as international organizations, but not assistance provided from internal sources, such as domestic non-governmental organizations.

(3) The draft article places limits on an affected State’s right to condition assistance, which must be exercised in accordance with applicable rules of law. The second sentence outlines the legal framework within which conditions may be imposed, which comprises “the present draft articles, applicable rules of international law, and the

national law of the affected State”. The Commission included the phrase “the present draft articles” to stress that all conditions must be in accordance with the principles reflected in previous and subsequent articles, there being no need to repeat an enumeration of the humanitarian and legal principles already addressed elsewhere, notably, good faith, sovereignty and the humanitarian principles dealt with in draft article 6, that is, humanity, neutrality, impartiality and non-discrimination.

(4) The reference to national law emphasizes the authority of domestic laws in the particular affected area. It does not, however, imply the prior existence of national law geared to the specifics of the conditions brought forth by an affected State in the event of a disaster. Although there is no requirement of specific national legislation before conditions can be fixed, they must be in accordance with any relevant domestic legislation in existence in the affected State.

(5) The affected State and the assisting actor must both comply with the applicable rules of national law. The affected State can only impose conditions that are in accordance with such laws, and the assisting actor must comply with such laws at all times throughout the duration of assistance. This reciprocity is not made explicit in the draft article, since it is inherent in the broader principle of respect for national law. Existing international agreements support the assertion that assisting actors must comply with national law. The ASEAN Agreement on Disaster Management and Emergency Response, for example, provides in article 13, paragraph 2, that “[m]embers of the assistance operation shall respect and abide by all national laws and regulations”. Several other international agreements also require assisting actors to respect national law³²² or to act in accordance with the law of the affected State.³²³

(6) The duty of assisting actors to respect national law implies the obligation to require that members of the relief operation observe the national laws and regulations of the affected State,³²⁴ the head of the relief operation take all appropriate measures to ensure the observance of the national laws and regulations of the affected State³²⁵ and assisting personnel cooperate with national authorities.³²⁶

³²² See, for example, the Inter-American Convention to Facilitate Disaster Assistance (1991), arts. VIII and XI (*d*); and the Convention on assistance in the case of a nuclear accident or radiological emergency (1986), art. 8, para. 7.

³²³ *Ibid.*; 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 (1998), arts. 5 and 9.

³²⁴ See, for example, Convention on the Transboundary Effects of Industrial Accidents, 17 March 1992, annex X (1): “The personnel involved in the assisting operation shall act in accordance with the relevant laws of the requesting Party.”

³²⁵ See, for example, ASEAN Agreement on Disaster Management and Emergency Response, art. 13, para. 2: “The Head of the assistance operation shall take all appropriate measures to ensure observance of national laws and regulations.”

³²⁶ See, for example, P. Macalister-Smith, *International Guidelines for Humanitarian Assistance Operations* (Heidelberg, Max Planck Institute for Comparative Public Law and International Law, 1991), para. 22 (*b*): “At all times during humanitarian assistance operations the assisting personnel shall ... [c]ooperate with the designated competent authority of the receiving State”.

The obligation to respect the national law and to cooperate with the authorities of the affected State accords with the overarching principle of the sovereignty of the affected State and the principle of cooperation.

(7) The right to condition assistance is the recognition of a right of the affected State to deny unwanted or unneeded assistance and to determine what assistance is appropriate and when. The third sentence of the draft article gives an explanation of what is required of conditions set by affected States, namely that they must “take into account” not only the identified needs of the persons affected by disasters but also the quality of the assistance. Nevertheless, the phrase “take into account” does not denote that conditions relating to the identified needs and the quality of assistance are the only ones which States can place on the provision of external assistance.

(8) The Commission included the word “identified” to signal that the needs must be apparent at the time conditions are set and that the needs can change as the situation on the ground changes and more information becomes available. It implies that conditions should not be arbitrary, but should be formulated with the goal of protecting those affected by a disaster. “Identified” indicates there must be some process by which needs are made known, which can take the form of a needs assessment, preferably also in consultation with assisting actors. However, the procedure to identify needs is not predetermined, and it is left to the affected State to follow the most suitable one. This is a flexible requirement that may be satisfied according to the circumstances of a disaster and the capacities of the affected State. In no instance should identifying needs hamper or delay prompt and effective assistance. The provision of the third sentence is meant to meet “the essential needs of the persons concerned” in the event of a disaster, as expressed in draft article 2, and should be viewed as further protection of the rights and needs of persons affected by disasters. The reference to “needs” in both draft articles is broad enough to encompass the special needs of women, children, the elderly, persons with disabilities, and vulnerable or disadvantaged persons and groups.

(9) The inclusion of the word “quality” is meant to ensure that affected States have the right to reject assistance that is not necessary or that may be harmful. Conditions may include restrictions based on, *inter alia*, safety, security, nutrition and cultural appropriateness.

(10) Draft article 13 contains a provision on the “scope and type of assistance sought”. This is in line with previous international agreements that contain a similar provision.³²⁷ By the use of the words “shall indicate” the draft article puts the onus on the affected State to specify the type and scope of assistance sought when placing conditions on assistance. At the same time, it implies that once fixed, the scope and type of such assistance will be made known to the third actors that may provide it, which would facilitate consultations. This will increase the efficiency of the assistance process and will ensure that appropriate assistance reaches those in need in a timely manner.

³²⁷ See, for example, Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, art. 4, para. 2: “A State Party requesting telecommunication assistance shall specify the scope and type of assistance required”.

(11) The Commission considered several possibilities for the proper verb to modify the word “conditions”. The Commission’s decision to use two different words, “place” and “formulate”, is a stylistic choice that does not imply differentiation of meaning between the two uses.

Article 14. Facilitation of external assistance

1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:

(a) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

(b) goods and equipment, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

Commentary

(1) Draft article 14 addresses the facilitation of external assistance. Its purpose is to ensure that national law accommodates the provision of prompt and effective assistance. To that effect, it further requires the affected State to ensure that its relevant legislation and regulations are readily accessible to assisting actors.

(2) The draft article provides that affected States “shall take the necessary measures” to facilitate the prompt and effective provision of assistance. The phrase “take the necessary measures, within its national law” may include, *inter alia*, legislative, executive and administrative measures. Measures may also include actions taken under emergency legislation, as well as permissible temporary adjustment or waiver of the applicability of particular national legislation or regulations, where appropriate. In formulating the draft article in such a manner, the Commission encourages States to allow for temporary non-applicability of their national laws in the event of disasters, and for appropriate provisions to be included within their national law so as not to create any legal uncertainty in the critical period following a disaster when such emergency provisions become necessary.

(3) The draft article outlines examples of areas of assistance in which national law should enable the taking of appropriate measures. The words “in particular” before the examples indicate that this is not an exhaustive list, but rather an illustration of the various areas that may need to be addressed by national law to facilitate prompt and effective assistance.

(4) Subparagraph (a) envisages relief personnel. Specific mention of both civilian and military relief personnel indicates the Commission’s recognition that the military often plays a key role in disaster response actions. Military relief personnel are those involved in the provision

of humanitarian assistance. The areas addressed in the subparagraph provide guidance as to how personnel can be better accommodated. Granting of privileges and immunities to assisting actors is an important measure included in many international agreements to encourage the help of foreign aid workers.³²⁸ Waiver or expedition of visa and entry requirements and work permits is necessary to ensure prompt assistance.³²⁹ Without a special regime in place, workers may be held up at borders or unable to work legally during the critical days after a disaster, or forced to exit and re-enter continually so as not to overstay their visas. Freedom of movement means the ability of workers to move freely within a disaster area in order to properly perform their specifically agreed-upon functions.³³⁰ Affected States can restrict access to certain sensitive areas while still allowing for freedom within the area concerned. Unnecessary restriction of movement of relief personnel inhibits workers' ability to provide flexible assistance.

(5) Subparagraph (b) addresses goods and equipment, which encompass any and all supplies, tools, machines, foodstuffs, medicines and other objects necessary for relief operations. The Commission intends that this category also include search dogs, which are normally regarded as goods and equipment, rather than creating a separate category for animals. Goods and equipment are essential to the facilitation of effective assistance, and national laws must be flexible to address the needs of persons affected by disasters and to ensure prompt delivery. Custom requirements and tariffs, as well as taxation, should be waived or lessened in order to reduce costs and prevent delay of goods.³³¹ Goods and equipment that are delayed can quickly lose their usefulness, and normal procedures in place aiming at protecting the economic interests of a State can become an obstacle in connection with aid equipment that can save lives or provide needed relief.

(6) The second paragraph of the draft article requires that all relevant legislation and regulations be readily accessible to assisting actors. By using the words "readily accessible", what is required is ease of access to such laws without creating the burden on the affected State to physically provide this information separately to all assisting actors.

³²⁸ See, for example, the Framework Convention on civil defence assistance, of 22 May 2000, art. 4 (5): "The Beneficiary State shall, within the framework of national law, grant all privileges, immunities, and facilities necessary for carrying out the assistance".

³²⁹ The League of Red Cross Societies has long noted that entry requirements and visas serve as a "time-consuming procedure which often delays the dispatch of such delegates and teams", thus delaying the vital assistance the affected State has a duty to provide (resolution adopted by the League of Red Cross Societies Board of Governors at its 33rd session, Geneva, 28 October–1 November 1975).

³³⁰ See M. El Baradei, *Model Rules for Disaster Relief Operations* (New York, United Nations Institute for Training and Research, 1982 (United Nations publication, Sales No. E.82.XV.PE/8)), annex A, rule 16, which states that an affected State must permit "the designated relief personnel freedom of access to, and freedom of movement within, disaster-stricken areas that are necessary for the performance of their specifically agreed functions".

³³¹ This is stressed in various international treaties. See, for example, Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, art. 9 (4); see also ASEAN Agreement on Disaster Management and Emergency Response, art. 14 (b).

Article 15. Termination of external assistance

The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actors wishing to terminate shall provide appropriate notification.

Commentary

(1) Draft article 15 deals with the question of termination of external assistance. The provision comprises two sentences. The first sentence concerns the requirement that the affected State, the assisting State, and as appropriate other assisting actors consult each other as regards the termination of the external assistance, including the modalities of such termination. The second sentence sets out the requirement that parties wishing to terminate assistance provide appropriate notification.

(2) When an affected State accepts an offer of assistance, it retains control over the duration for which that assistance will be provided. Draft article 9, paragraph 2, explicitly recognizes that the affected State has the primary role in the direction, control, coordination and supervision of disaster relief and assistance on its territory. For its part, draft article 11 requires the consent of the affected State to external assistance, with the caveat that consent shall not be withheld arbitrarily. The combined import of the foregoing provisions is that the affected State can withdraw consent, thereby terminating external assistance and bringing to an end the legal regime under which the assistance was being provided.

(3) Draft article 15 seeks to strike a balance between the right of the affected State to terminate external assistance and the position of assisting actors, with a view to providing adequate protection to persons affected by disasters. Accordingly, the provision does not recognize the right of only the affected State to unilaterally terminate assistance. Instead, the Commission acknowledges that assisting States and other assisting actors may themselves need to terminate their assistance activities. Draft article 15 thus preserves the right of any party to terminate the assistance being provided, on the understanding that this is done in consultation with the other States or actors, as appropriate.

(4) The words "assisting actors" are drawn from existing instruments³³² to describe international organizations and non-governmental organizations which provide disaster relief and assistance, on the understanding that they will be defined in an article on use of terms. Draft article 15 is drafted in bilateral terms, but it does not exclude the scenario of multiple assisting actors providing external assistance.

³³² Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, adopted at the 30th International Conference of the Red Cross and Red Crescent, Geneva, 26–30 November 2007 (30IC/07/R4, annex, and annotations thereto); or see International Federation of Red Cross and Red Crescent Societies, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (Geneva, 2008), p. 15.

(5) The requirement to consult reflects the spirit of solidarity and cooperation implicit throughout the draft articles and the principle of cooperation enshrined in draft articles 5 and 5 *bis*. The Commission anticipates that termination may become necessary for a variety of reasons and at different stages during the provision of assistance. The relief operations may reach a stage where it would be only logical either for the affected State or for one or more of the assisting parties to cease operations. Circumstances leading to termination may include instances in which the resources of assisting actors are depleted, or where the occurrence of another disaster makes the diversion of resources necessary. Draft article 15 is flexible, allowing for adjusting the duration of assistance according to the circumstances, while implying that parties should consult in good faith. In any event, draft article 15 should be read in the light of the purpose of the draft articles, as indicated in draft article 2; thus, decisions regarding the termination of assistance are to be made taking into consideration the needs of the persons affected by disaster, namely whether and how far such needs have been met.

(6) The word “modalities” refers to the procedures to be followed in terminating assistance. Even though termination on a mutual basis may not always be feasible, consultation in relation to the modalities would enable the relevant parties to facilitate an amicable and efficient termination.

(7) The second sentence establishes a requirement of notification by the party wishing to terminate the external assistance. Appropriate notification is necessary to ensure a degree of stability in the situation, so that no party is adversely affected by an abrupt termination of assistance. The provision is drafted flexibly so as to anticipate notification before, during or after the consultation process. No procedural constraints have been placed on the notification process. However, notification should be “appropriate” according to the circumstances, including the form and timing, preferably early, of the notification.

Article 16. Duty to reduce the risk of disasters

1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.

Commentary

(1) Draft article 16 deals with the duty to reduce the risk of disasters. The draft article is composed of two paragraphs. Paragraph 1 establishes the basic obligation to reduce the risk of disasters by taking certain measures, and paragraph 2 provides an indicative list of such measures.

(2) Draft article 16 represents the acknowledgement of the need to cover in the draft articles on the protection of persons in the event of disasters not only the response phase of a disaster, but also the pre-disaster duties of

States. The concept of disaster risk reduction has its origins in a number of General Assembly resolutions and has been further developed through the 1994 World Conference on Natural Disaster Reduction in Yokohama, Japan, from 23 to 27 May 1994,³³³ the Hyogo Framework for Action 2005–2015,³³⁴ and four sessions of the Global Platform for Disaster Risk Reduction, the latest of which took place in May 2013.

(3) As stated in the 2005 Hyogo Declaration,

a culture of disaster prevention and resilience, and associated pre-disaster strategies, which are sound investments, must be fostered at all levels, ranging from the individual to the international levels ... Disaster risks, hazards, and their impacts pose a threat, but appropriate response to these can and should lead to actions to reduce risks and vulnerabilities in the future.³³⁵

At the fourth session of the Global Platform for Disaster Risk Reduction in 2013, the concluding summary by the Chair drew attention to the

growing recognition that the prevention and reduction of disaster risk is a legal obligation, encompassing risk assessments, the establishment of early warning systems, and the right to access risk information.³³⁶

(4) The rule embodied in draft article 16 draws inspiration from among the sources of law identified by Article 38, paragraph 1, of the Statute of the International Court of Justice. The Commission bases itself on the fundamental principles of State sovereignty and non-intervention and, at the same time, draws on principles emanating from international human rights law, including the States’ obligation to respect, protect and fulfil human rights, in particular the right to life. Protection not only relates to actual violations of human rights but also entails an affirmative obligation on States to take the necessary and appropriate measures which are designed to prevent the occurrence of such violations, no matter the source of the threat. This is confirmed by the decisions of international tribunals, notably the European Court of Human Rights judgments in the *Öneryıldız v. Turkey*³³⁷ and *Budayeva and Others v. Russia*³³⁸ cases, which affirmed the duty to take preventive measures. In addition, draft article 16 draws from a number of international environmental law principles, including the “due diligence” principle.

(5) An important legal foundation for draft article 16 is the widespread practice of States reflecting their commitment to reduce the risk of disasters. Many States

³³³ See Report of the World Conference on Natural Disaster Reduction (A/CONF.172/9), chap. I, resolution 1, annex I, Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation, containing the Principles, the Strategy and the Plan of Action.

³³⁴ Report of the World Conference on Disaster Reduction, held in Kobe, Hyogo, Japan, 18–22 January 2005 (A/CONF.206/6 and Corr.1), chap. I, resolution 2, Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters.

³³⁵ *Ibid.*, resolution 1.

³³⁶ United Nations Office for Disaster Risk Reduction (UNISDR), *Proceedings. Fourth Session of the Global Platform for Disaster Risk Reduction, Geneva, 19–23 May 2013: Invest Today for a Safer Tomorrow*, p. 13 (available from www.unisdr.org/files/34330_proceedingsversionfinaleupdatecou.pdf).

³³⁷ *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII.

³³⁸ *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, ECHR 2008 (extracts).

have entered into multilateral, regional and bilateral agreements concerned with reducing the risk of disasters, including the ASEAN Agreement on Disaster Management and Emergency Response;³³⁹ the Beijing Action for Disaster Risk Reduction in Asia (2005),³⁴⁰ the Delhi Declaration on Disaster Risk Reduction in Asia (2007),³⁴¹ the Kuala Lumpur Declaration on Disaster Risk Reduction in Asia (2008),³⁴² the outcomes of the Fourth Asian Ministerial Conference on Disaster Risk Reduction, held in Incheon, Republic of Korea, from 25 to 28 October 2010, i.e. the Incheon Declaration on Disaster Risk Reduction in Asia and the Pacific 2010, the Incheon Regional Roadmap and Action Plan on Disaster Risk Reduction through Climate Change Adaptation in Asia and the Pacific, reaffirming the Framework for Action and proposing Asian initiatives for climate change adaptation and disaster risk reduction considering vulnerabilities in the region,³⁴³ the African Union Africa Regional Strategy for Disaster Risk Reduction (2004), which was followed by a programme of action for its implementation (originally for the period 2005–2010, but later extended to 2015),³⁴⁴ the outcomes of four sessions of the Africa Regional Platform for Disaster Risk Reduction, the most recent in 2013;³⁴⁵ the Arab Strategy for Disaster Risk Reduction 2020, adopted by the Council of Arab Ministers Responsible for the Environment at its twenty-second session, in December 2010;³⁴⁶ and, lastly, the Nayarit Communiqué on Lines of Action to Strengthen Disaster Risk Reduction in the Americas (2011).³⁴⁷

(6) Recognition of this commitment is further shown by the States' incorporation of disaster risk reduction measures into their national policies and legal frameworks. A compilation of national progress reports on the implementation of the Hyogo Framework³⁴⁸ indicates that 64 States or areas reported having established

specific policies on disaster risk reduction, evenly spread throughout all continents and regions, including the major hazard-prone locations. They are Algeria, Anguilla, Argentina, Armenia, Bangladesh, Bolivia (Plurinational State of), Brazil, British Virgin Islands, Canada, Cape Verde, Chile, Colombia, Cook Islands, Costa Rica, Côte d'Ivoire, Cuba, Dominican Republic, Fiji, Finland, Georgia, Germany, Ghana, Guatemala, Honduras, India, Indonesia, Italy, Japan, Kenya, Lao People's Democratic Republic, Lebanon, Madagascar, Malawi, Malaysia, Maldives, Marshall Islands, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Nepal, New Zealand, Nicaragua, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Saint Kitts and Nevis, Saint Lucia, Samoa, Senegal, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, The former Yugoslav Republic of Macedonia, United Republic of Tanzania, United States, Vanuatu and Venezuela (Bolivarian Republic of). More recently, the United Nations International Strategy for Disaster Reduction has identified 76 States that have adopted national platforms, defined as a "coordinating mechanism for mainstreaming disaster risk reduction into development policies, planning and programmes", to implement disaster risk reduction strategies.³⁴⁹ Several countries have adopted legislation specifically addressing disaster risk reduction, either as stand-alone legislation or as part of a broader legal framework concerning both disaster risk management and disaster response, including Algeria,³⁵⁰ Cameroon,³⁵¹ China,³⁵² Dominican Republic,³⁵³ El Salvador,³⁵⁴ Estonia,³⁵⁵ France,³⁵⁶ Guatemala,³⁵⁷ Haiti,³⁵⁸ Hungary,³⁵⁹ India,³⁶⁰ Indonesia,³⁶¹ Italy,³⁶² Madagascar,³⁶³ Namibia,³⁶⁴ New Zealand,³⁶⁵ Pakistan,³⁶⁶

³⁴⁹ For a list of States that have adopted national platforms, see www.unisdr.org/partners/countries/.

³⁵⁰ Algeria, Risk Prevention and Disaster Management Act of 25 December 2004.

³⁵¹ Cameroon, Order No. 037/PM of 19 March 2003 on the creation, organization and functioning of a National Risk Observatory.

³⁵² China, Disaster Prevention and Response Act (2002).

³⁵³ Dominican Republic, Decree No. 874-09 approving the Regulation for the application of Law No. 147-02 on Risk Management and repealing Chapters 1, 2, 3, 4 and 5 of Decree No. 932-03 (2009).

³⁵⁴ El Salvador, Law on Civil Protection, Disaster Prevention and Disaster Mitigation (2005).

³⁵⁵ Estonia, Emergency Preparedness Act (2000).

³⁵⁶ France, Law No. 2003-699 regarding the prevention of technological and natural risks and reparation of damages (2003).

³⁵⁷ Guatemala, Decree No. 109-96, Law on the National Coordinator for the Reduction of Natural or Man-made Disasters (1996).

³⁵⁸ Haiti, National Risk and Disaster Management Plan (2001).

³⁵⁹ Hungary, Act LXXIV on the management and organization for the prevention of disasters and the prevention of major accidents involving dangerous substances (1999).

³⁶⁰ India, Disaster Management Act, No. 53 (2005).

³⁶¹ Indonesia, Law No. 24 of 2007 concerning Disaster Management.

³⁶² Italy, Decree of the Prime Minister to establish a national platform for disaster risk reduction (2008).

³⁶³ Madagascar, Decree No. 2005-866 setting out the manner of application of Law No. 2003-010 of 5 September 2003 on the national risk and disaster management policy (2005).

³⁶⁴ Namibia, Disaster Risk Management Act (2012).

³⁶⁵ New Zealand, National Civil Defence Emergency Management Plan Order 2005 (SR 2005/295), part 3.

³⁶⁶ Pakistan, National Disaster Management Act (2010). See also the official statement of the Government of Pakistan at the third session of the Global Platform for Disaster Risk Reduction, in

³³⁹ The Agreement is the first international treaty concerning disaster risk reduction to have been developed after the adoption of the Hyogo Framework for Action.

³⁴⁰ Adopted at the Asian Conference on Disaster Reduction, held in Beijing, 27–29 September 2005.

³⁴¹ Adopted at the Second Asian Ministerial Conference on Disaster Risk Reduction, held in New Delhi, 7–8 November 2007.

³⁴² Adopted at the Third Asian Ministerial Conference on Disaster Risk Reduction, held in Kuala Lumpur, 2–4 December 2008. To consult the text of the Declaration, see www.preventionweb.net/files/3089_KLDeclarationonDisasterRiskReductioninAsia202008.pdf.

³⁴³ For the text of the Declaration, see www.preventionweb.net/files/16327_finalincheondeclaration1028.pdf. See also www.unisdr.org/files/16172_roadmapfinalversion08272350.pdf.

³⁴⁴ *Extended Programme of Action for the Implementation of the Africa Regional Strategy for Disaster Risk Reduction (2006–2015)*, adopted at the Second African Ministerial Conference on Disaster Risk Reduction, Nairobi, 14–16 April 2010 (*Declaration of the 2nd African Ministerial Conference on Disaster Risk Reduction 2010*). Foreword, available from www.unisdr.org/files/19613_bookletpoaenglish.pdf. See also www.unisdr.org/files/4038_africaregionalstrategy1.pdf.

³⁴⁵ UNISDR, "Africa seeks united position on disaster risk reduction", 13 February 2013. Available from www.unisdr.org/archive/31224/.

³⁴⁶ For the text of the Strategy, see www.unisdr.org/files/17934_asdrfinalenglishjanuary2011.pdf.

³⁴⁷ For the text of the Communiqué, see www.unisdr.org/files/18603_communiqenayarit.pdf.

³⁴⁸ Hyogo Framework for Action (2009–2011), priority for action 1, core indicator 1.1. See www.preventionweb.net/english/hyogo/progress/priority1/?pid:225&pil:1.

Peru,³⁶⁷ Philippines,³⁶⁸ Republic of Korea,³⁶⁹ Slovenia,³⁷⁰ South Africa,³⁷¹ Thailand³⁷² and United States.³⁷³

(7) Draft article 16 is to be read together with the rules of general applicability adopted thus far, including those principally concerned with the response to a disaster. Its ultimate placing in the set of draft articles will be decided at the time that the first reading is completed.

Paragraph 1

(8) Paragraph 1 starts with the words “Each State”. The Commission opted for this formula over “States”, for the sake of consistency with the draft articles previously adopted, where care had been taken to identify the State or States which bore the legal duty to act. In contrast to those draft articles dealing directly with disaster response where a distinction exists between an affected State or States and other States, in the pre-disaster phase the obligation in question applies to every State. Furthermore, as is evident from paragraph 2, the obligation to reduce risk implies measures primarily taken at the domestic level. Any such measures requiring interaction between States or with other international actors are meant to be covered by article 5 *ter*. In other words, the obligation applies to each State individually. Hence the Commission decided against using the word “States” also to avoid any implication of a collective obligation.

(9) The word “shall” signifies the existence of the international legal obligation to act in the manner described in the paragraph and is the most succinct way to convey the sense of that legal obligation. This is confirmed by the title of the draft article, which refers to the “duty” to reduce the risk of disasters. While each State bears the same obligation, the question of different levels of capacity among States to implement the obligation is dealt with under the phrase “by taking the necessary and appropriate measures”.

(10) The obligation is to “reduce the risk of disasters”.³⁷⁴ The Commission adopted the present formula in recognition of the fact that the contemporary view of the international community, as reflected in several major pronouncements, most recently in the Hyogo Declaration issued at the 2005 World Conference on Disaster Reduction,³⁷⁵ was that the focus should be placed on the reduction of the risk of harm caused by a hazard, as

distinguished from the prevention of disasters themselves. Accordingly, the emphasis in paragraph 1 is placed on the reduction of the risk of disasters. This is achieved by taking certain measures so as to prevent, mitigate and prepare for such disasters.

(11) The phrase “by taking the necessary and appropriate measures” indicates the specific conduct being required. In addition to the further specification about legislation and regulations explained in paragraph (13) below, the “measures” to be taken are qualified by the words “necessary” and “appropriate”, which accord with common practice. What might be “necessary and appropriate” in any particular case is to be understood in terms of the stated goal of the measures to be taken, namely “to prevent, mitigate, and prepare for disasters” so as to reduce risk. This is to be evaluated within the broader context of the existing capacity and availability of resources of the State in question, as has been noted in paragraph (8) above. The fundamental requirement of due diligence is inherent to the concept of “necessary and appropriate”. It is further understood that the question of the effectiveness of the measures is implied in that formula.

(12) The paragraph indicates by means of the phrase “including through legislation and regulations” the specific context in which the corresponding measures are to be taken. The envisaged outcome consists of a number of concrete measures which are typically taken within the context of a legislative or regulatory framework. Accordingly, for those States that do not already have such framework in place, the general obligation to reduce the risk of disasters would also include an obligation to put such legal framework into place so as to allow for the taking of the “necessary and appropriate” measures. The phrase “legislation and regulations” is meant to be understood in broad terms to cover as many manifestations of law as possible, it being generally recognized that such law-based measures are the most common and effective way for facilitating (hence the word “through”) the taking of disaster risk reduction measures at the domestic level.

(13) The qualifier “including” indicates that while “legislation and regulations” may be the primary methods, there may be other arrangements under which such measures could be taken. The word “including” was chosen in order to avoid the interpretation that the adoption and implementation of specific legislation and regulations would always be required. This allows a margin of discretion for each State to decide on the applicable legal framework, it being understood that having in place a legal framework which anticipates the taking of “the necessary and appropriate measures” is a *sine qua non* for disaster risk reduction. The use of the definite article “the” before “necessary”, therefore, serves the function of specifying that it is not just any general measures which are being referred to, but rather, specific, and concrete, measures aimed at prevention, mitigation and preparation for disasters.

(14) The phrase “through legislation and regulations” imports a reference to ensuring that mechanisms for implementation and accountability for non-performance

2011 (available from www.preventionweb.net/files/globalplatform/pakistanofficialstatement.pdf).

³⁶⁷ Peru, Law No. 29664 creating the National System for Disaster Risk Management (2011).

³⁶⁸ Philippines, Philippine Disaster Risk Management Act (2006).

³⁶⁹ Republic of Korea, Countermeasures against Natural Disasters Act (1995); National Disaster Management Act (2010).

³⁷⁰ Slovenia, Act on the Protection against Natural and Other Disasters (2006).

³⁷¹ South Africa, Disaster Management Act No. 57 (2002).

³⁷² Thailand, Disaster Prevention and Mitigation Act (2007).

³⁷³ United States, Disaster Mitigation Act (2000).

³⁷⁴ The Commission notes the existence of a linguistic difference involving the United Nations official translation into French of the term “disaster risk reduction”.

³⁷⁵ See footnotes 334 and 335 above.

are defined within domestic legal systems. Since such issues, though important, are not the only ones which could be the subject of legislation and regulations in the area of disaster risk reduction, singling them out in the text of paragraph 1 could have led to a lack of clarity.

(15) The last clause, namely “to prevent, mitigate, and prepare for disasters”, serves to describe the purpose of the “necessary and appropriate” measures which States are to take during the pre-disaster phase, with the ultimate goal of reducing their exposure to the risk of disasters. The phrase tracks the now well-accepted formula used in major disaster risk reduction instruments. The Commission was cognizant of the fact that adopting a different formulation could result in unintended *a contrario* interpretations as to the kinds of activities being anticipated in the draft article.

(16) To illustrate the meaning of each of the three terms used—prevention, mitigation and preparedness—the Commission deems it appropriate to have recourse to the Terminology on Disaster Risk Reduction prepared by UNISDR in 2009, according to which:

(a) *Prevention* is

[t]he outright avoidance of adverse impacts of hazards and related disasters ...

Prevention (i.e. disaster prevention) expresses the concept and intention to completely avoid potential adverse impacts through action taken in advance ... Very often the complete avoidance of losses is not feasible and the tasks transform to that of mitigation. Partly for this reason, the terms prevention and mitigation are sometimes used interchangeably in casual use.³⁷⁶

(b) *Mitigation* is

[t]he lessening or limitation of the adverse impacts of hazards and related disasters ...

The adverse impacts of hazards often cannot be prevented fully, but their scale or severity can be substantially lessened by various strategies and actions ... It should be noted that in climate change policy “mitigation” is defined differently, being the term used for the reduction of greenhouse gas emissions that are the source of climate change.³⁷⁷

(c) *Preparedness* is

[t]he knowledge and capacities developed by governments, professional response and recovery organizations, communities and individuals to effectively anticipate, respond to and recover from the impacts of likely, imminent or current hazard events or conditions ...

Preparedness action is carried out within the context of disaster risk management and aims to build the capacities needed to efficiently manage all types of emergencies and achieve orderly transitions from response through sustained recovery. Preparedness is based on a sound analysis of disaster risks and good linkages with early warning systems ... [The measures to be taken] must be supported by formal institutional, legal and budgetary capacities.³⁷⁸

³⁷⁶ UNISDR, *2009 UNISDR Terminology on Disaster Risk Reduction*, p. 22 (available from www.unisdr.org/we/inform/terminology/).

³⁷⁷ *Ibid.*, pp. 19–20. The Commission is conscious of the discrepancy in the concordance between the English and French versions of the official United Nations use of the term “mitigation”.

³⁷⁸ *Ibid.*, p. 21.

Paragraph 2

(17) Paragraph 2 lists three categories of disaster risk reduction measures: the conduct of risk assessments; the collection and dissemination of risk and past loss information; and the installation and operation of early warning systems. As noted in paragraph (3), these three measures were singled out in the Chair’s summary at the conclusion of the fourth session of the Global Platform for Disaster Risk Reduction, held in May 2013.³⁷⁹ The Commission decided to refer expressly to the three examples listed as reflecting the most prominent types of contemporary disaster risk reduction efforts. The word “include” serves to indicate that the list is non-exhaustive. The listing of the three measures is without prejudice to other activities aimed at reducing the risk of disasters which are being undertaken at present, or which may be undertaken in the future.

(18) The practical measures that can be adopted are innumerable and depend on social, environmental, financial, cultural and other relevant circumstances. Practice in the public and private sectors provides a wealth of examples. Among them may be cited community-level preparedness and education; the establishment of institutional frameworks; contingency planning; setting up monitoring mechanisms; land-use controls; construction standards; ecosystems management; drainage systems; funding; and insurance.

(19) The three consecutive measures selected in paragraph 2 share a particular characteristic: they are instrumental to the development and applicability of many, if not all, other measures, for instance in decision-making, concerning definitions of priorities or investment planning, both in the public and in the private sector.

(20) The first measure—*risk assessments*—is about generating knowledge concerning both hazards and vulnerabilities. As such, it is the first step towards any sensible measure to reduce the risk of disasters. Without a sufficiently solid understanding of the circumstances surrounding disasters and their characteristics, no effective measure can be enacted. Risk assessments also compel a closer look at local realities and the engagement of local communities.

(21) The second measure—*the collection and dissemination of risk and past loss information*—is the next step. Reducing disaster risk requires action by all actors in the public and private sectors and civil society. Collection and dissemination should result in the free availability of risk and past loss information, which is an enabler of effective action. It allows all stakeholders to assume responsibility for their actions and to make a better determination of priorities for planning purposes; it also enhances transparency in transactions and public scrutiny and control. The Commission wishes to emphasize the desirability of the dissemination and free availability of risk and past loss information, as it is the reflection of the prevailing trend focusing on the importance of public access to such information. The

³⁷⁹ See footnote 336 above.

Commission, while recognizing the importance of that trend, felt that it was best dealt with in the commentary and not in the body of paragraph 2, since making it a uniform legal requirement could prove burdensome for States.

(22) The third measure concerns *early warning systems*, which are instrumental both in initiating and implementing contingency plans, thus limiting the exposure to a hazard; as such, they are a prerequisite for effective preparedness and response.

(23) As has been explained in paragraph (11), paragraph 2 concerns the taking of the envisaged measures within the State. Any inter-State component would be covered by the duty to cooperate in article 5, read together with article 5 *ter*. Accordingly, the extent of any international legal duty relating to any of the listed and not listed measures that may be taken in order to reduce the risk of disasters is to be determined by way of the relevant specific agreements or arrangements each State has entered into with other actors with which it has the duty to cooperate.