

## Chapter IV

### Protection of persons in the event of disasters

#### A. Introduction

38. At its fifty-ninth session (2007), the Commission decided to include the topic “Protection of persons in the event of disasters” in its programme of work and to appoint Mr. Eduardo Valencia Ospina as Special Rapporteur for the topic.<sup>7</sup> In paragraph 7 of its resolution 62/66 of 6 December 2007, the General Assembly took note of the decision of the Commission to include the topic in its programme of work.

39. From its sixtieth (2008) to sixty-sixth sessions (2014), the Commission considered the topic on the basis of seven successive reports submitted by the Special Rapporteur.<sup>8</sup> The Commission also had before it a memorandum by the Secretariat<sup>9</sup> and a set of written replies submitted by the Office for the Coordination of Humanitarian Affairs and the International Federation of Red Cross and Red Crescent Societies to the questions addressed to them by the Commission in 2008.<sup>10</sup>

40. At its sixty-sixth session (2014), the Commission adopted, on first reading, a set of 21 draft articles on the protection of persons in the event of disasters, together with commentaries thereto.<sup>11</sup> It decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments, competent international organizations, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies for comments and observations.<sup>12</sup>

#### B. Consideration of the topic at the present session

41. At the present session, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/697), as well as comments and observations received from Governments, international organizations and other entities (A/CN.4/696 and Add.1).

42. The Commission considered the eighth report of the Special Rapporteur at its 3291st to 3296th meetings from 2 to 11 May 2016. At its 3296th meeting, held on 11 May 2016, the Commission referred the draft preamble, proposed by the Special Rapporteur in his eighth report, and draft articles 1 to 21 to the Drafting Committee, with the instruction that the Drafting Committee commence the second reading of the draft articles taking into

<sup>7</sup> *Yearbook ... 2007*, vol. II (Part Two), para. 375. At its fifty-eighth session (2006), the Commission endorsed the recommendation of the Planning Group to include, *inter alia*, the topic “Protection of persons in the event of disasters” in the long-term programme of work of the Commission. A brief syllabus on the topic, prepared by the secretariat, was annexed to the report of the Commission in 2006 (*Yearbook ... 2006*, vol. II (Part Two), annex III). In its resolution 61/34 of 4 December 2006, the General Assembly took note of the inclusion of the topic in the long-term programme of work of the Commission.

<sup>8</sup> See A/CN.4/598 (preliminary report), A/CN.4/615 and Corr.1 (second report), A/CN.4/629 (third report), A/CN.4/643 and Corr.1 (fourth report), A/CN.4/652 (fifth report), A/CN.4/662 (sixth report) and A/CN.4/668 and Corr.1 and Add.1 (seventh report).

<sup>9</sup> A/CN.4/590 and Add.1 to 3.

<sup>10</sup> *Yearbook ... 2008*, vol. II (Part Two), paras. 32-33.

<sup>11</sup> *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10 (A/69/10)*, paras. 55-56.

<sup>12</sup> *Ibid.*, paras. 51-53.

account the comments of Governments, international organizations and other entities, the proposals of the Special Rapporteur and the debate in the plenary on the Special Rapporteur's eighth report.

43. The Commission considered the report of the Drafting Committee (A/CN.4/L.871) at its 3310th meeting, held on 3 June 2016, and adopted the entire set of draft articles on the protection of persons in the event of disasters, on second reading, at the same meeting (sect. E.1 below).

44. At its 3332nd to 3335th meetings, from 2 to 4 August 2016, the Commission adopted the commentaries to the aforementioned draft articles (sect. E.2 below).

45. In accordance with its statute, the Commission submits the draft articles to the General Assembly, together with the recommendation set out below.

### **C. Recommendation of the Commission**

46. At its 3335th meeting, held on 4 August 2016, the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles on the protection of persons in the event of disasters.

### **D. Tribute to the Special Rapporteur**

47. At its 3335th meeting, held on 4 August 2016, the Commission, after adopting the draft articles on the protection of persons in the event of disasters, adopted the following resolution by acclamation:

*“The International Law Commission,*

*“Having adopted the draft articles on the protection of persons in the event of disasters,*

*“Expresses to the Special Rapporteur, Mr. Eduardo Valencia Ospina, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of draft articles on the protection of persons in the event of disasters.”*

### **E. Text of the draft articles on the protection of persons in the event of disasters**

#### **1. Text of the draft articles**

48. The text of the draft articles adopted by the Commission, on second reading, at its sixty-eighth session is reproduced below.

#### **Protection of persons in the event of disasters**

*Bearing in mind* Article 13, paragraph 1 (a), of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

*Considering* the frequency and severity of natural and human-made disasters and their short-term and long-term damaging impact,

*Fully aware* of the essential needs of persons affected by disasters, and conscious that the rights of those persons must be respected in such circumstances,

*Mindful* of the fundamental value of solidarity in international relations and the importance of strengthening international cooperation in respect of all phases of a disaster,

*Stressing* the principle of the sovereignty of States and, consequently, reaffirming the primary role of the State affected by a disaster in providing disaster relief assistance,

**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 the adequate and effective response to disasters, and reduction of the risk of disasters, so as to meet the essential needs of the persons concerned, with full respect for their rights.

**Article 3**  
**Use of terms**

For the purposes of the present draft articles:

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

(b) “affected State” means a State in whose territory, or in territory under whose jurisdiction or control, a disaster takes place;

(c) “assisting State” means a State providing assistance to an affected State with its consent;

(d) “other assisting actor” means a competent intergovernmental organization, or a relevant non-governmental organization or entity, providing assistance to an affected State with its consent;

(e) “external assistance” means relief personnel, equipment and goods, and services provided to an affected State by an assisting State or other assisting actor for disaster relief assistance;

(f) “relief personnel” means civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance;

(g) “equipment and goods” means supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles, telecommunications equipment, and other objects for disaster relief assistance.

**Article 4**  
**Human dignity**

The inherent dignity of the human person shall be respected and protected in the event of disasters.

**Article 5**  
**Human rights**

Persons affected by disasters are entitled to the respect for and protection of their human rights in accordance with international law.

**Article 6**  
**Humanitarian principles**

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**  
**Duty to cooperate**

In the application of the present draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors.

**Article 8**  
**Forms of cooperation in the response to disasters**

Cooperation in the response to disasters includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.

**Article 9**  
**Reduction of the risk of disasters**

1. Each State shall reduce the risk of disasters by taking 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.

**Article 10**  
**Role of the affected State**

1. The affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control.
2. The affected State has the primary role in the direction, control, coordination and supervision of such relief assistance.

**Article 11**  
**Duty of the affected State to seek external assistance**

To the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors.

**Article 12**  
**Offers of external assistance**

1. In the event of disasters, States, the United Nations, and other potential assisting actors may offer assistance to the affected State.

2. When external assistance is sought by an affected State by means of a request addressed to another State, the United Nations, or other potential assisting actor, the addressee shall expeditiously give due consideration to the request and inform the affected State of its reply.

#### **Article 13**

##### **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 external assistance is made in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner.

#### **Article 14**

##### **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 15**

##### **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, in particular regarding:
  - (a) relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and
  - (b) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and the disposal thereof.
2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

#### **Article 16**

##### **Protection of relief personnel, equipment and goods**

The affected State shall take the appropriate measures to ensure the protection of relief personnel and of equipment and goods present in its territory, or in territory under its jurisdiction or control, for the purpose of providing external assistance.

#### **Article 17**

##### **Termination of external assistance**

The affected State, the assisting State, the United Nations, or other assisting actor may terminate external assistance at any time. Any such State or actor intending to terminate shall provide appropriate notification. The affected State and, as appropriate, the assisting State, the United Nations, or other assisting actor shall consult with respect to the termination of external assistance and the modalities of termination.

**Article 18**  
**Relationship to other rules of international law**

1. The present draft articles are without prejudice to other applicable rules of international law.
2. The present draft articles do not apply to the extent that the response to a disaster is governed by the rules of international humanitarian law.

**2. Text of the draft articles and commentaries thereto**

49. The text of the draft preamble and the draft articles, together with commentaries thereto, adopted by the Commission on second reading, is reproduced below.

**Protection of persons in the event of disasters**

...

*Bearing in mind Article 13, paragraph 1 (a), of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,*

*Considering the frequency and severity of natural and human-made disasters and their short-term and long-term damaging impact,*

*Fully aware of the essential needs of persons affected by disasters, and conscious that the rights of those persons must be respected in such circumstances,*

*Mindful of the fundamental value of solidarity in international relations and the importance of strengthening international cooperation in respect of all phases of a disaster,*

*Stressing the principle of the sovereignty of States and, consequently, reaffirming the primary role of the State affected by a disaster in providing disaster relief assistance,*

...

**Commentary**

(1) The preamble aims at providing a conceptual framework for the draft articles, setting out the general context in which the topic of the protection of persons in the event of disasters has been elaborated and furnishing the essential rationale for the text.

(2) The first preambular paragraph focuses on the mandate given to the General Assembly, under Article 13, paragraph 1 (a), of the Charter of the United Nations, to encourage the progressive development of international law and its codification and on the consequential object of the International Law Commission, as provided in article 1 of its statute. It restates similar wording included in recent final drafts of the Commission containing a preamble.<sup>13</sup> It also serves, at the outset, to highlight the fact that the draft

<sup>13</sup> See the articles on prevention of transboundary harm from hazardous activities, General Assembly resolution 62/68 of 6 December 2007, annex, and for the commentary thereto, *Yearbook ... 2001*, vol. II (Part Two), chap. V, sect. E; and the articles on the law of transboundary aquifers, General Assembly resolution 63/124 of 11 December 2008, and for the commentaries thereto, *Yearbook ... 2008*, vol. II (Part Two), chap. IV, sect. E.

articles contain elements of both progressive development and codification of international law.

(3) The second preambular paragraph calls attention to the frequency and severity of natural and human-made disasters, and their damaging impact, which have raised the concern of the international community, leading to the formulation by the Commission of legal rules. The reference to “natural and human-made disasters” emphasizes a distinctive characteristic of the draft articles when compared with other similar instruments, which have a more restricted scope by being limited to natural disasters. On the contrary, disasters often arise from complex sets of causes. Furthermore, the draft articles are intended to cover the various stages of the disaster cycle, focusing on response and disaster risk reduction. The reference to “short-term and long-term impact” is intended to show that the focus of the draft articles is not just on the immediate effects of a disaster. It also implies a far-reaching approach, addressing activities devoted to the recovery phase.

(4) The third preambular paragraph addresses the essential needs of the persons whose lives, well-being and property have been affected by disasters, and reiterates that the rights of those persons must be respected in such circumstances as provided for by the draft articles.

(5) 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 and which cannot be interpreted as diminishing the sovereignty of affected States and their prerogatives within the limits of international law. Mention of “all phases of disasters” recognizes the reach of the articles into each component phase of the entire disaster cycle, as appropriate.

(6) 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 reference to sovereignty, and the primary role of the affected State, provides the background against which the entire set of draft articles is to be understood.

#### **Article 1** **Scope**

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

#### **Commentary**

(1) Draft article 1 establishes the scope of the draft articles and tracks the formulation of the title of the topic. It sets the orientation of the draft articles as being primarily focused on the protection of persons whose life, well-being and property are affected by disasters. Accordingly, as established in draft article 2, the focus is on facilitating a response to disasters, as well as reducing the risk of disasters, so as to adequately and effectively meet the essential needs of the persons concerned, while fully respecting their rights.

(2) The draft articles cover, *ratione materiae*, the rights and obligations of States affected by a disaster in respect of persons present in their territory (irrespective of nationality) or in territory under their jurisdiction or control, and the rights and obligations of third States and intergovernmental organizations and non-governmental organizations and other entities in a position to cooperate, particularly in the provision of disaster relief assistance as well as in the reduction of disaster risk. Such rights and obligations are understood to apply on two axes: the rights and obligations of States in relation to one another and the rights and obligations of States in relation to persons in need of protection.

While the focus is on the former, the draft articles also contemplate, albeit in general terms, the rights of individuals affected by disasters, as established by international law. The importance of human rights protections in disaster situations is demonstrated by the increased attention paid to the issue by human rights bodies established under the auspices of the United Nations, as well as by regional international courts. Furthermore, as is elaborated in draft article 3, the draft articles are not limited to any particular type of disaster. A distinction between natural and human-made disasters would be artificial and difficult to sustain in practice in view of the complex interaction of different causes leading to disasters.

(3) The scope *ratione personae* of the draft articles is limited to natural persons affected by disasters. In addition, the focus is primarily on the activities of States and intergovernmental organizations, including regional integration organizations, and other entities enjoying specific international legal competence in the provision of disaster relief assistance in the context of disasters. The activities of non-governmental organizations and other private actors, sometimes collectively referred to as “civil society” actors, are included within the scope of the draft articles only in a secondary manner, either as direct beneficiaries of duties placed on States (for example, of the duty of States to cooperate, in draft article 7) or indirectly, as being subject to the domestic laws implementing the draft articles of the affected State, a third State or the State of nationality of the entity or private actor. Except where specifically indicated otherwise, the draft articles cover international disaster response by both international and domestic actors. The draft articles do not, however, cover other types of international assistance, such as assistance provided by States to their nationals abroad and consular assistance.

(4) As suggested by the phrase “in the event of” in the title of the topic, the scope of the draft articles *ratione temporis* is primarily focused on the immediate post-disaster response and early recovery phase, including the post-disaster reconstruction phase. Nonetheless, as confirmed by draft article 2, the pre-disaster phase falls within the scope of the draft articles, and is the subject of draft article 9, which deals with disaster risk reduction and disaster prevention and mitigation activities.

(5) The draft articles are not limited, *ratione loci*, to activities in the area where the disaster occurs, but also cover those within assisting States and transit States. Nor is the transboundary nature of a disaster a necessary condition for the triggering of the application of the draft articles. Certainly, it is not uncommon for major disasters to have a transboundary effect, thereby increasing the need for international cooperation and coordination. Nonetheless, examples abound of major international relief assistance efforts being undertaken in response to disasters occurring solely within the territorial boundaries of a single State, or within a territory under its jurisdiction or control. In the event of a disaster, States have the duty to protect all persons present in their territory, or in territory under their jurisdiction or control, irrespective not only of nationality but also of legal status. While different considerations may arise, unless otherwise specified, the draft articles are not tailored with any specific disaster type or situation in mind, but are intended to be applied flexibly to meet the needs arising from all disasters, regardless of their transboundary effect.

## **Article 2**

### **Purpose**

The purpose of the present draft articles is to facilitate the adequate and effective response to disasters and reduction of the risk of disasters, so as to meet the essential needs of the persons concerned, with full respect for their rights.



## Commentary

(1) Draft article 2 elaborates on draft article 1 (Scope) by providing further guidance on the purpose of the draft articles. The main issue raised relates to the juxtaposition of “needs” versus “rights”. The Commission was aware of the debate in the humanitarian assistance community on whether a “rights-based” approach as opposed to the more traditional “needs-based” approach was to be preferred, or vice versa. The prevailing sense of the Commission was that the two approaches were not necessarily mutually exclusive, but were best viewed as being complementary. The Commission settled for a formulation that emphasized the importance of the response to a disaster, and the reduction of the risk of disasters, that adequately and effectively meets the “needs” of the persons concerned. Such response, or reduction of risk, has to take place with full respect for the rights of such persons.

(2) Although not necessarily a term of art, by “adequate and effective”, what is meant is a high-quality response or reduction of the risk of disasters, so as to meet the essential needs of the persons affected by the disaster. Similar formulations are to be found in existing agreements, in the context of the response to disasters. These include “effective and concerted” and “rapid and effective” found in the 2015 Agreement on Disaster Management and Emergency Response of the Association of Southeast Asian Nations (hereinafter, “ASEAN Agreement”),<sup>14</sup> as well as “proper and effective” used in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998 (hereinafter, “Tampere Convention”).<sup>15</sup> Given the context in which such response is to be provided, an element of timeliness is implicit in the term “effective”. The more drawn-out the response, the less likely it is that it will be effective. This and other aspects of what makes a response “adequate” and “effective” is the subject of other provisions of the draft articles, including draft article 15. Notwithstanding this, it is understood that while a high standard is called for, it has, nonetheless, to be based in what is realistic and feasible “on the ground” in any given disaster situation. Hence, no reference is made, for example, to the response having to be “fully” effective.

(3) While the main emphasis of the draft articles is on the response to disasters, the dimension of disaster risk reduction also falls within their scope and is the subject of draft article 9. In doing so, the draft articles acknowledge the general recognition, within the international community (most recently evidenced by the Sendai Framework for Disaster Risk Reduction, 2015-2030, adopted in 2015),<sup>16</sup> of the essential role of disaster risk reduction. The reference to “adequate and effective” action so as to “meet the essential needs of the persons concerned, with full respect for their rights”, accordingly, applies equally to disaster response and disaster risk reduction.

(4) The Commission decided not to formulate the provision in the form of a general statement on the obligation of States, as it was felt that it would not sufficiently highlight the specific rights and obligations of the affected State. It was not clear, for example, whether such a formulation would sufficiently distinguish between different obligations for different States, such as for the affected State as opposed to assisting States. Accordingly, a reference to States was not included, on the understanding that it was not strictly necessary for a provision on the purpose of the draft articles. The obligations of States are specifically considered in other provisions of the draft articles.

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<sup>14</sup> *ASEAN Document Series 2005*, p. 157.

<sup>15</sup> United Nations, *Treaty Series*, vol. 2296, No. 40906, p. 5.

<sup>16</sup> The Sendai Framework for Disaster Risk Reduction 2015-2030, adopted by the Third United Nations World Conference on Disaster Risk Reduction, and endorsed by the General Assembly in its resolution 69/283 of 3 June 2015, annex II.

(5) The word “facilitate” reflects the vision of the Commission for the role that the draft articles might play in the overall panoply of instruments and arrangements that exist at the international level in the context of disaster relief assistance, as well as disaster risk reduction. It was felt that while the draft articles could not by themselves ensure a response, or the reduction of risk, they were intended to facilitate an adequate and effective response or reduction of risk.

(6) The qualifier “essential” before the term “needs” was included in order to indicate more clearly that the needs being referred to are those related to survival or similarly basic needs in the aftermath of a disaster. It was felt that “essential” clearly brought out the context in which such needs arise. Such reference should be further understood in the context of the importance of taking into account the needs of the particularly vulnerable, as indicated in draft article 6.

(7) By “persons concerned” what is meant are people directly affected by the disaster, including by being displaced thereby, as opposed to individuals more indirectly affected. This term was inserted so as to qualify the scope of the draft articles and is in conformity with the approach taken by existing instruments, which focus on the provision of relief to persons directly affected by a disaster. This is not to say that individuals who are more indirectly affected, for example, through loss of family members in a disaster or who suffered economic loss owing to a disaster elsewhere, would be without remedy or recourse. Indeed, it is not the intention of the Commission to state the legal rules applicable to such individuals in the draft articles. The inclusion within the scope of the draft articles of disaster risk reduction implies that the “persons concerned” would cover those likely to be affected by a future disaster, a determination to be made at the national level based on an evaluation of the persons’ exposure and vulnerability.

(8) The reference to “with full respect for their rights” aims at ensuring that the rights in question be respected and protected, as confirmed, in the context of human rights, by draft article 5. In addition, the phrase intentionally leaves the question of how rights are to be enforced to the relevant rules of international law themselves. While the draft articles primarily envisage the application of human rights, which is the subject of draft article 5, the reference to “rights” is not only a reference to human rights, but also, *inter alia*, to rights acquired under domestic law.

### **Article 3**

#### **Use of terms**

For the purposes of the present draft articles:

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

(b) “affected State” means a State in whose territory, or in territory under whose jurisdiction or control, a disaster takes place;

(c) “assisting State” means a State providing assistance to an affected State with its consent;

(d) “other assisting actor” means a competent intergovernmental organization, or a relevant non-governmental organization or entity, providing assistance to an affected State with its consent;

(e) “external assistance” means relief personnel, equipment and goods, and services provided to an affected State by an assisting State or other assisting actor for disaster relief assistance;

(f) “relief personnel” means civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance;

(g) “equipment and goods” means supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles, telecommunications equipment, and other objects for disaster relief assistance.

### **Commentary**

(1) The Commission’s practice, as reflected in most of the draft articles adopted on diverse topics of international law, has been to include a provision on the “use of terms”. Some of the terms selected for inclusion in draft article 3 were specifically singled out in the commentaries to various draft articles as requiring definition. Other terms were included because of their overall frequency of occurrence in the draft articles.

#### *Subparagraph (a)*

(2) Subparagraph (a) defines the term “disaster” solely for the purposes of the draft articles. The definition has been delimited so as to properly capture the scope of the draft articles, as established in draft article 1, while not, for example, inadvertently also dealing with other serious events, such as political and economic crises, which may also undermine the functioning of society, but which are outside the scope of the draft articles. Such delimitation is evident from two features of the definition: (a) the emphasis placed on the existence of a calamitous event that causes serious disruption of the functioning of society; and (b) the inclusion of a number of qualifying phrases.

(3) The Commission considered the approach of the Tampere Convention, which conceptualized a disaster as being the consequence of an event, namely the serious disruption of the functioning of society caused by that event, as opposed to being the event itself. The Commission was aware that such an approach represented contemporary thinking in the humanitarian assistance community, as confirmed, notably, by the 2005 World Conference on Disaster Reduction, convened by the United Nations at Hyogo in Japan, as well as by recent treaties and other instruments, including the 2007 Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance of the International Federation of Red Cross and Red Crescent Societies (IFRC) (hereinafter, “IFRC Guidelines”).<sup>17</sup> Nonetheless, the Commission decided to shift the emphasis back to the earlier conception of “disaster” as being a specific event, since it was embarking on the formulation of a legal instrument, which required a more concise and precise legal definition, as opposed to one that is more policy oriented.

(4) The element requiring the existence of an event is qualified in several ways. First, the reference to a “calamitous” event serves to establish a threshold, by reference to the nature of the event, whereby only extreme events are covered. This was inspired by the definition embodied in the resolution on humanitarian assistance adopted by the Institute of International Law at its 2003 Bruges session,<sup>18</sup> which deliberately established a higher threshold so as to exclude other acute crises. What constitutes “calamitous” is to be understood both by application of the qualifier in the remainder of the provision, namely “... resulting in widespread loss of life, great human suffering and distress, mass

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<sup>17</sup> International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (Geneva, 2007).

<sup>18</sup> Institute of International Law, *Yearbook*, vol. 70, Part II, Session of Bruges (2003), p. 263.

displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society”; and by keeping in mind the scope and purpose of the draft articles, as articulated in draft articles 1 and 2. In addition, reference is made to “event or series of events” in order to cover those types of events, such as frequent small-scale disasters, that, on their own, might not meet the necessary threshold, but that, taken together would constitute a calamitous event for the purposes of the draft articles. No limitation is included concerning the origin of the event, that is whether it is natural or human-made, in recognition of the fact that disasters often arise from complex sets of causes that may include both wholly natural elements and contributions from human activities. Likewise, the draft articles apply equally to sudden-onset events (such as an earthquake or tsunami) and to slow-onset events (such as drought or sea-level rise), as well as frequent small-scale events (floods or landslides).

(5) The event is further qualified by two causation requirements. First, for the event, or series of events, to be considered “calamitous” in the sense required by the draft articles, it has to result in one or more of four possible outcomes: widespread loss of life, great human suffering and distress, mass displacement or large-scale material or environmental damage. Accordingly, a major event such as a serious earthquake, which takes place in the middle of the ocean or in an uninhabited area and which does not result in at least one of the four envisaged outcomes, would not satisfy the threshold requirement in subparagraph (a). Second, the nature of the event is further qualified by the requirement that any, or all, of the four possible outcomes, as applicable, result in the serious disruption of the functioning of society. In other words, an event that resulted in, for example, large-scale material damage, but did not seriously disrupt the functioning of society, would not, accordingly, satisfy the threshold requirement. Hence, by including such causal elements, the definition retains aspects of the approach taken in contemporary texts, as exemplified by the Tampere Convention, namely by considering the consequence of the event as a key aspect of the definition, albeit for purposes of establishing the threshold for the application of the draft articles.

(6) The element of “widespread loss of life” is a refinement, inspired by the 1995 Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief.<sup>19</sup> The requirement of “widespread” loss of life serves to exclude events that result in relatively low loss of life; it being borne in mind that such events could nonetheless satisfy one of the other causal requirements. Conversely, an event causing widespread loss of life could, on its own, satisfy the causation requirement and could result in the triggering of the application of the draft articles if it resulted in the serious disruption of the functioning of society.

(7) The possibility of “great human suffering and distress” was included out of recognition that many major disasters are accompanied by widespread loss of life or by great human suffering and distress, including that occasioned by non-fatal injuries, disease or other health problems caused by the disaster. Accordingly, cases where an event has resulted in relatively localized loss of life, owing to adequate prevention and preparation, as well as effective mitigation actions, but nonetheless has caused severe dislocation resulting in great human suffering and distress that seriously disrupt the functioning of society, would be covered by the draft articles.

(8) Similarly, “mass displacement” refers to one of the other consequences of major disasters, namely the displacement of persons on a large scale. Together with “great human suffering and distress”, displacement by the onset of a disaster is one of the two most common ways in which persons are considered “affected” by the disaster. Displacement

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<sup>19</sup> *International Review of the Red Cross*, vol. 36 (1996), No. 310, annex VI.

affects persons through the loss of access to livelihoods, social services and social fabric. In complying with their obligations set forth in the draft articles, States should also take into account the displacement dimension. The qualifier “mass” was included to align with the high threshold for the application of the draft articles.

(9) “Large-scale material or environmental damage” was included by the Commission in recognition of the wide-scale damage to property, livelihoods and economic, physical, social and cultural assets, as well as the environment typically caused by major disasters and the resultant disruption of the functioning of society arising from the severe setback for human development and well-being that such a loss typically causes. It is to be understood that it is not the environmental or property loss *per se* that would be covered by the draft articles, but rather the impact on persons of such loss; thus avoiding a consideration of economic loss in general. A requirement of economic loss might unnecessarily limit the scope of the draft articles, by, for example, precluding them from also dealing with activities designed to mitigate potential future human loss arising from existing environmental damage.

(10) As already alluded to, the requirement of serious disruption of the functioning of society serves to establish a high threshold that would exclude from the scope of the draft articles other types of crises such as serious political or economic crises. Moreover, differences in application can be further borne out by the purpose of the draft articles, as established in draft article 2, and by the fact that the type of protection required, and rights involved, may be different, and are, to varying extents, regulated by other rules of international law, in particular international humanitarian law, as indicated in draft article 18. A situation of armed conflict cannot be qualified *per se* as a disaster for the purposes of the present draft articles. The requirement of serious disruption necessarily also implies the potential for such disruption. This means that the fact that a State took appropriate disaster risk reduction measures or relief measures, in accordance with established emergency plans in response to a disaster with the potential to seriously disrupt the functioning of society, would not *per se* exclude the application of the draft articles.

(11) While the four possible outcomes envisaged provide some guidance on what might amount to a serious disruption of the functioning of society, the Commission refrained from providing further descriptive or qualifying elements, so as to leave some discretion in practice.

(12) The definition of “disaster”, for purposes of the draft articles, is subject to the specification in draft article 18, paragraph 2, that the draft articles do not apply to the extent that the response to a disaster is governed by the rules of international humanitarian law.

#### *Subparagraph (b)*

(13) Subparagraph (b), which defines the term “affected State” for purposes of the draft articles, is inspired by the definition of the same term provided in the IFRC Guidelines.<sup>20</sup> It reflects the basic orientation that the draft articles are primarily addressed to States. It also anticipates the centrality of the role to be played by the State affected by the disaster, as established in draft article 10.

(14) The key feature in disaster response or disaster risk reduction is State control. In most cases that would accord with control exercised by the State upon whose territory the disaster occurs. However, this does not necessarily exclude other situations in which a State may exercise *de jure* jurisdiction, or *de facto* control, over another territory in which a

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<sup>20</sup> See IFRC Guidelines (footnote 17 above), guideline 2, para. 8 (“the State upon whose territory persons or property are affected by a disaster”).

disaster occurs. The phrase “in whose territory, or in territory under whose jurisdiction or control” was inspired by the definition of “State of origin” in draft article 2, subparagraph (d), of the 2001 articles on prevention of transboundary harm from hazardous activities.<sup>21</sup>

(15) The Commission considered that a State exercising jurisdiction or control over a territory (other than its own) in which a disaster occurs would also be deemed an “affected State” for purposes of the draft articles. Such possibility is also implicit in the recognition, in article 18, that the draft articles would apply in the context of so-called “complex disasters”, which occur in the same territory where an armed conflict is taking place, to the extent that the response to the disaster in question is not governed by the rules of international humanitarian law. At the same time, the provision was intentionally formulated to make the territorial link clear. As such, the reference to “jurisdiction” is not intended to include States of nationality that may claim jurisdiction under international law over individual persons affected by a disaster that occurs outside their territory, or territory under their jurisdiction or control. The Commission recognized that the implication of including States exercising jurisdiction or control was that, in exceptional cases, there may be two affected States: the State upon whose territory the disaster occurs and the State exercising jurisdiction or control over the same territory.

(16) The concluding phrase “a disaster takes place” is intended to align the definition of “affected State” with that of “disaster”, in subparagraph (a). It seeks to strike a balance between the option of placing the emphasis on the effects of a disaster, thereby increasing the number of States that could potentially be considered “affected States”, as opposed to that of focusing on the territorial component (where the event took place), which could unnecessarily exclude States that suffer the consequences of the disaster even though the event did not, strictly speaking, take place in their territory (or territory under their jurisdiction or control). Accordingly, an explicit *renvoi* to the definition of “disaster”, in subparagraph (a), is made in recognition of the fact that the draft articles provide for a composite definition of disaster, covering both the event and its effects, and implying that different States may be considered “affected”, for purposes of the draft articles, in different scenarios. It also accords with the Commission’s approach of considering the consequence of the event as a key element for purposes of establishing the threshold for the application of the draft articles.<sup>22</sup>

#### *Subparagraph (c)*

(17) The definition of “assisting State” in subparagraph (c) is drawn from the definition of “supporting State” in the 2000 Framework Convention on Civil Defence Assistance,<sup>23</sup> with the term “Beneficiary State” changed to “affected State”, which is the term utilized in the draft articles and defined in subparagraph (b). The phrase “a State providing assistance” is a reference to the concept of “external assistance”, which is defined in subparagraph (e), and which is undertaken on the basis of the duty to cooperate in draft article 7, read together with draft articles 8 and 9.

(18) A State is only categorized as an “assisting State” once the assistance is being or has been provided. In other words, a State offering assistance is not an “assisting State”, with the various legal consequences that flow from such categorization, as provided for in the draft articles, until such assistance has been consented to by the affected State, in accordance with draft article 13.

<sup>21</sup> General Assembly resolution 62/68 of 6 December 2007, annex, art. 2; for the commentary thereto, see *Yearbook ... 2001*, chap. V, sect. E.

<sup>22</sup> See above, para. (4) of the commentary to draft art. 3.

<sup>23</sup> United Nations, *Treaty Series*, vol. 2172, No. 38131, p. 213, art. 1 (f).

*Subparagraph (d)*

(19) In addition to affected and assisting States, the draft articles also seek to regulate the position of other assisting actors. A significant proportion of contemporary disaster risk reduction and disaster relief activities are undertaken by, or under the auspices of, international organizations, including but not limited to the United Nations, as well as non-governmental organizations and other entities. This group of actors is collectively referred to in the draft articles as “other assisting actors”. This reference is without prejudice to the differing legal status of these actors under international law, which is acknowledged in the draft articles, for example, in draft article 12.<sup>24</sup>

(20) The definition reflects the commentary to draft article 7, which confirms the understanding that the term “assisting actors” refers to, in the formulation employed in draft article 7, the United Nations, the components of the Red Cross and Red Crescent Movement, and other assisting actors.<sup>25</sup> The phrase “or entity”, which is drawn, in part, from the ASEAN Agreement,<sup>26</sup> was added in recognition of the fact that not all actors that are involved in disaster relief efforts can be categorized in one or the other category mentioned. In particular, that phrase is to be understood as referring to entities such as the Red Cross and Red Crescent Movement.

(21) The Commission understood the definition of “other assisting actors” as being limited, for purposes of the draft articles, to those that are external to the affected State.<sup>27</sup> Accordingly, the activities of domestic non-governmental organizations, for example, are not covered. Nor would a domestic actor incidentally fall within the scope of the draft articles through the act of securing, or attempting to secure, assistance from abroad.

(22) As with the definition of “assisting State”, in subparagraph (c), the concluding phrase “providing assistance to that State with its consent” is a reference to the central role played by consent in the draft articles, in accordance with draft article 13. It is also included in recognition of the broad range of activities typically undertaken by the entities in question, in the context of both disaster risk reduction and the provision of disaster relief assistance, and which are regulated by the draft articles.

*Subparagraph (e)*

(23) Subparagraph (e) defines the type of assistance that the draft articles envisage assisting States or other assisting actors providing to the affected State, as a form of cooperation anticipated in draft article 8.

(24) The formulation is based on both the Guidelines on The Use of Foreign Military and Civil Defence Assets in Disaster Relief (also known as the “Oslo Guidelines”)<sup>28</sup> and the 2000 Framework Convention on Civil Defence Assistance.<sup>29</sup> The reference to “material” in the Oslo Guidelines was replaced with “equipment and goods”, which is the term used in the draft articles, and which is defined in subparagraph (g).

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<sup>24</sup> See below para. (4) of the commentary to draft art. 12.

<sup>25</sup> See below para. (1) of the commentary to draft art. 7. See also the IFRC Guidelines (footnote 17 above), guideline 2.14 (definition of “assisting actor”).

<sup>26</sup> Art. 1, para. 1 (definition of “assisting entity”).

<sup>27</sup> See below para. (2) of the commentary to draft art. 14.

<sup>28</sup> OCHA, *Guidelines on The Use of Foreign Military and Civil Defence Assets in Disaster Relief* (“Oslo Guidelines”) of 2006, as revised on 1 November 2007.

<sup>29</sup> See art. 1 (d) (definition of “assistance”).

(25) The phrase “provided to an affected State by an assisting State or other assisting actor” reiterates the nature of the legal relationship between the assisting State or actor and the affected State, as envisaged in the draft articles.

(26) The concluding clause seeks to clarify the purpose for which external assistance ought to be provided, namely “for disaster relief assistance”. The Commission understood that the concept of “external assistance”, by definition, applied specifically to the response phase. While the formulation is cast in the technical terminology of disaster response, it is understood to accord with the relevant part of the overall purpose of the draft articles, as set out in draft article 2, namely to “facilitate the adequate and effective response to disasters ... so as to meet the essential needs of the persons concerned, with full respect for their rights”.

*Subparagraph (f)*

(27) The subparagraph defines the personnel component of external assistance provided by assisting States or by other assisting actors. The definition indicates the two types of personnel who are typically sent for the purpose of providing disaster relief assistance, namely “civilian” or “military” personnel.<sup>30</sup> The reference to the latter category was also inspired by the bilateral treaty between Greece and the Russian Federation of 2000,<sup>31</sup> and is intended as recognition of the important role played by military personnel, as a category of relief personnel, in the provision of disaster relief assistance. While the reference to military personnel is more pertinent to the case of assisting States, the term “civilian” personnel is meant to be broad enough to cover such personnel sent by assisting States and other assisting actors. That these are options open to some, but not all, assisting entities (including States) is confirmed by the use of the phrase in the alternative (“or”).

(28) It is understood that such personnel are typically “specialized” personnel, as referred to in the annex to General Assembly resolution 46/182 of 19 December 1991, in that what is expected are personnel who have the necessary skill set and are provided with the necessary equipment and goods, as defined in subparagraph (g), to perform the functions in question.

(29) The phrase “sent by” establishes a nexus between the assisting actor, whether a State or other actor, and the personnel concerned. The Commission decided against making a reference to “acting on behalf of” in order not to prejudge any question related to the application of the rules of international law on the attribution of conduct to States or international organizations,<sup>32</sup> given the primary role of the affected State as provided for in draft article 10, paragraph 2.

*Subparagraph (g)*

(30) As indicated in subparagraph (e), “equipment” and “goods” are a key component of the kind of external assistance being envisaged in the draft articles. The formulation is

<sup>30</sup> See the Oslo Guidelines (footnote 28 above), guideline 5.

<sup>31</sup> Agreement between the Government of the Hellenic Republic and the Government of the Russian Federation on Cooperation in the Field of Prevention and Response to Natural and Man-Made Disasters, of 21 February 2000, art. 1 (definition of “team for providing assistance”).

<sup>32</sup> See articles on the responsibility of States for internationally wrongful acts, 2001, General Assembly resolution 56/83 of 12 December 2001, annex, arts. 4-9 (for the commentary thereto, see *Yearbook ... 2001*, vol. II (Part Two), and corrigendum, chap. IV, sect. E), and articles on the responsibility of international organizations, 2011, General Assembly resolution 66/100 of 9 December 2011, annex, arts. 6-7 (for the commentary thereto, see *Yearbook ... 2001*, vol. II (Part Two), and corrigendum, chap. V, sect. E).



drawn from the commentary to draft article 15,<sup>33</sup> as well as the resolution on humanitarian assistance of the Institute of International Law.<sup>34</sup> The list covers the types of material generally accepted to be necessary for the provision of disaster relief assistance. That the list is not exhaustive is confirmed by the reference to “other objects”.

(31) Generally speaking, two types of material are envisaged: the technical “equipment” required by the disaster relief personnel to perform their functions, both in terms of their own sustenance and in terms of what they require to provide relief, such as supplies, physical and electronic tools, machines and telecommunications equipment; and “goods” that are necessary for the survival and fulfilment of the essential needs of the victims of disasters, such as foodstuffs, drinking water, medical supplies, means of shelter, clothing and bedding. Search dogs are specifically anticipated in the phrase “specially trained animals”, which is drawn from Specific Annex J of the International Convention on the Simplification and Harmonization of Customs Procedures (“Kyoto Convention”).<sup>35</sup> The Commission considered the definition to be sufficiently flexible also to include services that might be provided by relief personnel.

#### **Article 4** **Human dignity**

The inherent dignity of the human person shall be respected and protected in the event of disasters.

#### **Commentary**

(1) Draft article 4 addresses the principle of human dignity in the context of both disaster response and disaster risk reduction. Human dignity is the core principle that informs and underpins international human rights law. In the context of the protection of persons in the event of disasters, human dignity is situated as a guiding principle for any action to be taken in the context of the provision of relief assistance, in disaster risk reduction and in the ongoing evolution of applicable laws. The Commission considered the centrality of the principle to the protection of persons in the event of disasters as sufficient justification for the inclusion of “human dignity” in a separate, autonomous provision in the body of the draft articles.

(2) The principle of human dignity undergirds international human rights instruments and has been interpreted as providing the ultimate foundation of human rights law. Reaffirmation of “the dignity and worth of the human person” is found in the preamble to the Charter of the United Nations, while the preamble to the 1948 Universal Declaration of Human Rights<sup>36</sup> declares “recognition of the inherent dignity ... of all members of the human family is the foundation of freedom, justice and peace in the world”. Affirmation of the principle of human dignity can be found in the International Covenant on Civil and Political Rights,<sup>37</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>38</sup>

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<sup>33</sup> See below, para. (5) of the commentary to draft art. 15.

<sup>34</sup> See footnote 18 above.

<sup>35</sup> United Nations, *Treaty Series*, vol. 950, No. 13561, p. 269, as revised by the Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures of 26 June 1999, United Nations, *Treaty Series*, vol. 2370, No. 13561, p. 27 (definition of “relief consignments”).

<sup>36</sup> General Assembly resolution 217 (III) (A) of 10 December 1948.

<sup>37</sup> United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171, preambular paragraphs and art. 10, para. 1.

<sup>38</sup> *Ibid.*, vol. 993, No. 14531, p. 3, preambular paragraphs and art. 13, para. 1.

the International Convention on the Elimination of all Forms of Racial Discrimination,<sup>39</sup> the Convention on the Elimination of All Forms of Discrimination against Women,<sup>40</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>41</sup> the Convention on the Rights of the Child<sup>42</sup> and the Convention on Rights of Persons with Disabilities.<sup>43</sup> The principle is also central to the field of international humanitarian law. The concept of personal dignity is recognized in common article 3, paragraph 1 (c), of the Geneva Conventions for the protection of war victims (hereinafter “1949 Geneva Conventions”),<sup>44</sup> articles 75 and 85 of Protocol I<sup>45</sup> and article 4 of Protocol II.<sup>46</sup>

(3) The concept of human dignity also lies at the core of numerous instruments at the international level directed towards the provision of humanitarian relief in the event of disasters. The IFRC Guidelines state that: “Assisting actors and their personnel should ... respect the human dignity of disaster-affected persons at all times.”<sup>47</sup> The General Assembly, in its resolution 45/100 14 December 1990, holds that “the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity”.<sup>48</sup> The Institute of International Law likewise was of the view that a failure to provide humanitarian assistance to those affected by disasters constitutes “an offence to human dignity”.<sup>49</sup>

(4) The precise formulation of the principle adopted by the Commission, namely the “inherent dignity of the human person”, is drawn from the preamble of the International Covenant on Economic, Social and Cultural Rights, and article 10, paragraph 1, of the

<sup>39</sup> *Ibid.*, vol. 660, No. 9464, p. 195, preambular paragraphs.

<sup>40</sup> *Ibid.*, vol. 1249, No. 20378, p. 13, preambular paragraphs.

<sup>41</sup> *Ibid.*, vol. 1465, No. 24841, p. 85, preambular paragraphs.

<sup>42</sup> *Ibid.*, vol. 1577, No. 27531, p. 3, preambular paragraphs; art. 23, para. 1; art. 28, para. 2; art. 37; and arts. 39-40.

<sup>43</sup> *Ibid.*, vol. 2515, No. 44910, p. 3, art. 3.

<sup>44</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31 (“Geneva Convention I”); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949), *ibid.*, No. 971, p. 85 (“Geneva Convention II”); Geneva Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), *ibid.*, No. 972, p. 135 (“Geneva Convention III”); and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), *ibid.*, No. 973, p. 287 (“Geneva Convention IV”), common art. 3, para. 1 (noting the prohibition on “outrages upon personal dignity, in particular, humiliating and degrading treatment”).

<sup>45</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3, art. 75, para. 2 (b) (noting the prohibition on “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”); art. 85, para. 4 (c) (noting that when committed wilfully and in violation of the Conventions or the Protocol, “practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination” are regarded as grave breaches of the Protocol).

<sup>46</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, *ibid.*, No. 17513, p. 609, art. 4, para. 2 (e) (noting the prohibition on “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault”).

<sup>47</sup> IFRC Guidelines (see footnote 17 above), guideline 4, para. 1.

<sup>48</sup> Preambular paragraph.

<sup>49</sup> Resolution on humanitarian assistance (see footnote 18 above), art. II, para. 1.

International Covenant on Civil and Political Rights. This formulation has also been adopted in instruments such as the Convention on the Rights of the Child,<sup>50</sup> and the American Convention on Human Rights.<sup>51</sup>

(5) The provision does not give an express indication of the actors being addressed. It could be considered that it applies only to States, but not necessarily to “other assisting actors”, given that different legal approaches exist as to non-State entities owing legal obligations, under international law, to protect the human dignity of an affected person. Nonetheless, the provision should be understood as applying to assisting States and those assisting actors (as understood under draft article 3) capable of acquiring legal obligations under international law. The Commission recognizes the role played both by affected States and assisting States in disaster response and risk reduction activities (which are the subject of draft articles 9 to 16). Much of the activity in the field of disaster response, and to a certain extent in that of disaster risk reduction, occurs through organs of intergovernmental organizations, non-governmental organizations and other non-State entities such as IFRC.<sup>52</sup>

(6) The phrase “respected and protected” accords with contemporary doctrine and jurisprudence in international human rights law. The formula is used in a number of instruments that relate to disaster relief, including the Oslo Guidelines,<sup>53</sup> the Mohonk Criteria,<sup>54</sup> the Guiding Principles on Internal Displacement,<sup>55</sup> and the Guiding Principles on the Right to Humanitarian Assistance.<sup>56</sup> In conjunction, the terms “respect” and “protect” connote a negative obligation to refrain from injuring the inherent dignity of the human person and a positive obligation to take action to protect human dignity. By way of example, the duty to protect may require States to adopt legislation proscribing activities of third parties in circumstances that threaten a violation of the principle of respect for human dignity. The Commission considered that an obligation to “protect” should be commensurate with the legal obligations borne by the respective actors addressed in the provision. An affected State therefore holds the primary role in the protection of human dignity, by virtue of its primary role in the direction, control, coordination and supervision of disaster relief assistance, as reflected in draft article 10, paragraph 2. Furthermore, each State shall be guided by the imperative to respect and protect the inherent dignity of the human person when taking measures to reduce the risk of disasters, as contemplated in draft article 9.

<sup>50</sup> See art. 37 (c) (noting, *inter alia*, that: “Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person”).

<sup>51</sup> United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123, art. 5, para. 2 (noting, *inter alia*, that: “All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person”).

<sup>52</sup> See *Official Records of the General Assembly, Sixty-first session, Supplement No. 10 (A/61/10)*, annex C, para. 28.

<sup>53</sup> Oslo Guidelines (see footnote 28 above), para. 20 (noting that: “The dignity and rights of all victims must be respected and protected”).

<sup>54</sup> J. M. Ebersole, “The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance” (“Mohonk Criteria”), *Human Rights Quarterly*, vol. 17, No. 1 (February 1995), pp. 192-208, p. 196 (“noting that: “The dignity and rights of all victims must be respected and protected”).

<sup>55</sup> E/CN.4/1998/53/Add.2, annex, principle 26 (noting, *inter alia*, that: “Persons engaged in humanitarian assistance, their transport and supplies shall be respected and protected”).

<sup>56</sup> Adopted by the Council of the International Institute of Humanitarian Law in April 1993, principle 10 (noting that: “Humanitarian assistance can, if appropriate, be made available by way of ‘humanitarian corridors’ which should be respected and protected by competent authorities of the parties involved and if necessary by the United Nations authority”).

(7) The generic reference at the end of the provision to “in the event of disasters”, which is the same formulation used in draft article 1, reflects the general scope of the draft articles, which includes disaster risk reduction.

## **Article 5**

### **Human rights**

Persons affected by disasters are entitled to the respect for and protection of their human rights in accordance with international law.

### **Commentary**

(1) Draft article 5 reflects the broad entitlement to human rights protection held by those persons affected by disasters. It also serves as a reminder of the duty of States to ensure compliance with all relevant human rights obligations applicable both during the disaster and the pre-disaster phase. The Commission recognizes an intimate connection between human rights and the principle of human dignity reflected in draft article 4, reinforced by the close proximity of the two draft articles.

(2) The general reference to “human rights” encompasses human rights obligations expressed in relevant international agreements and those in customary international law. Best practices for the protection of human rights included in non-binding texts at the international level, including, *inter alia*, the Inter-Agency Standing Committee Operational Guidelines on the Protection of Persons in Situations of Natural Disasters,<sup>57</sup> as well as the Guiding Principles on Internal Displacement,<sup>58</sup> serve to contextualize the application of existing human rights obligations to the specific situation of disasters. Protection under national law (such as that provided in the constitutional law of many States) is also envisaged. The formulation adopted by the Commission indicates the broad field of human rights obligations, without seeking to specify, add to or qualify those obligations.

(3) As clarified in the commentary to draft article 1, at paragraph (3), the scope *ratione personae* of the draft articles covers the activities of States and international organizations, including regional integration organizations, and other entities enjoying specific international legal competence in the provision of disaster relief assistance. The Commission recognizes that the scope and content of an obligation to protect the human rights of those persons affected by disasters will vary considerably among those actors. The neutral phrasing adopted by the Commission should be read in light of an understanding that distinct obligations will be held by affected States, assisting States and various other assisting actors, respectively.

(4) The draft article recognizes the entitlement of affected persons to “the respect for and protection of” their human rights, which continue to apply in the context of disasters. The phrase tracks that found in draft article 4, on human dignity, thereby further confirming the linkage between the two provisions. The reference to the concept of “protection”, commonly found in existing international instruments for the protection of human rights, is intended, together with “respect”, as a holistic formula describing the nature and extent of the obligations upon States, and is to be read in light of the reference to “full respect for their rights” in draft article 2. Hence, States’ obligations are not restricted to avoiding interference with people’s rights (“respect”), but may extend, as required by the rules in

<sup>57</sup> Inter-Agency Standing Committee, *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters* (Washington, D.C., Brookings-Bern Project on Internal Displacement, 2011).

<sup>58</sup> See footnote 55 above.

question, to “protection”<sup>59</sup> of their rights by, *inter alia*, adopting a number of measures varying from passive non-interference to active ensuring of the satisfaction of individual needs, all depending on the concrete circumstances. In light of the scope of the draft articles, set out in draft article 2, such measures also extend to the prevention and avoidance of conditions that might lead to the violation of human rights.<sup>60</sup>

(5) The Commission did not consider it feasible to draw up an exhaustive list of all potentially applicable rights and was concerned that such a list could lead to an *a contrario* interpretation that rights not mentioned therein were not applicable.

(6) A particularly relevant right is the right to life, as recognized in article 6, paragraph 1, of the International Covenant on Civil and Political Rights if a State is refusing to adopt positive measures to prevent or respond to disasters that cause loss of life.<sup>61</sup> It was also understood that some of the relevant rights are economic and social rights, which States parties to the Covenant on Economic, Social and Cultural Rights, and other applicable conventions, have an obligation to realize progressively, including those which provide minimum core obligations (in relation to the provision of essential foodstuffs, essential health care, basic shelter and housing and education for children) and which continue even in the context of a disaster. Other applicable rights include, *inter alia*, the right to receive humanitarian assistance; the rights of particularly vulnerable groups (as anticipated in draft article 6) to have their special protection and assistance needs taken into account; the right of communities to have a voice in the planning and execution of risk reduction, response and recovery initiatives; and the right of all persons displaced by disasters to non-discriminatory assistance in obtaining durable solutions to their displacement. References to specific rights are also to be found in some of the commentaries to other draft articles.<sup>62</sup>

(7) The draft article intentionally leaves open the question of how rights are to be enforced to the relevant rules of international law themselves. It is understood that there is often an implied degree of discretion in the application of rights, conditioned by the severity of the disaster, depending on the relevant rules recognizing or establishing the rights in question. Furthermore, the Commission considered that the reference to “human rights” incorporates both the rights and limitations that exist in the sphere of international human rights law. The reference to “human rights” is, accordingly, to the whole of international human rights law, including in particular its treatment of derogable and non-derogable rights. As such, the provision contemplates an affected State’s right of suspension or derogation where recognized under existing international agreements, which is also confirmed by the concluding phrase “in accordance with international law”.

(8) The concluding reference to “in accordance with international law” also serves to recall that there may be other rules of international law, such as those dealing with refugees and internally displaced persons, which may have a bearing on the rights of persons affected by disasters, a possibility also envisaged in draft article 18.

<sup>59</sup> See European Court of Human Rights, *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ECHR 2008-II.

<sup>60</sup> See, for example, Guiding Principles on Internal Displacement (footnote 55), annex, principle 5.

<sup>61</sup> See also the Inter-Agency Standing Committee Operational Guidelines on Human Rights and Natural Disasters, 2006 (A/HRC/4/38/Add.1, annex). See also paras. (2) and (3) of the commentary to draft art. 6.

<sup>62</sup> See, for example, paras. (4)-(5) of the commentary to draft art. 11, below.

## Article 6

### Humanitarian principles

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

#### Commentary

(1) Draft article 6 establishes the key humanitarian principles relevant to the protection of persons in the event of disasters. The Commission did not find it necessary to determine whether these principles are also general principles of international law and noted that the principles do not apply to the exclusion of other relevant principles of international law. The draft article recognizes the significance of these principles to the provision of disaster relief assistance, as well as in disaster risk reduction activities, where applicable.

(2) The principles of humanity, neutrality and impartiality are core principles recognized as foundational to humanitarian assistance.<sup>63</sup> The principles are likewise fundamental to applicable laws in disaster relief efforts. By way of example, the General Assembly, in its resolution 46/182, notes that: “Humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality”.<sup>64</sup>

(3) The principle of humanity stands as the cornerstone of the protection of persons in international law. Situated as an element both of international humanitarian law and international human rights law, it informs the development of laws regarding the protection of persons in the event of disasters. Within the field of international humanitarian law, the principle is most clearly expressed in the requirement of humane treatment in common article 3 of the 1949 Geneva Conventions.<sup>65</sup> However, as the International Court of Justice affirmed in the *Corfu Channel* case (merits), among general and well-recognized principles are “elementary considerations of humanity, even more exacting in peace than in war”.<sup>66</sup> Pictet’s commentary on the principles of the Red Cross attributes three elements to the principle of humanity, namely: to prevent and alleviate suffering; to protect life and health; and to assure respect for the individual.<sup>67</sup> In the specific context of disaster relief, the Oslo Guidelines and the Mohonk Criteria affirm that the principle of humanity requires that “[h]uman suffering must be addressed wherever it is found”.<sup>68</sup>

(4) While the principle of neutrality is rooted in the law of armed conflict, the principle is nonetheless applicable in other branches of the law. In the context of humanitarian assistance, the principle of neutrality requires that the provision of assistance be independent of any given political, religious, ethnic or ideological context. The Oslo Guidelines and the Mohonk Criteria both affirm that the assistance should be provided “without engaging in hostilities or taking sides in controversies of a political, religious or

<sup>63</sup> See discussion in the Memorandum by the Secretariat (A/CN.4/590), para. 11.

<sup>64</sup> Annex, para. 2.

<sup>65</sup> See art. 3, para. 1 (noting that: “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”).

<sup>66</sup> *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 4 at p. 22.

<sup>67</sup> J. Pictet, *The Fundamental Principles of the Red Cross Proclaimed by the Twentieth International Conference of the Red Cross, Vienna, 1965: Commentary* (Geneva, Henry Dunant Institute, 1979), pp. 21-27; also available from [www.icrc.org](http://www.icrc.org).

<sup>68</sup> Oslo Guidelines (see footnote 28 above), para. 20; Mohonk Criteria (see footnote 54 above), p. 196.

ideological nature”.<sup>69</sup> As such, the principle of neutrality indicates the apolitical nature of disaster response and affirms that humanitarian activities may not be used for purposes other than responding to the disaster at hand. The principle ensures that the interest of those persons affected by disasters are the primary concern of the affected State and any other relevant actors in disaster response. Respect for the principle of neutrality is central to facilitating the achievement of an adequate and effective response to disasters, as outlined in draft article 2.

(5) The principle of impartiality encompasses three principles: non-discrimination, proportionality and impartiality proper. For reasons discussed below, the principle of non-discrimination is articulated by the Commission not merely as an element of draft article 6, but also as an autonomous principle of disaster response. Non-discrimination is directed towards the removal of objective grounds for discrimination among individuals, such that the provision of assistance to affected persons is guided solely by their needs. The principle of proportionality stipulates that the response to a disaster be proportionate to the scope of that disaster and the needs of affected persons. The principle also acts as a distributive mechanism, enabling the provision of assistance to be delivered with attention given to the most urgent needs. Impartiality proper reflects the principle that no subjective distinctions be drawn among individuals in the response to disasters. The Commentary to the First Protocol Additional to the Geneva Conventions thus conceptualizes impartiality as “a moral quality which must be present in the individual or institution called upon to act for the benefit of those who are suffering”.<sup>70</sup> By way of example, the Draft International Guidelines for Humanitarian Assistance Operations provide that: “Humanitarian assistance should be provided on an impartial basis without any adverse distinction to all persons in urgent need.”<sup>71</sup> As a whole, the principle of impartiality requires that responses to disasters be directed towards full respect and fulfilment of the needs of those affected by disasters in a manner that gives priority to the needs of the particularly vulnerable.

(6) The principle of non-discrimination, applicable also in the context of disaster risk reduction, reflects the inherent equality of all persons and the determination that no adverse distinction may be drawn between them. Prohibited grounds for discrimination are non-exhaustive and include ethnic origin, sex, nationality, political opinions, race, religion and disability.<sup>72</sup> The Commission determined that non-discrimination should be referred to as an autonomous principle in light of its importance to the topic at hand. Such an approach has also been taken by the Institute of International Law in its 2003 resolution on humanitarian assistance, which stipulates that the offer and distribution of humanitarian assistance shall occur “without any discrimination on prohibited grounds”.<sup>73</sup> The IFRC

<sup>69</sup> *Ibid.*

<sup>70</sup> See C. Pilloud and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, International Committee of the Red Cross, 1987), paras. 2800-2801 (citing the “Proclamation of the Fundamental Principles of the Red Cross”, adopted by resolution VIII of the 20th International Conference of the Red Cross, Vienna, 1965), and Pictet, *Commentary* (see footnote 67 above), pp. 33-51.

<sup>71</sup> P. MacAlister-Smith, *International Guidelines for Humanitarian Assistance Operations* (Heidelberg, Germany, Max Planck Institute for Comparative Public Law and International Law, 1991), para. 6 (a).

<sup>72</sup> See, *inter alia*, the 1949 Geneva Conventions, common art. 3, para. 1; Universal Declaration of Human Rights, art. 2; International Covenant on Civil and Political Rights, art. 2, para. 1; and International Covenant on Economic, Social and Cultural Rights, art. 2, para. 2. See also Convention on the Rights of Persons with Disabilities, art. 5, and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3), art. 7.

<sup>73</sup> Resolution on humanitarian assistance (see footnote 18 above), art. II, para. 3.

Guidelines likewise specify that assistance be provided to disaster-affected persons without “any adverse distinction (such as in regards to nationality, race, ethnicity, religious beliefs, class, gender, disability, age, and political opinions)”.<sup>74</sup>

(7) The principle of non-discrimination is not to be taken as excluding the prospect of “positive discrimination” as appropriate. The phrase “while taking into account the needs of the particularly vulnerable” in draft article 6 reflects this position. The term “vulnerable” encompasses both groups and individuals. For this reason, the neutral expression “vulnerable” was preferred to either “vulnerable groups” or “vulnerable persons”. The qualifier “particularly” was used in recognition of the fact that those affected by disaster are by definition vulnerable. The specific phrasing of “particularly vulnerable” is drawn from article 4, paragraph 3 (a), of the IFRC Guidelines, which refer to the special needs of “women and particularly vulnerable groups, which may include children, displaced persons, the elderly, persons with disabilities, and persons living with HIV and other debilitating illnesses”.<sup>75</sup> The qualifier is also mirrored in the resolution on humanitarian assistance adopted by the Institute of International Law, which refers to the requirement to take into account the needs of the “most vulnerable”.<sup>76</sup> Similarly, the General Assembly, in its resolution 69/135 of 12 December 2014, requested:

“Member States, relevant humanitarian organizations of the United Nations system and other relevant humanitarian actors to ensure that all aspects of humanitarian response, including disaster preparedness and needs assessments, take into account the specific humanitarian needs and vulnerabilities of all components of the affected population, in particular girls, boys, women, older persons and persons with disabilities, including in the design and implementation of disaster risk reduction, humanitarian and recovery programming and post-humanitarian emergency reconstruction, and in this regard encourages efforts to ensure gender mainstreaming ...”<sup>77</sup>

The Commission decided against including a list of vulnerable groups within the draft article itself in recognition of the relative nature of vulnerability. What was important was less a fixed iteration of particularly vulnerable subgroups of individuals within the broader body of persons affected, or potentially affected, by a disaster, and more a recognition that the principle of non-discrimination includes within it the positive obligation to give specific attention to the needs of the particularly vulnerable. The term “particularly vulnerable” is deliberately open-ended to include not only the categories of individuals usual associated with the concept, as mentioned above, but also other possible individuals that might find themselves being particularly vulnerable in the wake of a disaster, such as non-nationals.

(8) The Commission understood the reference to “taking into account” in a broad sense, so as also to cover, *inter alia*, accessibility to information and community participation, including engagement of vulnerable groups in the design, implementation, monitoring and evaluation and assistance provided in the event of a disaster, as well as in preparing for the possibility of a disaster.

(9) The Commission was cognizant of the fact that disasters frequently affect women, girls, boys and men differently. In many contexts, gender inequalities constrain the influence and control of women and girls over decisions governing their lives as well as their access to resources such as finance, food, agricultural inputs, land and property, technologies, education, health, secure housing and employment. They are often

<sup>74</sup> IFRC Guidelines (see footnote 17 above), art. 4, para. 2 (b).

<sup>75</sup> *Ibid.*, art. 4, para. 3 (a).

<sup>76</sup> Resolution on humanitarian assistance (see footnote 18 above), art. II, para. 3.

<sup>77</sup> See para. 32.



disproportionately affected and exposed to risks, including increased loss of life and livelihoods and gender-based violence, during and in the aftermath of disasters. It is increasingly recognized that women and girls — like men and boys — possess skills and capacity to prepare for, respond to and recover from crisis, as actors and partners both in disaster risk reduction and humanitarian action. The capacity and knowledge of women and girls plays an important part in individual as well as community resilience. The significance of taking a gender-based approach to disaster risk management has been recognized, including in both the Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters<sup>78</sup> and the Sendai Framework.<sup>79</sup>

#### **Article 7**

##### **Duty to cooperate**

In the application of the present draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors.

#### **Commentary**

(1) Effective international cooperation is indispensable for the protection of persons in the event of disasters. The duty to cooperate is well established as a principle of international law and can be found in numerous international instruments. The Charter of the United Nations enshrines it, not least with reference to the humanitarian context in which the protection of persons in the event of disasters places itself. Article 1, paragraph 3, of the Charter clearly spells it out as one of the purposes of the Organization:

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

Articles 55 and 56 of the Charter elaborate on Article 1, paragraph 3, with respect to international cooperation. Article 55 of the Charter reads:

“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

“a. higher standards of living, full employment, and conditions of economic and social progress and development;

“b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

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<sup>78</sup> A/CONF.206/6 and Corr.1, chap. I, resolution 2, para. 13 (d): “A gender perspective should be integrated into all disaster risk management policies, plans and decision-making processes, including those related to risk assessment, early warning, information management, and education and training.”

<sup>79</sup> Para. 19 (d): “Disaster risk reduction requires an all-of-society engagement and partnership. It also requires empowerment and inclusive, accessible and non-discriminatory participation, paying special attention to people disproportionately affected by disasters, especially the poor. A gender, age, disability and cultural perspective should be integrated into all policies and practices, and women and youth leadership should be promoted. In this context, special attention should be paid to the improvement of organized voluntary work of citizens.”

“c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

Article 56 of the Charter reads:

“All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”

The general duty to cooperate was reiterated as one of the principles of international law in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations in the following terms:

“States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences.”<sup>80</sup>

(2) Cooperation takes on special significance with regard to international human rights obligations that have been undertaken by States. The International Covenant on Economic, Social and Cultural Rights refers explicitly to international cooperation as a means of realizing the rights contained therein.<sup>81</sup> This has been reiterated by the Committee on Economic, Social and Cultural Rights in its general comments relating to the implementation of specific rights guaranteed by the Covenant.<sup>82</sup> International cooperation gained particular prominence in the 2006 Convention on the Rights of Persons with Disabilities, which reaffirms existing international obligations in relation to persons with disabilities “in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters”.<sup>83</sup>

(3) With regard to cooperation in the context of disaster relief assistance, the General Assembly recognized, in resolution 46/182, that:

“The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws ...”<sup>84</sup>

Furthermore, with regard to cooperation in the context of risk reduction, the Sendai Framework’s guiding principles, paragraph 19 (a), indicate that: “Each State has the primary responsibility to prevent and reduce disaster risk, including through international, regional, subregional, transboundary and bilateral cooperation.” In addition, there exist a vast number of instruments of specific relevance to the protection of persons in the event of disasters, which demonstrate the importance of international cooperation in combating the effects of disasters. Not only are these instruments in themselves expressions of cooperation, they generally reflect the principle of cooperation relating to specific aspects

<sup>80</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1.

<sup>81</sup> Arts. 11, 15, 22 and 23.

<sup>82</sup> See, in particular, general comments No. 2 (E/1990/23-E/C.12/1990/3, annex III), No. 3 (E/1991/23-E/C.12/1990/8, annex III), No. 7 (E/1998/22-E/C.12/1997/10, annex IV), No. 14 (E/2001/22-E/C.12/2000/21) and No. 15 (E/2003/22-E/C.12/2002/13, annex IV).

<sup>83</sup> Art. 11.

<sup>84</sup> Annex, para. 5.

of disaster governance in the text of the instrument. Typically in bilateral agreements, this has been reflected in the title given to the instrument, denoting either cooperation or (mutual) assistance.<sup>85</sup> Moreover, the duty to cooperate, in the vast majority of cases, is framed as one of the objectives of the instrument or is attributed positive effects towards their attainment. Again, the Tampere Convention is of relevance in this respect as it indicates in paragraph 21 of its preamble that the parties wish “to facilitate international cooperation to mitigate the impact of disaster”. Another example can be found in an agreement between France and Malaysia:

“Convinced of the need to develop cooperation between the competent organs of both Parties in the field of the prevention of grave risks and the protection of populations, property and the environment ....”<sup>86</sup>

(4) Cooperation, however, should not be interpreted as diminishing the primary role of the affected State as provided for in draft article 10, paragraph 2. Furthermore, the principle of cooperation is to be understood also as being complementary to the duty of the authorities of the affected State to take care of the persons affected by natural disasters and similar emergencies occurring in its territory, or in territory under its jurisdiction or control (draft article 10, paragraph 1).<sup>87</sup>

(5) A key feature of activity in the field of disaster relief assistance is international cooperation not only among States, but also with intergovernmental and non-governmental organizations. The importance of their role has been recognized for some time. In its resolution 46/182, the General Assembly confirmed that:

“Intergovernmental and non-governmental organizations working impartially and with strictly humanitarian motives should continue to make a significant contribution in supplementing national efforts.”<sup>88</sup>

In its resolution 2008/36 of 25 July 2008, the Economic and Social Council recognized:

“... the benefits of engagement of and coordination with relevant humanitarian actors to the effectiveness of humanitarian response, and encourage[d] the United Nations to continue to pursue efforts to strengthen partnerships at the global level with the International Red Cross and Red Crescent Movement, relevant humanitarian non-governmental organizations and other participants of the Inter-Agency Standing Committee.”<sup>89</sup>

(6) Draft article 7 recognizes the central importance of international cooperation to international disaster relief assistance activities, as well as in the reduction of disaster risk. It reflects a legal obligation for the various parties concerned. The nature of the obligation of cooperation may vary, depending on the actor and the context in which assistance is being sought and offered. The nature of the legal obligation to cooperate is dealt with in specific provisions (hence the opening phrase “[i]n the application of the present draft

<sup>85</sup> See A/CN.4/590/Add.2 for a comprehensive list of relevant instruments. For a further typology of instruments for the purposes of international disaster response law, see Horst Fischer, “International disaster response law treaties: trends, patterns and *lacunae*”, in *International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges* (Geneva, IFRC, 2003), at pp. 24-44.

<sup>86</sup> Agreement between the Government of the French Republic and the Government of Malaysia on Cooperation in the Field of Disaster Prevention and Management and Civil Security, 25 May 1998, preambular paragraph 4.

<sup>87</sup> See also General Assembly resolution 46/182, annex, para. 4, and the Hyogo Declaration, A/CONF.206/6 and Corr.1, chap. 1, resolution 1, para. 4.

<sup>88</sup> See annex, para. 5.

<sup>89</sup> Para. 7.

articles”), particularly draft articles 8, on response to disasters, and 9, concerning the reduction of risk of disasters. The Commission inserted the phrase “as appropriate”, which qualifies the entire draft article, both as a reference to existing specific rules that establish the nature of the obligation to cooperate among the various actors mentioned in the draft article, and as an indication of a degree of latitude in determining, on the ground, when cooperation is or is not “appropriate”. It does not qualify the level of cooperation being envisaged, but rather the actors with whom the cooperation should take place.

(7) In addition to cooperation among States, draft article 7 also envisages cooperation with assisting actors. Express reference is made to cooperation with the United Nations, in recognition of the central role played by the Organization in the coordination of relief assistance. The Office for the Coordination of Humanitarian Affairs (OCHA) enjoys a special mandate, in accordance with General Assembly resolution 46/182 of 19 December 1991, to assist in the coordination of international assistance. Under that resolution, the Assembly established the high-level position of Emergency Relief Coordinator as the single United Nations focal point for complex emergencies as well as for natural disasters. The Emergency Relief Coordinator processes requests from affected Member States for emergency assistance requiring a coordinated response, serves as a central focal point concerning United Nations emergency relief operations and provides consolidated information, including early warning on emergencies.

(8) The reference to “other assisting actors” imports the definition contained in draft article 3, subparagraph (d), which includes competent intergovernmental organizations and relevant non-governmental organizations or entities. The Commission felt it appropriate to single out one such group of entities, namely the components of the Red Cross and Red Crescent Movement, in recognition of the important role played by the Movement in international cooperation in the context of the situations covered by the draft articles. The reference to the components of the Red Cross and Red Crescent Movement includes the International Committee of the Red Cross as a consequence of the fact that the draft articles may also apply in complex emergencies involving armed conflict.<sup>90</sup> As indicated in paragraph (18) of the commentary to draft article 3, the category of “other assisting actors” is intentionally broad. In the reduction of the risk of disasters, the cooperation with other actors is enshrined in the Sendai Framework’s paragraph 19 (b), which indicates that “[d]isaster risk reduction requires that responsibilities be shared by central Governments and relevant national authorities, sectors and stakeholders”, and paragraph 19 (d), which indicates that “[d]isaster risk reduction requires an all-of-society engagement and partnership”.

(9) The forms of cooperation in the context of the response phase are covered by draft article 8, and in risk reduction by draft article 9.

### **Article 8**

#### **Forms of cooperation in the response to disasters**

Cooperation in the response to disasters includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.

### **Commentary**

(1) Draft article 8 seeks to clarify the various forms which cooperation between affected States, assisting States and other assisting actors may take in the context of response to

<sup>90</sup> See below para. (8) of the commentary to art. 18.

disasters. Cooperation is enshrined in general terms in draft article 7 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 elaborate further on the meaning of draft article 7, without creating any additional legal obligations.

(2) The list of forms of cooperation in draft article 8 — humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and goods, and scientific, medical and technical resources — is loosely based on the second sentence of paragraph 4 of article 17 of the articles on the law of transboundary aquifers. That paragraph explains the general obligation to cooperate in article 7 of those articles by describing the cooperation necessary in emergency situations.<sup>91</sup> The second sentence of paragraph 4 of article 17 reads:

“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.”<sup>92</sup>

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 8. However, the text of draft article 8 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 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 improvement of communication channels among themselves as regards disaster warnings, exchange of experts and trainees, exchange of information and documents, and dissemination of medical supplies, services and relief assistance.”<sup>93</sup>

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 regard to “specialized personnel and teams of technical specialists, as well as relief supplies, equipment, and services ...”<sup>94</sup>

(3) The beginning of draft article 8 confirms that the forms of cooperation being referred to are those relevant in the response phase following the onset of a disaster or in the post-disaster recovery phase. They are by their nature concerned with the provision or facilitation of relief assistance to affected persons. Cooperation in the pre-disaster phase, including disaster prevention, preparedness and mitigation, is dealt with in draft article 9. At the same time, draft article 8, which is to be read in 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 and effective response to disasters ... so as to meet the essential needs of the persons concerned, with full respect for their rights”. In the context of the present

<sup>91</sup> General Assembly resolution 63/124 of 11 December 2008, annex (for the commentary thereto, see *Yearbook ... 2008*, vol. II (Part Two), chap. IV, sect. E.

<sup>92</sup> *Ibid.*

<sup>93</sup> *ASEAN Documents Series 1976*.

<sup>94</sup> Annex, para. 27.

topic, the ultimate goal of the duty to cooperate, and therefore of any of the forms of cooperation referred to in draft article 8, 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; technology transfer covering, among others, technology relating to satellite imagery; training; information-sharing; joint simulation exercises and planning; and undertaking needs assessments and situation overview.

(5) As draft article 8 is illustrative of possible forms of cooperation, it is not intended to create additional legal obligations for either affected States or other assisting actors to engage in certain activities. Notwithstanding this, cooperation may also take place in the context of existing obligations. For example, an affected State may have a duty to inform or notify, at the onset of a disaster, other States and other assisting actors that have a mandated role to gather information, provide early warning and coordinate assistance provided by the international community. Such duty was envisaged in article 17 of the articles on prevention of transboundary harm from hazardous activities, adopted in 2001, which provides:

“The State of origin shall, without delay and by the most expeditious means at its disposal, notify the State likely to be affected of an emergency concerning an activity within the scope of the present draft articles and provide it with all relevant and available information.”<sup>95</sup>

(6) The forms that 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 other assisting actors involved. As with the principle of cooperation itself, the forms of cooperation in draft article 8 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.<sup>96</sup> 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 other assisting actors may be appropriate.

(7) Cooperation in the areas mentioned must be in conformity with the other draft articles. For example, as with draft article 7, the forms of cooperation touched upon in draft article 8 must be consistent with draft article 10, which grants the affected State the primary role in disaster relief assistance, as a consequence of its sovereignty. Cooperation must also be undertaken in accordance with the requirement of consent of the affected State to external assistance (draft article 13), 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 article 14). Cooperation is also related to draft article 15, which recognizes the role of the affected State in the facilitation of prompt and effective assistance to persons

<sup>95</sup> General Assembly resolution 62/68 of 6 December 2007, annex (for the commentary thereto, see *Yearbook ... 2001*, vol. II (Part Two), chap. V, sect. E).

<sup>96</sup> See above, para. (6) of the commentary to draft art. 7.

affected by a disaster. As such, and since draft article 8 does not create any additional legal obligations, the relationship between the affected State, assisting State, and other assisting actors with regard to the above-mentioned forms of cooperation will be regulated in accordance with the other provisions of the present draft articles.

(8) Humanitarian assistance is intentionally placed first among the forms of cooperation mentioned in draft article 8, 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,<sup>97</sup> communication and information is also relevant in the disaster response 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.<sup>98</sup> The mention of “making available relief personnel, equipment and goods, 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 among 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.

#### **Article 9**

##### **Reduction of the risk of disasters**

1. Each State shall reduce the risk of disasters by taking 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 9 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.

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<sup>97</sup> See, for example, the ASEAN Agreement, art. 18, para. 1.

<sup>98</sup> See, for example, the Tampere Convention, art. 3 (calling for “the deployment of terrestrial and satellite telecommunication equipment to predict, monitor and provide information concerning natural 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 Oslo Guidelines (see footnote 28 above), para. 54. See also discussion in the Memorandum by the Secretariat (A/CN.4/590), paras. 158-174.

(2) As indicated in draft article 2, the reduction of the risk of disasters falls within the purpose of the present draft articles. 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,<sup>99</sup> the Hyogo Framework for Action and the Sendai Framework, as well as several sessions of the Global Platform for Disaster Risk Reduction.

(3) At the fourth session<sup>100</sup> 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”. At the Third United Nations World Conference on Disaster Risk Reduction, “States also reiterated their commitment to address disaster risk reduction and the building of resilience to disasters with a renewed sense of urgency”.<sup>101</sup> The Sendai Framework indicated that “it is urgent and critical to anticipate, plan for and reduce disaster risk in order to more effectively protect persons, communities and countries” and called for “accountability for disaster risk creation ... at all levels.”<sup>102</sup> Furthermore, the Sendai Framework stated, as a principle, that “each State has the primary responsibility to prevent and reduce disaster risk, including through international, regional, subregional, transboundary and bilateral cooperation”.<sup>103</sup> Finally, with the aim to achieve “the substantial reduction of disaster risk and losses in lives, livelihoods and health and in the economic, physical, social, cultural and environmental assets of persons, businesses, communities and countries”,<sup>104</sup> the Sendai Framework indicated that “the following goal must be pursued: [p]revent new and reduce existing disaster risk through the implementation of integrated and inclusive economic, structural, legal, social, health, cultural, educational, environmental, technological, political and institutional measures that prevent and reduce hazard exposure and vulnerability to disaster, increase preparedness for response and recovery, and thus strengthen resilience.”<sup>105</sup>

(4) 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 obligations undertaken by States to respect and protect human rights, in particular the right to life. Protection entails a positive obligation on States to take the necessary and appropriate measures to prevent harm from impending disasters. This is confirmed by the decisions of international tribunals, notably the European Court of Human Rights judgments in the *Öneryildiz v. Turkey*<sup>106</sup> and *Budayeva and Others v. Russia*<sup>107</sup> cases, which affirmed the duty to take preventive measures. In addition, draft article 9 draws inspiration from a number of international environmental law principles, including the “due diligence” principle.

<sup>99</sup> See Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation and Plan of Action (A/CONF.172/9), chap. I, resolution I, annex I.

<sup>100</sup> Geneva, 19-23 May 2013.

<sup>101</sup> See Sendai Declaration in General Assembly resolution 69/283 of 3 June 2015, annex I (footnote omitted).

<sup>102</sup> See Sendai Framework, paras. 5-6.

<sup>103</sup> See Sendai Framework (guiding principles), para. 19 (a).

<sup>104</sup> See Sendai Framework (expected outcome and goal), para. 16.

<sup>105</sup> See Sendai Framework’s Goal, para. 17.

<sup>106</sup> *Öneryildiz v. Turkey* [GC], no. 48939/99, ECHR 2004-XII.

<sup>107</sup> *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ECHR 2008-II.



(5) An important legal foundation for draft article 9 is the widespread practice of States reflecting their commitment to reduce the risk of disasters. States and international organizations have adopted multilateral, regional and bilateral instruments concerned with reducing the risk of disasters, including: the Paris Agreement (2015);<sup>108</sup> Transforming our world: the 2030 Agenda for Sustainable Development (2015);<sup>109</sup> the Addis Ababa Action Agenda of the Third International Conference on Financing for Development (2015);<sup>110</sup> the SIDS Accelerated Modalities of Action (SAMOA) Pathway (2014);<sup>111</sup> the ASEAN Agreement;<sup>112</sup> the Beijing Action for Disaster Risk Reduction in Asia (2005);<sup>113</sup> the Delhi Declaration on Disaster Risk Reduction in Asia (2007);<sup>114</sup> the Kuala Lumpur Declaration on Disaster Risk Reduction in Asia (2008);<sup>115</sup> the Incheon Declaration on Disaster Risk Reduction in Asia and the Pacific 2010;<sup>116</sup> the Incheon Regional Roadmap and Action Plan on Disaster Risk Reduction through Climate Change Adaptation in Asia and the Pacific,<sup>117</sup> reaffirming the Hyogo Framework for Action and proposing Asian initiatives for climate change adaptation and disaster risk reduction considering vulnerabilities in the region; “The way forward: climate and disaster resilient development in the Pacific” (meeting statement) of the Pacific Platform for Disaster Risk Management (2014);<sup>118</sup> the Framework of Cooperation on Strengthening Regional Cooperation of Disaster Management Authorities of Central Asian and South Caucasus Region in the Area of Disaster Risk Reduction (2015);<sup>119</sup> the African Union Africa Regional Strategy for Disaster Risk Reduction of 2004,<sup>120</sup> which was followed by a programme of action for its implementation (originally for the period between 2005 and 2010, but later extended to 2015);<sup>121</sup> the East African

<sup>108</sup> Report of the conference of the parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, addendum: decisions adopted by the conference of the parties (FCCC/CP/2015/10/Add.1), decision 1/CP.21, annex.

<sup>109</sup> General Assembly resolution 70/1 of 25 September 2015.

<sup>110</sup> General Assembly resolution 69/313 of 27 July 2015, annex.

<sup>111</sup> General Assembly resolution 69/15 of 14 November 2014, annex.

<sup>112</sup> The ASEAN Agreement is the first international treaty concerning disaster risk reduction to have been developed after the adoption of the Hyogo Framework for Action.

<sup>113</sup> Adopted at the Asian Conference on Disaster Risk Reduction in Asia, which was held in Beijing from 27 to 29 September 2005. Available from <http://nidm.gov.in/amcdrr/beijing.pdf> (accessed on 4 July 2016).

<sup>114</sup> Adopted at the Second Asian Ministerial Conference on Disaster Reduction, which was held in New Delhi on 7 and 8 November 2007. Available from <http://nidm.gov.in/amcdrr/declaration.asp> (accessed on 4 July 2016).

<sup>115</sup> Adopted at the Third Asian Ministerial Conference on Disaster Risk Reduction, which was held in Kuala Lumpur from 2 to 4 December 2008. Available from [www.preventionweb.net/files/3089\\_KLDeclarationonDisasterRiskReductioninAsia202008.pdf](http://www.preventionweb.net/files/3089_KLDeclarationonDisasterRiskReductioninAsia202008.pdf) (accessed on 4 July 2016).

<sup>116</sup> Available from [www.preventionweb.net/files/16327\\_finalincheondeclaration1028.pdf](http://www.preventionweb.net/files/16327_finalincheondeclaration1028.pdf) (accessed on 4 July 2016).

<sup>117</sup> See [www.unisdr.org/files/20382\\_summaryof4hamcdrr.pdf](http://www.unisdr.org/files/20382_summaryof4hamcdrr.pdf) (accessed on 4 July 2016).

<sup>118</sup> Adopted at the sixth session of the Pacific Platform for Disaster Risk Management, which was held in Suva from 2 to 4 June 2014. Available from [www.pacificdisaster.net/pdnadmin/data/original/PPDRM\\_2014\\_Chairs\\_Summary.pdf](http://www.pacificdisaster.net/pdnadmin/data/original/PPDRM_2014_Chairs_Summary.pdf) (accessed on 4 July 2016).

<sup>119</sup> Adopted by the Regional Ministerial Meeting of Disaster Management Authorities of Central Asian and South Caucasus Countries, which was held in Bishkek on 30 January 2015. Available from [www.preventionweb.net/files/42374\\_frameworkofcooperationregionaldrca.pdf](http://www.preventionweb.net/files/42374_frameworkofcooperationregionaldrca.pdf) (accessed on 4 July 2016).

<sup>120</sup> Available from [www.unisdr.org/files/4038\\_aficaregionalstrategy1.pdf](http://www.unisdr.org/files/4038_aficaregionalstrategy1.pdf) (accessed on 4 July 2016).

<sup>121</sup> Extended Programme of Action for the Implementation of the Africa Regional Strategy for Disaster Risk Reduction (2006-2015). Available from [www.unisdr.org/files/19613\\_bookletpoaenglish.pdf](http://www.unisdr.org/files/19613_bookletpoaenglish.pdf) (accessed on 4 July 2016).

Community Disaster Risk Reduction and Disaster Management Bill (2013);<sup>122</sup> four sessions of the African Regional Platform on Disaster Risk Reduction, the most recent one being in 2013;<sup>123</sup> the Yaoundé Declaration on the Implementation of the Sendai Framework in Africa (2015);<sup>124</sup> the Arab Strategy for Disaster Risk Reduction 2020;<sup>125</sup> the Sharm El Sheikh Declaration on Disaster Risk Reduction (2014);<sup>126</sup> the Asuncion Declaration “Guidelines towards a Regional Action Plan for the Implementation of the Sendai Framework 2015-2030” (2016);<sup>127</sup> the Aqaba Declaration on Disaster Risk Reduction in Cities (2013);<sup>128</sup> the Latin American Parliament Protocol on Disaster Risk Management in Latin America and the Caribbean (2013);<sup>129</sup> the Guayaquil Communiqué of the Fourth Session of the Regional Platform for Disaster Risk Reduction in the Americas (2014);<sup>130</sup> the Nayarit Communiqué on Lines of Action to Strengthen Disaster Risk Reduction in the Americas (2011);<sup>131</sup> the Outcome of the European ministerial meeting on disaster risk reduction: towards a post-2015 framework for disaster risk reduction — building the resilience of nations and communities to disasters (2014);<sup>132</sup> 6th annual meeting of the European Forum for Disaster Risk Reduction — Roadmap for the Implementation of the Sendai Framework (2015);<sup>133</sup> “Solidarity in Action”, Joint Statement of the Ministers for Foreign Affairs of the South East Europe Cooperation Process (2013);<sup>134</sup> the European Union’s Civil Protection Mechanism (2013);<sup>135</sup> resolution 6 on strengthening legal frameworks for disaster response, risk reduction and first aid, adopted by the 32nd

<sup>122</sup> Available from [www.unisdr.org/files/48230\\_eacdrbill.pdf](http://www.unisdr.org/files/48230_eacdrbill.pdf) (accessed on 4 July 2016).

<sup>123</sup> United Nations Office for Disaster Risk Reduction, “Africa seeks united position on disaster risk reduction”, 13 February 2013. Available from [www.unisdr.org/archive/31224](http://www.unisdr.org/archive/31224).

<sup>124</sup> Adopted by the Fourth High-Level Meeting on Disaster Risk Reduction, which was held in Yaoundé on 23 July 2015. Available from [www.preventionweb.net/files/43907\\_43907\\_yaoundeclarationen.pdf](http://www.preventionweb.net/files/43907_43907_yaoundeclarationen.pdf) (accessed on 4 July 2016).

<sup>125</sup> Adopted by the Council of Arab Ministers Responsible for the Environment at its twenty-second session, which was held in Cairo on 19 and 20 December 2010. Available from [www.unisdr.org/files/18903\\_17934asdrfinalenglishjanuary20111.pdf](http://www.unisdr.org/files/18903_17934asdrfinalenglishjanuary20111.pdf) (accessed on 4 July 2016).

<sup>126</sup> Adopted at the Second Arab Conference on Disaster Risk Reduction, which was held at Sharm El Sheikh, Egypt, from 14 to 16 September 2014. Available from [www.unisdr.org/files/42726\\_42726sharmdeclarationpublicationfin.pdf](http://www.unisdr.org/files/42726_42726sharmdeclarationpublicationfin.pdf) (accessed on 4 July 2016).

<sup>127</sup> Adopted at the 1st meeting of Ministers and High-Level Authorities on the Implementation of the Sendai Framework for Disaster Risk Reduction 2015-2030 in the Americas, which was held in Asuncion on 8 and 9 June 2016. Available from [www.preventionweb.net/files/49235\\_asunciondeclaration2016.pdf](http://www.preventionweb.net/files/49235_asunciondeclaration2016.pdf) (accessed on 4 July 2016).

<sup>128</sup> Adopted at the First Arab Conference for Disaster Risk Reduction, which was held in Aqaba, Jordan, from 19 to 21 March. Available from [www.preventionweb.net/files/31093\\_aqabadeclarationenglishfinaldraft.pdf](http://www.preventionweb.net/files/31093_aqabadeclarationenglishfinaldraft.pdf) (accessed on 4 July 2016).

<sup>129</sup> <http://eird.org/americas/noticias/protocolo-sobre-gestion-del-riesgo.pdf> (accessed on 4 July 2016).

<sup>130</sup> The fourth session was held in Guayaquil, Ecuador, from 27 to 29 May 2014. Available from [www.preventionweb.net/files/37662\\_communiqueguayaquilpr1428may14\[1\].pdf](http://www.preventionweb.net/files/37662_communiqueguayaquilpr1428may14[1].pdf).

<sup>131</sup> Adopted at the second session of the Regional Platform for Disaster Risk Reduction in the Americas, which was held in Nayarit, Mexico, from 15 to 17 March 2011. Available from [www.unisdr.org/files/18603\\_communicuenayarit.pdf](http://www.unisdr.org/files/18603_communicuenayarit.pdf).

<sup>132</sup> Adopted at the European Ministerial Meeting in Milan, Italy, on 8 July 2014. Available from [www.preventionweb.net/files/38378\\_europeandrrministerialstatement.pdf](http://www.preventionweb.net/files/38378_europeandrrministerialstatement.pdf) (accessed on 4 July 2016).

<sup>133</sup> The 6th annual meeting took place in Paris from 7 to 9 October 2015. Available from [www.preventionweb.net/files/43847\\_efdrroadmap20152020final.pdf](http://www.preventionweb.net/files/43847_efdrroadmap20152020final.pdf) (accessed on 4 July 2016).

<sup>134</sup> Adopted by the ministers in Ohrid, the former Yugoslav Republic of Macedonia, on 31 May 2013. Available from [www.preventionweb.net/files/31414\\_solidarityinactionjointstatement.pdf](http://www.preventionweb.net/files/31414_solidarityinactionjointstatement.pdf) (accessed on 4 July 2016).

<sup>135</sup> See Decision No. 1313/2013/EU of the European Parliament and of the Council of 17 December 2013, *Official Journal of the European Union*, L 347.

International Conference of the Red Cross and Red Crescent (2015);<sup>136</sup> and the European Commission Action Plan on the Sendai Framework for Disaster Risk Reduction 2015-2030 (2016).<sup>137</sup>

(6) Recognition of this commitment is further shown by the incorporation by States of disaster risk reduction measures into their national policies and legal frameworks. A compilation of national progress reports on the implementation of the Hyogo Framework for Action<sup>138</sup> and other sources indicate that, as of 2016, 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 of America; Vanuatu; and Venezuela (Bolivarian Republic of). More recently, the United Nations Office for Disaster Risk Reduction identified 93 States<sup>139</sup> that had adopted national platforms for disaster risk reduction, which, in accordance with the Sendai Framework, are government coordination forums composed of relevant stakeholders aimed "to, *inter alia*, identify sectoral and multisectoral disaster risk, build awareness and knowledge of disaster risk through sharing and dissemination of non-sensitive disaster risk information and data, contribute to and coordinate reports on local and national disaster risk, coordinate public awareness campaigns on disaster risk, facilitate and support local multisectoral cooperation (e.g. among local governments) and contribute to the determination of and reporting on national and local disaster risk management plans and all policies relevant for disaster risk management".<sup>140</sup> 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;<sup>141</sup> Cameroon;<sup>142</sup> China;<sup>143</sup> Cambodia,<sup>144</sup> Dominican Republic;<sup>145</sup> El Salvador,<sup>146</sup> Estonia,<sup>147</sup>

<sup>136</sup> The conference was held in Geneva from 8 to 10 December 2015. Available from [http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-Res6-legal-frameworks-for-disaster\\_EN.pdf](http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-Res6-legal-frameworks-for-disaster_EN.pdf) (accessed on 4 July 2016).

<sup>137</sup> See SWD(2016) 205 of 16 June 2016. Available from [http://ec.europa.eu/echo/sites/echo-site/files/sendai\\_swd\\_2016\\_205\\_0.pdf](http://ec.europa.eu/echo/sites/echo-site/files/sendai_swd_2016_205_0.pdf) (accessed on 4 July 2016).

<sup>138</sup> Hyogo Framework for Action (see footnote 78 above), priority 1, core indicator 1.1.

<sup>139</sup> For a list of States that have adopted national platforms, see [www.unisdr.org/partners/countries](http://www.unisdr.org/partners/countries).

<sup>140</sup> See Sendai Framework, para. 27 (g).

<sup>141</sup> Law No. 04-20 of 25 December 2004 on Risk Prevention and Disaster Management in the Framework of Sustainable Development.

<sup>142</sup> Cameroon, Decree No. 037/PM of 19 March 2003 on the Establishment, Organization and Functions of a National Observatory on Disasters.

<sup>143</sup> Emergency Response Law of the People's Republic of China (2007). Available from [www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471589.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471589.htm) (accessed on 4 July 2016).

<sup>144</sup> Law on Disaster Management, NS/RKM/0715/007. Approved by the Senate on 30 June 2015. Available from [www.ifrc.org/Global/Publications/IDRL/DM%20acts/Cambodia%20DM%20Law\\_English.pdf](http://www.ifrc.org/Global/Publications/IDRL/DM%20acts/Cambodia%20DM%20Law_English.pdf) (accessed on 4 July 2016).

<sup>145</sup> 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).

<sup>146</sup> Law on Civil Protection and the Prevention and Mitigation of Disasters (2005).

France;<sup>148</sup> Georgia,<sup>149</sup> Guatemala;<sup>150</sup> Haiti;<sup>151</sup> Hungary;<sup>152</sup> India;<sup>153</sup> Indonesia;<sup>154</sup> Italy;<sup>155</sup> Madagascar;<sup>156</sup> Namibia;<sup>157</sup> New Zealand;<sup>158</sup> Pakistan;<sup>159</sup> Peru;<sup>160</sup> Philippines;<sup>161</sup> Republic of Korea;<sup>162</sup> Slovenia;<sup>163</sup> South Africa;<sup>164</sup> Thailand;<sup>165</sup> and the United States of America.<sup>166</sup>

(7) Draft article 9 is to be read together with the rules of general applicability in the present draft articles, including those principally concerned with the response to a disaster.

(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 that 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 assisting actors are meant to be covered by draft article 7. 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. 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 appropriate measures”.

(10) The obligation is to “reduce the risk of disasters”. 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, notably, and most recently, in

<sup>147</sup> Emergency Preparedness Act (2000).

<sup>148</sup> Law No. 2003-699 regarding the Prevention of Technological and Natural Risks and Reparation of Damages (2003).

<sup>149</sup> Law on Public Safety. Document No. 2467-IIIb. Available from <https://matsne.gov.ge/en/document/view/2363013> (accessed on 4 July 2016).

<sup>150</sup> Law No. 109-96 on the National Coordinator for the Reduction of Disasters (1996).

<sup>151</sup> National Risk and Disaster Management Plan (2001).

<sup>152</sup> Act LXXIV on the Management and Organization of the Prevention of Disasters and the Prevention of Major Accidents Involving Dangerous Substances (1999).

<sup>153</sup> Disaster Management Act, No. 53 (2005).

<sup>154</sup> Law No. 24 of 2007 concerning Disaster Management.

<sup>155</sup> Decree on Establishing a National Platform for Disaster Risk Reduction (2008).

<sup>156</sup> Decree No. 2005-866 Laying Down the Procedure for Implementing Law No. 2003-010 of 5 September 2003 on National Risk and Disaster Management Policy (2005).

<sup>157</sup> Disaster Risk Management Act (2012).

<sup>158</sup> National Civil Defence Emergency Management Plan Order 2005 (SR 2005/295).

<sup>159</sup> 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 2011, available from [www.preventionweb.net/files/globalplatform/pakistanofficialstatement.pdf](http://www.preventionweb.net/files/globalplatform/pakistanofficialstatement.pdf).

<sup>160</sup> Law No. 29664 creating the National System for Disaster Risk Management (2011).

<sup>161</sup> Philippine Disaster Risk Management Act 2006.

<sup>162</sup> Countermeasures Against National Disaster Act (1995) and National Disaster Management Act (2010).

<sup>163</sup> Act on Protection against Natural and Other Disasters (2006).

<sup>164</sup> Disaster Management Act No. 57 of 2002.

<sup>165</sup> Disaster Prevention and Mitigation Act (2007).

<sup>166</sup> Disaster Mitigation Act of 2000.

the Sendai Framework, is that the focus should be placed on the reduction of the risk of harm caused by a hazard, as distinguished from the prevention and management 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. The duty being envisaged is 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.

(11) The phrase “by taking 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 word “appropriate”, which accords with common practice. The use of the word “appropriate”, therefore, serves the function of specifying that it is not just any general measures that are being referred to, but rather specific and concrete measures aimed at prevention, mitigation and preparation for disasters. What might be “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 (9) above. Accordingly, the reference to “taking appropriate measures” is meant to indicate the relative nature of the obligation. The fundamental requirement of due diligence is inherent in the concept of “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 that are typically taken within the context of a legislative or regulatory framework. Accordingly, for those States that do not already have such a framework in place, the general obligation to reduce the risk of disasters would also include an obligation to put such a legal framework into place so as to allow for the taking of the “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 to facilitate (hence the word “through”) the taking of disaster risk reduction measures at the domestic level.

(13) The word “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 that anticipates the taking of “appropriate measures” is a *sine qua non* for disaster risk reduction.

(14) The phrase “through legislation and regulations” imports a reference to ensuring that mechanisms for implementation and accountability for non-performance be defined within domestic legal systems. Such issues, though important, are not the only ones that could be the subject of legislation and regulations in the area of disaster risk reduction.

(15) The last clause, namely “to prevent, mitigate, and prepare for disasters”, serves to describe the purpose of the “appropriate” measures that States are to take during the pre-disaster phase to address exposure, vulnerability and the characteristics of a hazard, with the ultimate goal of reducing disaster risk. The phrase tracks the 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. In addition, the Commission was of the

opinion that this clause would also address the Sendai Framework's requirement to prevent new, and reduce existing, risk, and thus strengthen resilience.

(16) The Terminology on Disaster Risk Reduction prepared by the United Nations Office for Disaster Risk Reduction in 2009 illustrates the meaning of each of the three terms used, prevention, mitigation and preparedness:<sup>167</sup>

“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 task transforms to that of mitigation. Partly for this reason, the terms prevention and mitigation are sometimes used interchangeably in casual use.

“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.[<sup>168</sup>]

“Preparedness [is] [th]e 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 to 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.”

The Commission is cognizant that the above terms may be subject to further refinements by the General Assembly on the basis of the outcome of the Open-ended Intergovernmental Expert Working Group on Indicators and Terminology relating to Disaster Risk Reduction, established by its resolution 69/284 of 3 June 2015.

(17) Paragraph 2 lists three categories of disaster risk reduction measures, namely: 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) above, 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. The Commission decided to refer expressly to the three examples listed as reflecting the most prominent types of contemporary disaster risk reduction efforts. The relevance of such measures was further confirmed by their inclusion in the Sendai Framework. 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 the reduction

<sup>167</sup> See [www.unisdr.org/we/inform/terminology](http://www.unisdr.org/we/inform/terminology).

<sup>168</sup> 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”.

of the risk of disasters that are being undertaken at present or which may be undertaken in the future.

(18) The practical structural and non-structural measures that can be adopted are innumerable and depend on the social, environmental, financial, cultural and other relevant circumstances. Practice in the public and private sectors as well as instruments, such as the Sendai Framework, provide a wealth of examples, among which may be cited: community-level preparedness and education; the establishment of disaster risk governance frameworks; contingency planning; setting-up of monitoring mechanisms; land-use controls; construction standards; ecosystems management; drainage systems; social safety-nets addressing vulnerability and resilience; risk disclosure; risk-informed investments; and insurance.

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

(20) The first measure — risk assessments — is about generating knowledge concerning hazards, exposure and vulnerabilities as well as disaster risk trends. 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 and factors, and their characteristics, that drive disaster risk no measure can be defined and enacted effectively. 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 decisions and action. It allows all stakeholders to assume responsibility for their actions and to make a risk-informed determination of priorities for planning and investment 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 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 explained in paragraph (8) above, draft article 9 concerns the taking of the envisaged measures within the State. Any inter-State component would be covered by the duty to cooperate in draft article 7. Accordingly, the extent of any international legal duty relating to any of the listed or 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.

#### **Article 10** **Role of the affected State**

1. The affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control.

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

### Commentary

(1) Draft article 10 is addressed to an affected State in the context of the protection of persons in the event of a disaster upon its territory, or in territory under its jurisdiction or control. The term “role” in the title is a broad formulation intended to cover as well the “function” of a State. Paragraph 1 reflects the obligation of an affected State to protect persons and to provide disaster relief assistance. Paragraph 2 affirms the primary role held by an affected State in the response to a disaster upon its territory, or in a territory under its jurisdiction or control.

(2) Draft article 10 is premised on the core principle of sovereignty as highlighted in the preamble to the present draft set of articles. Both the principles of sovereignty and its corollary, non-intervention, inform the Charter of the United Nations,<sup>169</sup> and numerous international legal instruments and judicial pronouncements.<sup>170</sup> In the context of disaster relief assistance, General Assembly resolution 46/182 affirms: “The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations.”<sup>171</sup>

(3) The duty held by an affected State to ensure the protection of persons and the provision of disaster relief assistance in its territory, as recognized in paragraph 1, stems from its sovereignty. The further reference to “or in territory under its jurisdiction or control” has been inserted to align the text with the expanded meaning of the term “affected State” in draft article 3, subparagraph (b).

(4) The conception of a bond between sovereign rights and concomitant duties upon a State was expressed in particular by Judge Alvarez in an individual opinion in the *Corfu Channel* case:

“By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States.

“Sovereignty confers rights upon States and imposes obligations on them.”<sup>172</sup>

<sup>169</sup> Charter of the United Nations, Art. 2, paras. 1 (“The Organization is based on the principle of the sovereign equality of all its Members”) and 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”).

<sup>170</sup> See, for example, the Declaration on Principles on International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) (noting, *inter alia*, that: “All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community”; “The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention”; and “States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention”). The International Court of Justice has held that: “Between independent States, respect for territorial sovereignty is an essential foundation of international relations” (see *Corfu Channel* case (footnote 66 above), at p. 35).

<sup>171</sup> Annex, para. 3.

<sup>172</sup> *Corfu Channel* case (see footnote 66 above), Individual Opinion by Judge Alvarez, p. 39, at p. 43. See also the opinion expressed by Max Huber, Arbitrator, in the *Island of Palmas* case (*the*



(5) Paragraph 1 emphasizes that the affected State is the actor that holds the duty to protect persons located within its territory or within a territory under its jurisdiction or control. The Commission considered that the term “duty” was more appropriate than the term “responsibility”, which could be misunderstood given its use in other contexts.

(6) Paragraph 2 further reflects the primary role held by a State in disaster response. For the reasons expressed above, the Commission decided to adopt the word “role” rather than “responsibility” in articulating the position of an affected State. The adoption of the term “role” was inspired by General Assembly resolution 46/182, which affirms, *inter alia*, that an affected State “has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory”.<sup>173</sup> Use of the word “role” rather than “responsibility” allows some flexibility for States in the coordination of disaster response activities. Language implying an obligation upon States to direct or control disaster response activities may, conversely, be too restrictive for States that preferred to take a more limited role in disaster response coordination because, for example, they faced a situation of limited resources.

(7) The primacy of an affected State is also grounded in the long-standing recognition in international law that the State is best placed to determine the gravity of an emergency situation and to frame appropriate response policies. The affirmation in paragraph 2 that an affected State holds the primary role in the direction, control, coordination and supervision of disaster relief assistance should be read in concert with the duty of cooperation outlined in draft article 7. In this context, draft article 10, paragraph 2, confirms that an affected State holds the primary position in the cooperative relationships with other relevant actors contemplated in draft article 7.

(8) Reference to the “direction, control, coordination and supervision” of disaster relief assistance is drawn from article 4, paragraph 8, of the Tampere Convention.<sup>174</sup> The Tampere Convention formula is gaining general acceptance in the field of disaster relief assistance and represents more contemporary language.<sup>175</sup> The formula reflects the position that an affected State exercises control over the manner in which relief operations are carried out, which shall be in accordance with international law, including the present draft articles. Such control by an affected State is not to be regarded as undue interference with the activities of an assisting actor.

(9) The Commission departed from the Tampere Convention in deciding not to include a reference to “national law” in its articulation of the primary role of an affected State. In the context of the Tampere Convention, the reference to national law indicates that appropriate coordination requires consistency with an affected State’s domestic law. The Commission decided not to include this reference in light of the fact that the internal law of

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*Netherlands/United States of America*), Award of 4 April 1928, *Reports of International Arbitral Awards*, vol. II, p. 839 (“Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States ...”).

<sup>173</sup> Annex, para. 4.

<sup>174</sup> Tampere Convention (noting that: “Nothing in this Convention shall interfere with the right of a State Party, under its national law, to direct, control, coordinate and supervise telecommunication assistance provided under this Convention within its territory”).

<sup>175</sup> See, for example: the ASEAN Agreement, art. 3, para. 2 (noting that: “The Requesting or Receiving Party shall exercise the overall direction, control, co-ordination and supervision of the assistance within its territory”); and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, United Nations, *Treaty Series*, vol. 1457, No. 24643, p. 133, art. 3 (a) (noting, *inter alia*, that unless otherwise agreed: “The overall direction, control, co-ordination and supervision of the assistance shall be the responsibility within its territory of the requesting State”).

an affected State may not in all cases regulate or provide for the primary position of a State in disaster response situations.

#### **Article 11**

##### **Duty of the affected State to seek external assistance**

To the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors.

#### **Commentary**

(1) Draft article 11 addresses the particular situation in which a disaster manifestly exceeds a State's national response capacity. In these circumstances, an affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors as defined in draft article 3, subparagraph (d). The duty expounded in draft article 11 is a specification of draft articles 7 and 10. Paragraph 1 of draft article 10 stipulates that an affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control. The draft article affirms the obligation of the affected State to do its utmost to provide assistance to persons in a territory under its jurisdiction or control. The duty to cooperate also underlies an affected State's duty to the extent that a disaster manifestly exceeds its national response capacity. Draft article 7 affirms that the duty to cooperate is incumbent upon not only potential assisting States or other potential assisting actors, but also affected States where such cooperation is appropriate. The Commission considers that where an affected State's national capacity is manifestly exceeded seeking assistance is both appropriate and required.

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

(3) The Commission considers that the duty to seek assistance in draft article 11 also derives from an affected State's obligations under international human rights instruments and customary international law. Recourse to international support may be a necessary element in the fulfilment of a State's international obligations towards individuals where the resources of the affected State are inadequate to meet protection needs. While this may occur also in the absence of any disaster, as alluded to in the commentary to draft article 5, a number of human rights are directly implicated in the context of a disaster, including the right to life, the right to adequate food, the right to health and medical services, the right to safe drinking water, the right to adequate housing, clothing and sanitation and the right to

be free from discrimination.<sup>176</sup> The Commission notes that the Human Rights Committee has said (see general comment No. 6 on the right to life) that a State's duty in the fulfilment of the right to life extends beyond mere respect to encompass a duty to protect the right by adopting positive measures.<sup>177</sup> The right to life is non-derogable under the International Covenant on Civil and Political Rights, even in the event of a "public emergency which threatens the life of the nation"<sup>178</sup> — which has been recognized to include a "natural catastrophe" by the Human Rights Committee in general comment No. 29.<sup>179</sup> The International Covenant on Economic, Social and Cultural Rights states that in pursuance of the right to food:

"The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."<sup>180</sup>

The Committee on Economic, Social and Cultural Rights noted, in general comment No. 12 on the right to adequate food (article 11 of the Covenant), that if a State party maintains that resource constraints make it impossible to provide access to food to those in need:

"the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. ... A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food."<sup>181</sup>

The Commission therefore notes that "appropriate steps" to be taken by a State include seeking international assistance where domestic conditions are such that the right to food cannot be realized.

(4) Specific references to the protection of rights in the event of disasters are made in the African Charter on the Rights and Welfare of the Child<sup>182</sup> and the Convention on the Rights of Persons with Disabilities. Under article 23 of the African Charter on the Rights and Welfare of the Child, States shall take "all appropriate measures" to ensure that children seeking or holding refugee status, as well as those who are internally displaced due to events including "natural disaster", are able to "receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties". The Convention on the Rights of Persons with Disabilities refers to the obligation of States towards disabled persons in the event of disasters:

"States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in

<sup>176</sup> See the examples listed in *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598, para. 26.

<sup>177</sup> Report of the Human Rights Committee, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 5.

<sup>178</sup> See art. 4, para. 1.

<sup>179</sup> Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40 (A/56/40)*, vol. I, annex VI, para. 5.

<sup>180</sup> See art. 11.

<sup>181</sup> *Official Records of the Economic and Social Council, Twentieth and Twenty-first Sessions, Supplement No. 2 (E/2000/22-E/C.12/1999/11)*, annex V, p. 102, para. 17.

<sup>182</sup> *Human Rights: A Compilation of International Instruments*, vol. II, *Regional Instruments* (United Nations publication, Sales No. E.97.XIV.1), sect. C, No. 39.

situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.”<sup>183</sup>

The phrase “all necessary measures” may encompass recourse to possible assistance from members of the international community in the event that an affected State’s national capacity is manifestly exceeded. Such an approach would cohere with the guiding principle of humanity as applied in the international legal system. The International Court of Justice affirmed in the *Corfu Channel* case that among general and well-recognized principles are “elementary considerations of humanity, even more exacting in peace than in war”.<sup>184</sup> Draft article 6 affirms the core position of the principle of humanity in disaster response.

(5) The Commission considers that a duty to “seek” assistance is more appropriate than a duty to “request” assistance in the context of draft article 11. The Commission derives this formulation from the duty outlined in the resolution on humanitarian assistance adopted by the Institute of International Law, which notes:

“Whenever the affected State is unable to provide sufficient humanitarian assistance to the victims placed under its jurisdiction or *de facto* control, it shall seek assistance from competent international organizations and/or from third States.”<sup>185</sup>

Similarly, the IFRC Guidelines hold that:

“If an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons.”<sup>186</sup>

In addition, the guiding principles annexed to General Assembly resolution 46/182 also appear to support a duty on the affected State to have recourse to international cooperation where an emergency exceeds its response capacity:

“The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws.”<sup>187</sup>

(6) The alternate formulation of “request” is incorporated in the Oslo Guidelines, which note that: “If international assistance is necessary, it should be requested or consented to by the Affected State as soon as possible upon the onset of the disaster to maximise its effectiveness.”<sup>188</sup> The Commission considers that a “request” of assistance carries an implication that an affected State’s consent is granted upon acceptance of that request by an assisting State or other assisting actor. In contrast, the Commission is of the view that a duty to “seek” assistance implies a broader, negotiated approach to the provision of international aid. The term “seek” entails the proactive initiation by an affected State of a

<sup>183</sup> *Ibid.*, art. 11.

<sup>184</sup> *Corfu Channel* case (see footnote 66 above), at p. 22 (noting that: “The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war ...”).

<sup>185</sup> Resolution on humanitarian assistance (see footnote 18 above), art. III, para. 3.

<sup>186</sup> IFRC Guidelines (see footnote 17 above), guideline 3, para. 2.

<sup>187</sup> General Assembly resolution 46/182, annex, para. 5.

<sup>188</sup> Oslo Guidelines (see footnote 28 above), para. 58.

process through which agreement may be reached. Draft article 11 therefore places a duty upon affected States to take positive steps actively to seek out assistance to the extent that a disaster manifestly exceeds its national response capacity.

(7) An affected State will be in the best position, in principle, to determine the severity of a disaster situation and the limits of its national response capacity. Having said this, this assessment and that its assessment of the severity of a disaster must be carried out in good faith. The principle of good faith is expounded in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,<sup>189</sup> which stipulates that “[e]very State has the duty to fulfil in good faith” obligations assumed by it “in accordance with the Charter of the United Nations”,<sup>190</sup> “obligations under the generally recognized principles and rules of international law”<sup>191</sup> and “obligations under international agreements valid under the generally recognized principles and rules of international law”.<sup>192</sup> A good faith assessment of the severity of a disaster is an element of an affected State’s duty to ensure the protection of persons and provision of disaster relief assistance pursuant to draft article 10, paragraph 1.

(8) The phrase “as appropriate” was adopted by the Commission to emphasize the discretionary power of an affected State to choose from other States, the United Nations, and other potential assisting actors the assistance that is most appropriate to its specific needs. The term further reflects that the duty to seek assistance does not imply that a State is obliged to seek assistance from every source listed in draft article 11. The phrase “as appropriate” therefore reinforces the fact that an affected State has the primary role in the direction, control, coordination and supervision of the provision of disaster relief assistance, as outlined in draft article 10, paragraph 2.

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

## **Article 12**

### **Offers of external assistance**

1. In the event of disasters, States, the United Nations, and other potential assisting actors may offer assistance to the affected State.

2. When external assistance is sought by an affected State by means of a request addressed to another State, the United Nations, or other potential assisting actor, the addressee shall expeditiously give due consideration to the request and inform the affected State of its reply.

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<sup>189</sup> General Assembly resolution 2625 (XXV), annex.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

## 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 10. It is an expression of the principles of solidarity and cooperation, highlighted in the preamble, which underlie the whole set of draft articles on the topic, the latter principle being specifically embodied in draft articles 7 to 9.

(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 conformity with the principle of the sovereignty of States and the primary role of the affected State, stressed in the preamble and which inform 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 the conditions set forth in draft article 13.

(3) Offers of assistance must be made consistent with the principles set forth in these draft articles, in particular in draft article 6. Such offers of assistance 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 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.”<sup>193</sup>

(4) Draft article 12 addresses the question of offers of assistance to affected States made by those most likely to be involved in such offers after the occurrence of a disaster, namely States, the United Nations and other assisting actors. The term “other assisting actor”, qualified by the word “potential”, is defined in draft article 3, subparagraph (d), to comprise a competent intergovernmental organization or a relevant non-governmental organization or entity. The United Nations and intergovernmental organizations not only are entitled, as mandated by their constituent instruments, but are also encouraged to make offers of assistance to the affected State.

(5) Non-governmental organizations or entities may be well placed, because of their nature, location and expertise, to provide assistance in response to a particular disaster. The position of non-governmental organizations or entities in carrying out relief operations is not a novelty in international law. The 1949 Geneva Conventions 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.”<sup>194</sup>

Similarly, Protocol II to the 1949 Geneva Conventions provides that:

“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

<sup>193</sup> Institute of International Law, *Yearbook*, vol. 63, Part II, Session of Santiago de Compostela (1989), p. 339, at p. 345, art. 5.

<sup>194</sup> See, for example, Geneva Convention I, art. 3, para. 2.

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.”<sup>195</sup>

The important contribution of non-governmental organizations or entities, working with strictly humanitarian motives, in disaster response was stressed by the General Assembly in its resolution 43/131 of 8 December 1988 on humanitarian assistance to victims of natural disasters and similar emergency situations. In that resolution, 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” 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”.<sup>196</sup>

(6) The use of the verb “may” in paragraph 1 is intended to emphasize that, in the context of offers of external assistance, what matters is the possibility open to all potential assisting actors to make an offer of assistance, regardless of their status and the legal grounds on which they can base their action.

(7) Paragraph 2 finds inspiration in article 3 (e) of the 2000 Framework Convention on Civil Defence Assistance, according to which: “Offers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time.”<sup>197</sup> The paragraph aims at introducing a greater balance within the text of the draft articles as a whole, by providing a countervailing obligation on the part of States, or other potential assisting actors, when confronted with a request by an affected State for external assistance. The obligation is established in parallel 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. However, the obligation is formulated differently in each of the two articles in recognition that the position of an affected State, in the wake of a disaster falling within the scope of the present draft articles, is different from that of an assisting State or other assisting actor.

(8) 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. Such specification is important since it limits the application of the provision to specific requests, and not general appeals for assistance.

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

(10) Third, paragraph 2 sets an obligation on the addressee or addressees of the specific request, which is structured in two parts: first, to give due consideration to the request; and,

<sup>195</sup> See art. 18, para. 1.

<sup>196</sup> See General Assembly resolution 43/131, paras. 4-5.

<sup>197</sup> See also the ASEAN Agreement, art. 4 (c) (“In pursuing the objective of this Agreement, the Parties shall ... promptly respond to a request for assistance from an affected Party”); and the SAARC [South Asian Association for Regional Cooperation] Agreement on Rapid Response to Natural Disasters (Malé, 26 May 2011), art. 4.

second, to inform the affected State of its or their reply thereto. Both obligations contain the term “expeditiously”, which is a reference to timeliness. The formulation of the obligation to give “due consideration to the request” is drawn from similar wording in article 19, of the articles on diplomatic protection, adopted in 2006.<sup>198</sup> 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 giving the request careful consideration.

### **Article 13**

#### **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 external assistance is made in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner.

### **Commentary**

(1) Draft article 13 addresses consent of an affected State to the provision of external assistance. As a whole, it creates for affected States a qualified consent regime in the field of disaster relief operations. Paragraph 1 reflects the core principle that implementation of international relief assistance is contingent upon the consent of the affected State. Paragraph 2 stipulates that consent to external assistance shall not be withheld arbitrarily, while paragraph 3 places a duty upon an affected State to make known, whenever possible, its decision regarding an offer of external assistance in a timely manner.

(2) The principle that the provision of external assistance requires the consent of the affected State is fundamental to international law. Accordingly, paragraph 3 of the guiding principles annexed to General Assembly resolution 46/182 notes that “humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country”.<sup>199</sup> The Tampere Convention stipulates that “[n]o telecommunication assistance shall be provided pursuant to this Convention without the consent of the requesting State Party”,<sup>200</sup> while the ASEAN Agreement notes that “external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party”.<sup>201</sup> Recognition of the requirement of State consent to the provision of external assistance comports with the position in draft article 10, paragraph 2, that an affected State has the primary role in the direction, control, coordination and supervision of disaster relief assistance in its territory or in territory under its jurisdiction or control.

(3) The recognition, in paragraph 2, that an affected State’s right to refuse an offer is not unlimited reflects the dual nature of sovereignty as entailing both rights and obligations. This approach is reflected in paragraph 1 of draft article 10, which affirms that an affected State “has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory or in territory under its jurisdiction or control”.

(4) The Commission considers that the duty of an affected State to ensure protection and assistance to those within its territory, or in territory under its jurisdiction or control, in the

<sup>198</sup> General Assembly resolution 62/67 of 6 December 2007, and for the commentary thereto, see *Yearbook ... 2006*, vol. II (Part Two), chap. IV, sect. E.

<sup>199</sup> General Assembly resolution 46/182, annex, para. 3.

<sup>200</sup> See art. 4, para. 5.

<sup>201</sup> See art. 3, para. 1.



event of a disaster, is aimed at preserving the life and dignity of the persons affected by the disaster and guaranteeing the access of persons in need to humanitarian assistance. This duty is central to securing the right to life of those within an affected State's territory, or in territory under its jurisdiction or control.<sup>202</sup> The Human Rights Committee has interpreted the right to life as embodied in article 6 of the International Covenant on Civil and Political Rights to contain the obligation for States to adopt positive measures to protect this right.<sup>203</sup> An offer of assistance that is met with refusal might thus under certain conditions constitute a violation of the right to life. The General Assembly reaffirmed in its resolutions 43/131 of 8 December 1988 and 45/100 of 14 December 1990 that "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity".<sup>204</sup>

(5) Recognition that an affected State's discretion regarding consent is not unlimited is reflected in the Guiding Principles on Internal Displacement.<sup>205</sup> The Guiding Principles, which have been welcomed by the former Commission on Human Rights and the General Assembly in unanimously adopted resolutions and described by the Secretary-General as "the basic international norm for protection" of internally displaced persons, provide:<sup>206</sup>

"Consent [to offers of humanitarian assistance] shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance."<sup>207</sup>

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

"Les États sur le territoire desquels de telles situations de détresse [où la population est gravement menacée dans sa vie ou sa santé] existent ne refuseront pas arbitrairement de pareilles offres de secours humanitaires."<sup>208</sup>

In 2003, the Institute of International Law revisited this issue, stipulating in its resolution on humanitarian assistance under the heading "Duty of affected States not arbitrarily to reject *bona fide* humanitarian assistance":

"Affected States are under the obligation not arbitrarily and unjustifiably to reject a *bona fide* offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims or

<sup>202</sup> See International Covenant on Civil and Political Rights, art. 6, para. 1.

<sup>203</sup> General comment No. 6 (see footnote 177 above), para. 5 ("The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures").

<sup>204</sup> General Assembly resolution 43/131, preambular paragraph 8; and General Assembly resolution 45/100, preambular paragraph 6.

<sup>205</sup> E/CN.4/1998/53/Add.2, annex.

<sup>206</sup> A/59/2005, para. 210.

<sup>207</sup> E/CN.4/1998/53/Add.2, annex, principle 25, para. 2.

<sup>208</sup> Institute of International Law, *Yearbook*, vol. 63, Part II (deliberations of the Institute during Plenary Meetings), Session of Santiago de Compostela (1989), p. 339, at p. 345. The French text is presented in mandatory language, while the English translation reads: "States in whose territories these emergency situations exist should not arbitrarily reject such offers of humanitarian assistance." The explanatory text, "où la population est gravement menacée dans sa vie ou sa santé", is drawn from art. 5, para. 1, of that resolution.

would amount to a violation of the ban on starvation of civilians as a method of warfare.”<sup>209</sup>

(6) In the context of armed conflict, the Security Council has frequently called upon parties to the conflict to grant humanitarian access, and on a number of occasions it has adopted measures in relation to humanitarian relief operations.<sup>210</sup> In response to the humanitarian crisis caused by the conflict in Syria, the Security Council has adopted a more proactive approach. In resolution 2139 (2014) of 22 February, it condemned all cases of denial of humanitarian access and recalled that “arbitrary denial of humanitarian access and depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access, can constitute a violation of international humanitarian law”.<sup>211</sup> In resolution 2165 (2014) of 14 July 2014, the Security Council decided to authorize United Nations humanitarian agencies and their implementing partners to use routes across conflict lines and specified border crossings to provide humanitarian assistance to people in need, with notification by the United Nations to the Syrian authorities.<sup>212</sup>

(7) The term “withheld” implies a temporal element in the determination of arbitrariness. Both the refusal of assistance, and the failure of an affected State to make known a decision in accordance with draft article 13, paragraph 3, within a reasonable time frame, may be deemed arbitrary. This view is reflected in General Assembly resolutions 43/131<sup>213</sup> and 45/100,<sup>214</sup> which each include the following preambular paragraphs:

“*Concerned* about the difficulties that victims of natural disasters and similar emergency situations may experience in receiving humanitarian assistance,

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

The 2000 Framework Convention on Civil Defence Assistance likewise reflects among the principles that States parties, in terms of providing assistance in the event of a disaster, undertake to respect that: “Offers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time.”<sup>215</sup>

(8) The term “arbitrary” directs attention to the basis of an affected State’s decision to withhold consent. The determination of whether the withholding of consent is arbitrary must be determined on a case-by-case basis, although as a general rule several principles can be adduced. First, the Commission considers that withholding consent to external assistance is not arbitrary where a State is capable of providing, and willing to provide, an adequate and effective response to a disaster on the basis of its own resources. Second, withholding consent to assistance from one external source is not arbitrary if an affected State has accepted appropriate and sufficient assistance from elsewhere. Third, the withholding of consent is not arbitrary if the relevant offer is not made in accordance with the present draft articles. In particular, draft article 6 establishes that humanitarian assistance must take place in accordance with the principles of humanity, neutrality and

<sup>209</sup> Resolution on humanitarian assistance (see footnote 18 above), art. VIII, para. 1.

<sup>210</sup> In relation to northern Iraq, by Security Council resolution 688 (1991) of 5 April 1991; in relation to Bosnia and Herzegovina, by resolution 770 (1992) of 13 August 1992 and resolution 781 (1992) of 9 October 1992; and in relation to Somalia, by resolution 794 (1992) of 3 December 1992.

<sup>211</sup> Security Council resolution 2139 (2014) of 22 February 2014, preambular para. 10.

<sup>212</sup> Security Council resolution 2165 (2014) of 14 July 2014, operative para. 2.

<sup>213</sup> Preambular paras. 9-10.

<sup>214</sup> Preambular paras. 8-9.

<sup>215</sup> Framework Convention on Civil Defence Assistance, art. 3 (e), also quoted in para. (7) of the commentary to draft art. 12.

impartiality, and on the basis of non-discrimination. Conversely, where an offer of assistance is made in accordance with the draft articles and no alternate sources of assistance are available, there would be a strong inference that a decision to withhold consent is arbitrary.

(9) In 2013, the Secretary-General requested the Office for the Coordination of Humanitarian Affairs to engage in further analysis on the issue of arbitrary withholding of consent to humanitarian relief operations. According to the resulting guidance document,<sup>216</sup> consent is withheld arbitrarily if: (a) it is withheld in circumstances that result in the violation by a State of its obligations under international law; or (b) the withholding of consent violates the principles of necessity and proportionality; or (c) consent is withheld in a manner that is unreasonable, unjust, lacking in predictability or that is otherwise inappropriate. Even if the guidance addresses situations of armed conflict, it provides valuable insights in order to establish factors for the determination of when withholding of consent can be considered “arbitrary”. It is evident that, in fact as well as in law, situations of armed conflict differ from disasters. Nevertheless, in the context of the non-arbitrary withholding of consent, the subjacent legal issue presents itself in similar terms in both kinds of situation.

(10) An affected State’s discretion to determine the most appropriate form of assistance is an aspect of its primary role in the direction, control, coordination and supervision of disaster relief assistance under draft article 10, paragraph 2. This discretion must be exercised in good faith in accordance with an affected State’s international obligations.<sup>217</sup> The Commission encourages affected States to give reasons where consent to assistance is withheld. The provision of reasons is fundamental to establishing the good faith of an affected State’s decision to withhold consent. The absence of reasons may act to support an inference that the withholding of consent is arbitrary.

(11) In this vein, it is generally accepted in international law that good faith has, *inter alia*, the purpose of limiting the admissible exercise of rights and discretion. The International Court of Justice and international arbitral tribunals have in a number of cases examined this function of good faith.<sup>218</sup> Thus, good faith serves as an outer limit of sovereignty and the exercise of discretion, both in cases where the decision of a State necessitates the taking into account of political factors, as well as when the performance of treaty obligations is at stake. *A fortiori* this is the case when the treaty provision in question imposes positive obligations to act in a certain manner, as for example in article 6 of the International Covenant on Civil and Political Rights referred to above.

<sup>216</sup> D. Akande and E. Gillard, *Oxford Guidance on the Law Regulating Humanitarian Relief Operations in Situations of Armed Conflict*, commissioned and to be published later in 2016 by the United Nations Office for the Coordination of Humanitarian Affairs.

<sup>217</sup> See, for example, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex, para. 1 (noting, *inter alia*, that “[e]very State has the duty to fulfil in good faith” obligations assumed by it “in accordance with the Charter of the United Nations”, “obligations under the generally recognized principles and rules of international law” and “obligations under international agreements valid under the generally recognized principles and rules of international law”).

<sup>218</sup> *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion: I.C.J. Reports 1948, p. 57, at pp. 63-64; *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952: I.C.J. Reports 1952, p. 176, at p. 212; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177, at p. 229, para. 145; and *The North Atlantic Coast Fisheries Case (Great Britain, United States of America)*, Reports of International Arbitral Awards, 7 September 1910, vol. XI, at p. 188.

(12) In paragraph 3, the Commission opted for the phrase “make known its decision regarding the offer in a timely manner” to give a certain degree of flexibility to affected States in determining how best to respond to offers of assistance. It is recognized that a rigid duty formally to respond to every offer of assistance may place too high a burden on affected States in disaster situations. This is balanced by the indication that the decision ought to be timely, so as to allow the actor or actors offering the external assistance the opportunity to react appropriately. The Commission considers the current formulation to encompass a wide range of possible means of response, including a general publication of the affected State’s decision regarding all offers of assistance. The paragraph applies to both situations where an affected State accepts assistance and situations in which an affected State withholds its consent.

(13) The Commission considers the phrase “whenever possible” to have a restricted scope. The phrase directs attention to extreme situations where a State is incapable of forming a view regarding consent due to the lack of a functioning Government or circumstances of equal incapacity. The phrase is thus meant to convey the sense of general flexibility on which the provision is built. The phrase also circumscribes the applicability of the expression “in a timely manner”. The Commission is further of the view that an affected State is capable of making its decision known in the manner it feels most appropriate if the exceptional circumstances outlined in this paragraph are not applicable.

#### **Article 14** **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 14 addresses the setting of conditions by the affected State on the provision of external assistance in its territory or in territory under its jurisdiction or control. It affirms the right of the affected State to place conditions on such assistance, in accordance with the present draft articles and applicable rules of international and national law. The draft 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 10, which recognizes the primary role of the affected State in the direction, control, coordination and supervision of disaster relief assistance in its territory, or in territory under its jurisdiction or control. By using the phrasing “may place conditions”, which accords with the voluntary nature of the provision of assistance, draft article 14 acknowledges the right of the affected State to impose 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, 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 the draft articles, there being no need to repeat an enumeration of the humanitarian and legal principles already addressed elsewhere, notably, sovereignty, good faith 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 (internal law) addressing the specific conditions imposed 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 whatever relevant domestic legislation is in existence in the affected State, as envisaged in draft article 15.

(5) The affected State and the assisting actor must both comply with the applicable rules of national law of the affected State. The affected State may 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 affirmation that assisting actors must comply with national law. The ASEAN Agreement, for example, provides in article 13, paragraph 2, that: “Members 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 law<sup>219</sup> or to act in accordance with the law of the affected State.<sup>220</sup>

(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;<sup>221</sup> the head of the relief operation take all appropriate measures to ensure the observance of the national laws and regulations of the affected State;<sup>222</sup> and assisting personnel cooperate with national authorities.<sup>223</sup> 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 and when assistance is

<sup>219</sup> See, for example, the Inter-American Convention to Facilitate Disaster Assistance, *OAS Official Records* (OEA/Ser.A/49 (SEPF), p. 15, arts. VIII and XI, para. d; and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, art. 8, para. 7.

<sup>220</sup> *Ibid.*; and the 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. Available from [www.bsec-organization.org/documents/LegalDocuments/agreementmous/agr4/Documents/Emergencyagreement%20071116.pdf](http://www.bsec-organization.org/documents/LegalDocuments/agreementmous/agr4/Documents/Emergencyagreement%20071116.pdf) (accessed on 4 July 2016).

<sup>221</sup> See, for example, the Convention on the Transboundary Effects of Industrial Accidents, 17 March 1992, United Nations, *Treaty Series*, vol. 2105, No. 36605, p. 457, annex X, para. 1) (“The personnel involved in the assisting operation shall act in accordance with the relevant laws of the requesting Party”).

<sup>222</sup> See, for example, the ASEAN Agreement, art. 13, para. 2 (“The Head of the assistance operation shall take all appropriate measures to ensure observance of national laws and regulations”).

<sup>223</sup> See, for example, MacAlister-Smith, *International Guidelines* (footnote 71 above), 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”).

appropriate. 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 that 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 needs can change as the situation on the ground changes and more information becomes available. It implies that conditions should not be arbitrary, but be formulated with the goal of protecting those affected by a disaster. “Identified” indicates that 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 14 contains a reference to the “scope and type of assistance sought.” This is in line with previous international agreements that contain a similar provision.<sup>224</sup> 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 assisting 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.

(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 15** **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, in particular regarding:

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

<sup>224</sup> See, for example, the Tampere Convention, art. 4, para. 2) (“[a] State Party requesting telecommunication assistance shall specify the scope and type of assistance required”).

- (b) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and the 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 15 addresses the facilitation of external assistance. This includes ensuring that national law accommodates the provision of prompt and effective assistance. To that effect, it further requires, in paragraph 2, 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 necessary measures, within its national law” may include, *inter alia*, legislative, executive or 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. It can also extend to practical measures designed to facilitate external assistance, provided that they are not prohibited by national law. In formulating the draft article in such a manner, the Commission encourages States to allow for temporary non-applicability of their national laws that might unnecessarily hamper assistance in the event of disasters and for appropriate provisions on facilitation 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. Certain facilitation measures may also remain necessary even after the need for assistance has passed, in order to guarantee an efficient and appropriate withdrawal, handover, exit and/or re-export of relief personnel, equipment and unused goods upon termination of external assistance. This is emphasized by the use of the expression “disposal thereof” in paragraph 1 (b). While the focus of draft article 15 is on the affected State, the facilitation for the benefit of persons affected by disasters implies that a transit State will likely take the necessary measures, within its national law, to ensure an effective provision of external assistance.

(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. Guidance on such measures can be found in relevant instruments, such as the 2007 IFRC Guidelines and the related 2013 Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.<sup>225</sup>

(4) Subparagraph (a) envisages facilities for relief personnel. The areas addressed in the subparagraph provide guidance on how personnel can be better facilitated. 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.<sup>226</sup> Waiver or expedition of visa and entry requirements and work permits is necessary to ensure prompt

<sup>225</sup> Elaborated by IFRC, the Office for the Coordination of Humanitarian Affairs and the Inter-Parliamentary Union, 2013.

<sup>226</sup> See, for example, the Framework Convention, art. 4, para. 5 (“[t]he Beneficiary State shall, within the framework of national law, grant all privileges, immunities, and facilities necessary for carrying out the assistance”).

assistance.<sup>227</sup> Without a special regime in place, workers may be held up at borders or be 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 functions.<sup>228</sup> Unnecessary restriction of movement of relief personnel inhibits workers' ability to provide flexible assistance.

(5) Subparagraph (b) addresses equipment and goods, as defined in draft article 3, subparagraph (g), which encompasses supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles, telecommunications equipment and other objects for disaster relief assistance. The Commission intends that this category also includes 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. Customs requirements and tariffs, as well as taxation, should be waived or lessened in order to reduce costs and prevent delay in the provision of goods.<sup>229</sup> Equipment and goods 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. States can therefore reduce, prioritize or waive inspection requirements at borders with regard to equipment and goods related to assisting States and other assisting actors. National regulation can also address overflight and landing rights, tools, minimization of documentation required for import and transit of equipment and goods and temporary recognition of foreign registration of vehicles. Subparagraph (b) does not provide an exhaustive list of potential measures aimed at facilitating external assistance in relation to equipment and goods. For instance, given the crucial role of telecommunications in emergency situations, it will often be necessary to reduce or limit regulations restricting the use of telecommunication equipment or of the radio-frequency spectrum, as envisaged by the 1998 Tampere Convention.

(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, including, when necessary, their translation into other languages, without creating the burden on the affected State to provide this information separately to all assisting actors. This paragraph also confirms the importance of States introducing domestic regulations concerning the facilitation of external assistance in advance of disasters, as envisaged in draft article 9, paragraph 1.

## **Article 16**

### **Protection of relief personnel, equipment and goods**

<sup>227</sup> The League of Red Cross Societies has long noted that "the obtaining of visas for disaster and relief delegates and teams remains 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 13 adopted by the League of Red Cross Societies Board of Governors at its 33rd session, Geneva, 28 October-1 November 1975.

<sup>228</sup> See M. El Baradei, and others, *Model Rules for Disaster Relief Operations*, Policy and Efficacy Studies No. 8 (United Nations publication, Sales No. E.82.XV.PE/8), annex A, rule 16, which states that an affected State must permit assisting "personnel freedom of access to, and freedom of movement within, disaster stricken areas that are necessary for the performance of their specifically agreed functions".

<sup>229</sup> This is stressed in various international treaties. See, for example, the Tampere Convention, art. 9, para. 4; and the ASEAN Agreement, art. 14, para. b.



The affected State shall take the appropriate measures to ensure the protection of relief personnel and of equipment and goods present in its territory, or in territory under its jurisdiction or control, for the purpose of providing external assistance.

### **Commentary**

(1) Draft article 16 establishes the obligation for the affected State to take the measures that would be appropriate in the circumstances to ensure the protection of relief personnel, equipment and goods involved in the provision of external assistance. Taking into account the often chaotic situations arising from disasters, the security concerns for such individuals and objects might create obstacles for the carrying out of activities aimed at giving support to the victims, thus reducing the likelihood that their essential needs would be properly satisfied.

(2) This draft article, therefore, complements draft article 15 in establishing a coherent set of obligations whereby the affected State is expected to perform a series of activities that are necessary in order to guarantee to assisting States and other assisting actors the possibility to deliver efficient and prompt assistance. Nevertheless, the two provisions have a somewhat different focus and approach. Draft article 15 highlights the need for the affected State to establish a domestic legal order capable of facilitating the external assistance, mainly through the adoption of a series of legislative and regulatory actions. On the other hand, the question of the protection of relief personnel and their equipment and goods has traditionally — and for compelling policy reasons owing to its nature and the kind of measures to be adopted — been dealt with as a distinct matter, deserving of its own separate treatment, as the present draft article does.

(3) The measures to be adopted by the affected State may vary in content and can imply different forms of State conduct due to the context-driven nature of the obligation concerned. In particular, the flexibility inherent in the concept of “appropriate measures” suggests that the affected State may assume different obligations depending on the actors involved in potential threats to relief personnel, equipment and goods.

(4) A preliminary requirement for the affected State is to prevent its organs from adversely affecting relief activities. In this case, the duty imposed on the affected State is not to cause harm to the personnel, equipment and goods involved in external assistance through acts carried out by its organs.

(5) Secondly, draft article 16 contemplates a series of measures to be adopted to prevent detrimental activities caused by non-State actors aimed, for instance, at profiting from the volatile security conditions that may ensue from disasters in order to obtain illicit gains from criminal activities directed against disaster relief personnel, equipment and goods. The affected State is not expected to succeed, whatever the circumstances, in preventing the commission of harmful acts but rather to endeavour to attain the objective sought by the relevant obligation. In particular, the wording “appropriate measures” allows a margin of discretion to the affected State in deciding what actions to take in this regard. It requires the State to act in a diligent manner in seeking to avoid the harmful events that may be caused by non-State actors. Measures to be taken by States in the realization of their best efforts to achieve the expected objective are context-dependent. Consequently, draft article 16 does not list the means to achieve the result aimed at, as this obligation can assume a dynamic character according to the evolving situation.

(6) Diverse circumstances might be relevant to evaluate the appropriateness of the measures to be taken in a disaster situation in implementation of this obligation. These include the difficulties that a State might encounter when attempting to perform its regular activities, due to the unruly situation created by the magnitude of the disaster and the

deterioration of its economic situation, and the extent of the resources at the disposal of the concerned State, which might have been seriously affected by the disaster, as well as its capacity to exercise control in some areas involved in the disaster. The same applies to the security conditions prevailing in the relevant area of operations and the attitude and behaviour of the humanitarian actors involved in relief operations. In fact, even if external actors are requested to consult and cooperate with the affected State on matters of protection and security they might disregard the directive role attributed to the local authorities, thus increasing the possibility of their being faced with security risks. Furthermore, if harmful acts are directed against relief personnel, equipment and goods, the affected State shall address them by exercising its inherent competence to repress crimes committed within the area on which a disaster occurs.

(7) International humanitarian actors can themselves contribute to the realization of the goal sought by adopting, in their own planning and undertaking of operations, a series of mitigation measures geared to reducing their vulnerability to security threats. This may be achieved, for instance, through the elaboration of proper codes of conduct, training activities and furnishing appropriate information about the conditions under which their staff are called upon to operate and the standards of conduct they are required to meet. In any event, the adoption of such mitigating measures should not interfere with the taking of autonomous measures by the affected State.

(8) At the same time, it must be emphasized that security risks should be evaluated having in mind the character of relief missions and the need to guarantee to victims an adequate and effective response to a disaster. Draft article 16 should not be misinterpreted as entailing the creation of unreasonable and disproportionate hurdles for relief activities. As already emphasized with regard to draft article 15, the measures that, based on security concerns, may be adopted to restrict the movement of relief personnel should not result in unnecessarily inhibiting the capacity of these actors to provide assistance to the victims of disasters.

(9) Similarly, the possibility of resorting to armed escorts in disaster relief operations to dispel safety concerns should be strictly assessed according to the best practices developed in this area by the main humanitarian actors. Particular attention is drawn to the 2013 Inter-agency Standing Committee Non-binding Guidelines on the Use of Armed Escorts for Humanitarian Convoys,<sup>230</sup> which are designed to assist relevant actors in evaluating, in an appropriate manner, the taking of such a sensitive course of action. As explained in that document, humanitarian convoys will not, as a general rule, use armed escorts unless exceptional circumstances are present that make the use of armed escorts necessary. In order for the exception to be adopted, the consequences of and the possible alternatives to the use of armed escorts should be considered by the relevant actors, especially taking into account that the security concerns that may prevail in disaster situations may be far less serious than those present in other scenarios.

(10) Draft article 16 provides protection for “relief personnel, equipment and goods”, that is, the pertinent persons and objects qualified as such in draft article 3, subparagraphs (f) and (g), and involved in providing external assistance. As emphasized in other provisions of the current draft articles, mainly draft articles 10 and 13, external assistance is contingent upon the consent of the affected State, which has the primary role in the direction, control, coordination and supervision of such activities. Therefore, once the affected State has requested assistance or has accepted offers submitted by assisting States, it shall endeavour to guarantee the protection prescribed in draft article 16.

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<sup>230</sup> Endorsed by the Inter-agency Standing Committee on 27 February 2013.

(11) Such a comprehensive approach is relevant for the proper fulfilment of the obligation enshrined in draft article 16. Domestic authorities are best placed to assure a proper safety framework for the performance of relief activities. In particular, they are requested to evaluate the security risks that might be incurred by international relief personnel, to cooperate with them in dealing with safety issues and to coordinate the activities of external actors, taking into account those concerns.

(12) In accordance with draft article 3, subparagraph (f), the relief personnel that would potentially benefit from draft article 16 may belong to either the civilian or military personnel sent, as the case may be, by an assisting State or other assisting actor, namely a competent intergovernmental organization, or a relevant non-governmental organization or entity, providing assistance to an affected State with its consent. All these categories are, thus, pertinent regarding the application of draft article 16. The reference to the term “external assistance” reflects the position, also affirmed in the commentary to draft article 14,<sup>231</sup> that the articles only regulate the activities of actors that are external to the affected State.

(13) Equipment and goods, as defined in draft article 3, subparagraph (g), relating to the activities of relief personnel, likewise benefit from the application of draft article 16. Being at the disposal of assisting States or other assisting actors, equipment and goods will be covered by the application of draft article 16 independently from their origin. These objects could also be directly acquired in the domestic market of the affected State. The wording “present in its territory or in territory under its jurisdiction or control” is intended to clarify this aspect.

#### **Article 17** **Termination of external assistance**

The affected State, the assisting State, the United Nations, or other assisting actor may terminate external assistance at any time. Any such State or actor intending to terminate shall provide appropriate notification. The affected State and, as appropriate, the assisting State, the United Nations, or other assisting actor shall consult with respect to the termination of external assistance and the modalities of termination.

#### **Commentary**

(1) Draft article 17 deals with the question of termination of external assistance. The provision is comprised 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. The second sentence sets out the requirement that parties intending to terminate assistance provide appropriate notification. The third sentence concerns the requirement that the affected State and, as appropriate, the assisting State, the United Nations, or other assisting actor consult each other as regards the termination of external assistance, including the modalities of such termination. It is understood that the reference to termination of assistance includes both whole or partial termination. An express reference to the United Nations among the potential assisting actors has also been made in draft article 17, given its central role in the provision of relief assistance.

(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 10, paragraph 2, explicitly recognizes that the affected State has the primary role in the direction, control, coordination

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<sup>231</sup> See above para. (2) of the commentary to draft art. 14.

and supervision of disaster relief assistance in its territory. For its part, draft article 13 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.

(3) Draft article 17 does not recognize the right of only the affected State to unilaterally terminate assistance. Instead, the Commission acknowledges that assisting States, the United Nations and other assisting actors may themselves need to terminate their assistance activities. Draft article 17 thus preserves the right of any party to terminate the assistance being provided.

(4) Draft article 17 should be read in light of the purpose of the draft articles, as indicated in draft article 2. Accordingly, 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 so that the termination of external assistance does not adversely impact persons affected by a disaster as a premature decision to terminate assistance could be a setback for recovery.

(5) 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 either the affected State or one or more of the assisting actors feel they must cease operations. Circumstances leading to termination may include instances in which the resources of an assisting State or other assisting actor are depleted or where the occurrence of another disaster makes the diversion of resources necessary. In a similar vein, affected States ought to be able to terminate assistance that had become irrelevant or had deviated from the original offers. Draft article 17 is flexible, allowing for the adjustment of the duration of assistance according to the circumstances, while implying that parties should consult in good faith. Draft article 17 is drafted in bilateral terms, but it does not exclude the scenario of multiple assisting actors providing external assistance.

(6) In the Commission's 1989 draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and draft optional protocols thereto,<sup>232</sup> article 9, paragraph 2, states that "the diplomatic courier may not be appointed from among persons having the nationality of the receiving State except with the consent of that State, which may be withdrawn at any time". According to the corresponding commentary, "the words 'at any time' are not intended to legitimize any arbitrary withdrawal of consent".<sup>233</sup>

(7) The second sentence establishes a requirement of notification by the party intending to terminate 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.

(8) The requirement to consult, in the third sentence, reflects, as stressed in the preamble, the spirit of solidarity and cooperation implicit throughout the draft articles and the principle of cooperation enshrined in draft articles 7 and 8. 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. The

<sup>232</sup> *Yearbook ... 1989*, vol. II (Part Two), para. 72.

<sup>233</sup> *Ibid.*, para. (4) of the commentary to draft art. 9.

reference to the term “as appropriate” clarifies that the anticipated consultation takes place between the affected 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.

### **Article 18**

#### **Relationship to other rules of international law**

1. The present draft articles are without prejudice to other applicable rules of international law.
2. The present draft articles do not apply to the extent that the response to a disaster is governed by the rules of international humanitarian law.

### **Commentary**

(1) Draft article 18 deals with the relationship between the draft articles and other rules of international law. It seeks to clarify the way in which the draft articles interact with certain rules of international law that either deal with the same subject matter as the draft articles or are not directly concerned with disasters but would nonetheless apply in situations covered by the draft articles.

(2) The reference to “other rules” in the title aims at safeguarding the continued application of existing obligations regarding matters covered by the present draft articles. The formulation “other applicable rules of international law”, in paragraph 1, is intentionally flexible, 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.

(3) Paragraph 1 is meant to cover different forms of “other applicable rules of international law”. Those include, in particular, more detailed rules enshrined in treaties the scope of which falls *ratione materiae* within that of the present draft articles (for example, regional or bilateral treaties on mutual assistance in case of disasters) as well as those included in treaties devoted to other matters but which contain specific rules addressing disaster situations.<sup>234</sup>

(4) This draft article also deals, in paragraph 1, with the interaction between the present draft articles and rules of international law that are not directly concerned with disasters, but that nonetheless may be applied in the event of disasters. Examples would be provisions concerning the law of treaties — in particular, those related to supervening impossibility of performance and fundamental change of circumstances — as well as the rules on the responsibility of States and international organizations and the responsibility of individuals. The provision confirms that such a category of rules is not displaced by the present draft articles.

(5) The without prejudice clause in draft article 18 also applies to the rules of customary international law. In fact, the draft articles do not cover all the issues that may be relevant in the event of disasters. Moreover, the draft articles do not intend to preclude the further development of rules of customary international law in this field. As such, the draft article is inspired by the preambular paragraph of the Vienna Convention on the Law of Treaties of 1969,<sup>235</sup> which states that “the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention”.

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<sup>234</sup> See, for example, sect. 5, art. F, of the annex to the 1965 Convention on Facilitation of International Maritime Traffic (modified in 1978), United Nations, *Treaty Series*, vol. 1110, No. 8564, p. 318, at p. 320.

<sup>235</sup> United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

(6) In addition, it should be borne in mind that rules of general application not directly concerned with disasters might also be contained in treaty law. The Commission therefore considered that the wording “other applicable rules of international law” was the most appropriate to indicate all rules of international law that might interact with the draft articles, for it expresses the idea that the without prejudice clause in draft article 18 applies to all categories of international law rules.

(7) Paragraph 2 deals specifically with the relationship between the draft articles and international humanitarian law. The provision is formulated in a manner intended to clarify the relationship by giving precedence to the rules of international humanitarian law.

(8) The Commission considered including an express exclusion of the applicability of the draft articles in situations of armed conflict as a further element in the definition of “disaster” (draft article 3, subparagraph (a)), so as to avoid any interpretation that, for purposes of the draft articles, armed conflict would be covered to the extent that the threshold criteria in draft article 3 were satisfied. Such approach was not followed since a categorical exclusion could be counterproductive, particularly in situations of “complex emergencies” where a disaster occurs in an area where there is an armed conflict. A blank exclusion of the applicability of the draft articles because of the coexistence of an armed conflict would be detrimental to the protection of the persons affected by the disaster, especially when the onset of the disaster predated the armed conflict.<sup>236</sup>

(9) In such situations, the rules of international humanitarian law shall be applied as *lex specialis*, whereas the rules contained in the present draft articles would continue to apply “to the extent” that legal issues raised by a disaster are not covered by the rules of international humanitarian law. The present draft articles would thus contribute to filling legal gaps in the protection of persons affected by disasters during an armed conflict while international humanitarian law shall prevail in situations regulated by both the draft articles and international humanitarian law. In particular, the present draft articles are not to be interpreted as representing an obstacle to the ability of humanitarian organizations to conduct, in times of armed conflict (be it international or non-international) even when occurring concomitantly with disasters, their humanitarian activities in accordance with the mandate assigned to them by international humanitarian law.

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<sup>236</sup> See above para. (10) of the commentary to draft art. 3, subparagraph (a).