

Comments of Australia on the ILC Draft Articles on the Protection of Persons in the Event of Disasters

Australia welcomes the opportunity to comment on the International Law Commission's *Draft Articles on the Protection of Persons in the Event of Disasters* (the Draft Articles).

In light of the increased frequency of disasters around the globe, Australia is supportive of international efforts to encourage States to engage with disaster risk reduction initiatives and to better protect and assist persons affected by disasters. Australia appreciates the considerable work the International Law Commission has done to draw out and consolidate the issues relating to disaster risk reduction and the protection of persons in this context.

Australia is hopeful that the International Law Commission's work in highlighting the complex array of challenges inherent in international disaster risk reduction and response, coupled with the adoption in March 2015 of the *Sendai Framework for Disaster Risk Reduction 2015-2030* (the Sendai Framework), will reinforce continued international cooperative efforts. Initiatives such as the Sendai Framework, aimed at encouraging collaboration and the development of relationships of trust, are central to the provision of quality, flexible, and tailored assistance in both situations of large-scale disasters (as contemplated by draft Article 3 of the Draft Articles) and recurring small-scale and slow-onset disasters.

Insofar as the Draft Articles consolidate existing rules of international law, Australia considers that they will usefully serve as a guide for States in implementing their prevailing international obligations. For example, Australia welcomes the confirmation that existing human rights conventions continue to apply in disaster situations, as sought to be captured in draft Articles 2, 5, and 6. Australia notes that such conventions contain derogable and non-derogable rights, absolute rights and an obligation to take steps, including through international assistance and cooperation, to the maximum of a State's available resources to progressively realise economic, social and cultural rights.

To the extent that the Draft Articles also seek to progressively develop the law relating to the protection of persons in the event of disasters, Australia would encourage further discussion as to whether the proposed creation of new duties for States or the novel application of principles drawn from other areas represent the most effective approach. Australia emphasises the importance that the International Law Commission's work be received with the broadest possible consensus; progressive development of the law in this field pursued too rapidly may raise an impediment to achieving such consensus.

Australia would wish to see a careful balance struck between those elements of the Draft Articles which may encroach on the core international law principles of State sovereignty and non-intervention as against the likelihood that their implementation will effectively assure tangible and practical benefits in terms of reducing the risk of, ameliorating the effects of, or improving recovery from disasters.

The Draft Articles (quite properly) proceed on the basis that the consent of the affected State remains a condition precedent to the provision of external assistance. However, Australia has reservations about the importation into draft Article 14(2) of a duty on the affected State not to "arbitrarily" withhold its consent. Such a duty does not exist at customary international law. Australia queries the standards against which

– and by whom – any perceived “arbitrariness” would be measured, and also whether it would be beneficial in practice to place on States which may be reluctant to seek or accept external assistance a duty to do so. Failure to comply with any such duty would not give rise to any corresponding right of intervention by other States wishing to provide assistance. Australia is similarly cautious as to the effect of draft Article 19, which appears to introduce limits on the prerogative of the affected State to freely withdraw its consent to the presence of external actors providing assistance on its territory.

Australia is also mindful of creating duties that States may lack the capacity to fully implement. Whilst Australia welcomes the reflection in draft Article 12 of the primary role of the affected State in preventing and responding to disasters, Australia would approach with care the assertion, in draft Article 12(1), of an unqualified duty on the part of the affected State to ensure the protection of persons and provision of disaster relief and assistance on its territory. Likewise, Australia submits that it would be of value to further consider the capacity of all States to fulfil the duties embodied, for example, in draft Articles 11(1), 17 and 18.

Australia observes that there is an existing body of international law sufficient to provide the legal underpinnings of disaster risk reduction and response efforts. This is in turn complemented by a broad range of domestic legal and policy decisions which more properly fall within the sovereign competence of States. Accordingly, Australia considers that the Commission’s work will be most valuable where it assists States to understand and implement their prevailing obligations. In that regard, Australia compliments the Commission on its extensive consideration of existing obligations and presentation of the Draft Articles which consolidate those obligations. On the other hand, those elements of the Draft Articles which seek to develop or create new duties or obligations would, for the time being, seem to be more appropriately pursued as best practice principles or guidelines.

Australia thanks the Secretary-General for the opportunity to comment on the *Draft Articles on the Protection of Persons in the Event of Disasters* and expresses its appreciation for the work of the International Law Commission in this complex area.