

A universal treaty for disasters? Remarks on the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters

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Abstract

This article analyzes the Draft Articles on the Protection of Persons in the Event of Disasters adopted by the International Law Commission in 2016 in light of the recommendation made by the Commission to elaborate a convention on the basis of this project. While the latter proposal is still under evaluation by the United Nations General Assembly, which has recently decided to postpone its decision until 2020, such a potential outcome would represent a significant novelty in the area of disaster law, currently characterized by a fragmented legal framework and the lack of a universal flagship treaty. The Draft Articles thus aim to provide a systematization of the main legal issues relevant in the so-called disaster cycle, with solutions that accommodate the different interests of actors involved in a disaster scenario – namely, the affected State, external assisting actors and disaster victims – using a complex “checks and balances” approach.

Keywords: humanitarian assistance, international disaster law, IFRC, disasters, IDRL Guidelines.

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Introduction: Setting the scene of international disaster law

As emphasized by the impressive data provided in the International Federation of Red Cross and Red Crescent Societies' (IFRC) *World Disasters Report 2018*,¹ natural and technological disasters are a commonplace phenomenon, representing one of the most significant challenges for humanitarian actors and affected States. Despite its importance, the international legal architecture addressing prevention and response to disasters is commonly depicted along similar lines: as international law has managed this topic “in a confused and uncoordinated manner”,² through an “ad hoc incoherence of legal and institutional response”,³ the result is “a rather scattered and heterogeneous collection of instruments”.⁴ Indeed, the absence of an overarching and universal “flagship treaty”⁵ represents an anomaly in comparison to other areas of law (for example, international humanitarian law (IHL)) and is due largely to past failures at the United Nations (UN) level, such as the 1984 Draft Convention on Expediting the Delivery of Emergency Assistance,⁶ mirroring the unsuccessful experience of the International Relief Union in the 1920s.⁷

As a result, the legal landscape pertaining to prevention and response to disasters is composed of a “pot pourri”⁸ of binding instruments with varying

- 1 IFRC, *World Disasters Report 2018: Leaving No One Behind*, Geneva, 2018, p. 168. According to this report, in the last decade (2008–17) more than 3,700 natural hazards have been recorded, 2 billion individuals have been affected by such events, around 700,000 people have lost their lives as a result of disasters, and damages have been estimated at \$1.65 trillion. Such data do not include technological hazards, armed conflicts or conflict-related famine.
- 2 Andrea de Guttry, “Surveying the Law”, in Andrea de Guttry, Marco Gestri and Gabriella Venturini (eds), *International Disaster Response Law*, Springer, Berlin, 2012, p. 4.
- 3 David Caron, “Preface”, in David Caron, Michael Kelly and Anastasia Telesetsky (eds), *The International Law of Disaster Relief*, Cambridge University Press, Cambridge, 2014, p. xx.
- 4 David Fisher, “Domestic Regulation of International Humanitarian Relief in Disasters and Armed Conflict: A Comparative Analysis”, *International Review of the Red Cross*, Vol. 89, No. 866, 2007, p. 353.
- 5 David Fisher, “The Future of International Disaster Response Law”, *German Yearbook of International Law*, Vol. 55, 2012, p. 89.
- 6 See the failure of the 1984 Draft Convention on Expediting the Delivery of Emergency Assistance, UN Doc. A/39/267/Add.2–E/1984/96/Add.2, 18 June 1984, elaborated at the initiative of the UN Disaster Relief Coordinator.
- 7 Convention Establishing an International Relief Union, 135 LNTS 247, 12 July 1927 (entered into force 27 December 1932). Due to multiple elements such as financial shortcomings, lack of support by involved States and increasing isolationism, the International Relief Union was largely ineffective in the 1930s and attempts to reactivate it in the aftermath of World War II failed, thus leading to the transfer of its assets to the UN Economic and Social Council in 1967. See Peter MacAlister-Smith, “The International Relief Union: Reflections on Establishing an International Relief Union of July 12, 1927”, *Legal History Review*, Vol. 54, 1986.
- 8 Craig Allan and Therese O’Donnell, “A Call to Alms? Natural Disasters, R2P, Duties of Cooperation and Unchartered Consequences”, *Journal of Conflict and Security Law*, Vol. 17, No. 3, 2012, p. 345.

impacts. Several universal treaties have addressed specific types of disasters, in particular technological ones,⁹ or specific forms of assistance,¹⁰ although these are limited by their low ratification numbers.¹¹ Regional treaties and soft law, especially in Europe, Asia, the Caribbean and the Americas,¹² are conversely assuming an increasingly important role, giving rise to a phenomenon of “regionalization” of international disaster law. Indeed, in the past decades there have been several binding documents developed by regional organizations in this area, coupled with the creation of institutional mechanisms of coordination and cooperation, in light of mandates provided by recent founding treaties of relevant regional organizations making express reference to the possibility of cooperating with regard to disaster settings.¹³ However, the effective impact or self-sufficient character of such regional initiatives can be doubted,¹⁴ especially in the face of large-scale disasters. The numerous bilateral treaties lack coherence, being sometimes limited to an exchange of good practices and information between States, while in significant regions, such as Africa, Asia and the Middle East, there is a very limited number of such instruments.¹⁵

In light of States' reluctance to address the legal regulation of disaster preparation and response through binding provisions, this area has also been characterized by an impressive number of soft-law instruments.¹⁶ Such documents range from UN strategies for disaster risk reduction endorsed by UN General Assembly resolutions¹⁷ to instruments elaborated by non-State actors

- 9 E.g. Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1457 UNTS 134, 26 September 1986 (entered into force 26 February 1987).
- 10 See in particular the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, 2296 UNTS 5, 18 June 1998 (entered into force 8 January 2005).
- 11 For instance, only forty-nine States are parties to the Tampere Convention, above note 10.
- 12 For an overview of regional instruments, see the database of the International Disaster Law Project, available at: <http://disasterlaw.sssup.it/disasters-database/list-of-instruments-included-in-the-database/> (all internet references were accessed in December 2018). On the “regionalization” of international disaster law, see IFRC, *Law and Legal Issues in International Disaster Response: A Desk Study*, Geneva, 2007, pp. 62–79.
- 13 See Constitutive Act of the African Union, 2158 UNTS 3, 11 July 2000 (entered into force 26 May 2001), Art. 13(1)(e); Treaty on the Functioning of the European Union, 2702 UNTS 3, 13 December 2007 (entered into force 1 December 2009), Art. 196.
- 14 For instance, the Inter-American Convention to Facilitate Disaster Assistance elaborated by the Organization of American States in 1991 and entered into force on 16 October 1996 (available at: www.oas.org/juridico/english/signs/a-54.html) has only six States Parties. For the irrelevance of the Arab Cooperation Agreement on Regulating and Facilitating Relief Operations, concluded by the League of Arab States in 1987, see IFRC, above note 12, p. 78. An unofficial English translation of this treaty is available at: www.ifrc.org/Docs/idrl/N644EN.pdf.
- 15 A. de Guttry, above note 2, pp. 11–17.
- 16 For a survey, see the International Disaster Law Project database, above note 12. See also Dug Cubie, “An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?”, *Journal of International Humanitarian Legal Studies*, Vol. 2, No. 2, 2011; Tommaso Natoli, “Non-State Humanitarian Actors and Human Rights in Disaster Scenarios: Normative Role, Standard Setting and Accountability”, in Flavia Orzi Giustiniani, Emanuele Sommaro, Federico Casolari and Giulio Bartolini (eds), *Routledge Handbook of Human Rights and Disasters*, Routledge, London, 2018.
- 17 For example, the Sendai Framework for Disaster Risk Reduction, UN Doc. A/RES/ 69/283, 23 June 2015 (Sendai Framework).

such as humanitarian organizations and NGOs, reflecting trends towards informal international law-making approaches.¹⁸ However, the concrete impact of such instruments is hardly predictable. Sometimes they might assume a substantial role, as exemplified by the Sphere Project, mentioned in the Kampala Convention¹⁹ as a reference document for State actions, or by the 1994 Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations in Disaster Relief, whose acceptance by NGOs has been required in order to access funds provided by main donors.²⁰ Still, such documents hardly escape the typical difficulties of soft-law instruments, as evidenced by the positive but lengthy progress of influencing regulatory changes at the domestic level experienced by the “Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance” (IDRL Guidelines)²¹ adopted by the 27th International Conference of the Red Cross and Red Crescent.²²

Against this background, the activities recently carried out by the UN International Law Commission (ILC) on the topic of “Protection of Persons in the Event of Disasters” might represent the first step toward a significant law-making development in this area. As will be further discussed below, in recent years the ILC has been engaged in analyzing the abovementioned topic with the purpose of elaborating a series of Draft Articles on the Protection of Persons in the Event of Disasters (DAs) aimed at providing a legal framework for challenges raised in these contexts. This paper will thus assess activities carried out by the ILC in this area. First, the analysis will focus on the drafting history of the DAs and law-making techniques adopted by the Special Rapporteur and the ILC in order to subsequently explore and critically assess solutions endorsed in the text. In this regard attention will be paid to the structure of the DAs, arranged into “vertical” and “horizontal” dimensions, and the content of relevant provisions. Finally, the paper will address positions expressed by States on the recommendation made by the ILC to elaborate a universal treaty on the basis of the DAs, and will evaluate whether the current text is fit for this purpose.

18 Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking*, Oxford University Press, Oxford, 2012.

19 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 23 October 2009 (entered into force 6 December 2012), Art. 1(q), available at: <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>.

20 Sandesh Sivakumaran, “Techniques in International Law-Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief”, *European Journal of International Law*, Vol. 28, No. 4, 2017, pp. 1103–1104.

21 For the text of the IDRL Guidelines, see the Annex to Resolution 4 of the 30th International Conference of the Red Cross and Red Crescent, reproduced in IFRC/ICRC, *Report of the 30th International Conference of the Red Cross and Red Crescent*, Geneva, 2007, pp. 51–58.

22 For an assessment, see IFRC, *Ready or Not? Third Progress Report on the Implementation of the IDRL Guidelines*, Geneva, 2015, pp. 7–9.

Creation of the Draft Articles on the Protection of Persons in the Event of Disasters

The ILC, following an initial discussion held in 2006, decided in 2007 to include the topic “Protection of Persons in the Event of Disasters” in its programme of work,²³ a decision largely influenced by the impact and challenges raised by the 2004 tsunami affecting the Indian Ocean. In 2016, on the basis of the eight reports submitted by Special Rapporteur Eduardo Valencia-Ospina and comments²⁴ provided by States, international organizations, the International Committee of the Red Cross (ICRC) and the IFRC on the twenty-one draft articles adopted on first reading in 2014,²⁵ the ILC adopted the final text of the eighteen DAs and their commentary on second reading.²⁶ The relevance of this text is amplified by the choice made by the ILC to recommend “to the General Assembly the elaboration of a convention on the basis of the draft articles”,²⁷ thus significantly diverging from recent trends of the ILC favouring “soft” final forms for topics under examination, such as guidelines or recommendations.²⁸ Indeed, since the late 1990s, the ILC has recommended the immediate drafting of a treaty only with regard to the Draft Articles on Diplomatic Protection,²⁹ coupled with few examples where the ILC has requested the General Assembly to take note of adopted texts and, “at a later stage”, to consider convening a diplomatic conference.³⁰ The choice made in this case reflects the characteristics of the proposed text, which, as in past instances, has been

23 ILC, *Report of the International Law Commission: Fifty-Ninth Session (7 May–5 June and 9 July–10 August 2007)*, UN Doc. A/62/10, 2007, p. 230, para. 375.

24 See comments and observations received from governments and international organizations, UN Doc. A/CN.4/696, 14 March 2016, and UN Doc. A/CN.4/696/Add.1, 28 April 2016.

25 ILC, *Report of the International Law Commission: Sixty-Sixth Session (5 May–6 June and 7 July–8 August 2014)*, UN Doc. A/69/10, 2014, para. 55. For an analysis of the text adopted on first reading, see Giulio Bartolini, Tommaso Natoli and Alice Riccardi, *Report of the Expert Meeting on the ILC's Draft Articles on the Protection of Persons in the Event of Disasters*, International Law and Disasters Working Papers Series, Vol. 3, 2015, available at: <http://disasterlaw.sssp.it/wp-content/uploads/2014/01/Bartolini-Natoli-Riccardi-Report-of-the-Expert-Meeting-2015-DEF.pdf>.

26 For the text of the DAs with commentaries, see ILC, *Report of the International Law Commission: Sixty-Eighth Session (2 May–10 June and 4 July–12 August 2016)*, UN Doc. A/71/10, 2016 (DAs Report), pp. 13–73, available at: http://legal.un.org/ilc/reports/2016/english/a_71_10.pdf. The text of the DAs is also reproduced in Annex 1, below.

27 DAs Report, above note 26, p. 13, para. 46.

28 See Jacob Katz Cogan, “The Changing Form of the International Law Commission's Work”, in Roberto Virzo and Ivan Ingravallo (eds), *Evolutions in the Law of International Organizations*, Brill, Leiden and Boston, MA, 2015.

29 ILC, *Report of the International Law Commission, Fifty-Eighth Session (1 May–9 June and 3 July–11 August 2006)*, UN Doc. A/61/10, 2006, para. 46.

30 See the ILC recommendations regarding the Draft Articles on Responsibility of States (ILC, *Report of the International Law Commission: Fifty-Third Session (23 April–1 June and 2 July–10 August 2001)*, UN Doc. A/56/10, 2001, paras 72–73), the Draft Articles on the Law of Transboundary Aquifers (ILC, *Report of the International Law Commission: Sixtieth Session (5 May–6 June and 7 July–8 August 2008)*, UN Doc. A/63/10, 2008, para. 49), the Draft Articles on Responsibility of International Organizations (ILC, *Report of the International Law Commission, Sixty-Third Session (26 April–3 June and 4 July–12 August 2011)*, UN Doc. A/66/10, 2011, para. 85) and the Draft Articles on the Effects of Armed Conflicts on Treaties (*ibid.*, para. 97).

drafted with “the look and feel” of a convention,³¹ this is evidenced by the mandatory language used for relevant provisions, with the constant use of the verb “shall” rather than “softer” alternative formulas such as “should”, and the inclusion of a preamble, commonly included by the ILC for texts expected to be translated into a treaty.³²

The final result will obviously depend on States’ attitudes, which are explored in detail below. Through its Resolution 71/141 adopted in December 2016, the UN General Assembly requested States to submit “comments concerning the recommendation by the Commission to elaborate a convention on the basis of these articles” and included this item in its 2018 agenda.³³ In 2018, States provided diverging views on the final form of the DAs: some were in favour of translating them into a binding text, while others were against this potential outcome. This created a stalemate situation leading to the adoption of Resolution 73/209³⁴ in December 2018, which reiterated the request to receive comments by States on the proposal to adopt a treaty and noted the decision to include this topic in the General Assembly’s 2020 agenda.

The law-making techniques and structure of the DAs

Taking into account the variegated legal framework provided by instruments addressing disasters, it was a complex matter for the ILC to limit its activities to traditional codification efforts based on extensive State practice, precedent and doctrine.³⁵ As a result, “the draft articles contain elements of both progressive development and codification of international law”³⁶ without clearly spelling out the current nature of proposed provisions. Although some members of the Commission spoke against the ambiguity of this approach,³⁷ it allowed the elaboration of a more comprehensive text that was able both to address issues not yet sufficiently crystallized into practice and to provide a broad systematization to the fragmented existing legal framework.

Furthermore, the ILC has not apparently “abused” this flexible law-making approach, as aspects of progressive development are mainly limited to provisions

31 For a similar approach related to the Draft Articles on State Responsibility, see David Caron, “The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority”, *American Journal of International Law*, Vol. 96, No. 4, 2002, p. 862.

32 See, for example, the Draft Articles on the Law of Transboundary Aquifers, with commentaries, in ILC, *Report of the International Law Commission, Sixtieth Session (5 May–6 June and 7 July–8 August 2008)*, UN Doc. A/63/10, 2008, para. 53).

33 UN Doc. A/RES/71/141, 13 December 2016, para. 2.

34 UN Doc. A/RES/73/209, 20 December 2018.

35 According to Article 15 of the Statute of the ILC adopted in 1947, “the expression ‘codification of international law’ is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine”.

36 DAs Report, above note 26, pp. 17–18, para. 2.

37 See Sean D. Murphy, “Protection of Persons in the Event of Disasters and Other Topics: The Sixty-Eighth Session of the International Law Commission”, *American Journal of International Law*, Vol. 110, No. 4, 2016, p. 719; Dire Tladi, “The International Law Commission’s Draft Articles on the Protection of Persons in the Event of Disasters: Codification, Progressive Development or Creation of Law from Thin Air?”, *Chinese Journal of International Law*, Vol. 16, No. 3, 2017, p. 426.

addressing disaster risk reduction, the duties to cooperate and request assistance, and the consent of the affected State. While criticism from some States implied that solutions adopted in these provisions were not yet grounded in solid practice, other States supported the proposed solutions as they provided a systemic approach to the issue.³⁸ This self-restrained approach is also emphasized by the overall structure of the DAs. The ILC's final text is a short one, composed of only a preamble and eighteen articles, some of which have a mere functional role, such as provisions addressing the "Scope" (Article 1) and "Purpose" (Article 2) of the project, and the "Use of Terms" (Article 3). This solution, coupled with the decision to draft basic general principles rather than detailed provisions, permitted the ILC to limit instances where it was required to resolve contentious issues; the final result is a sort of framework convention whose content might appear elusive to some extent.

The Special Rapporteur managed the topic through complementary law-making techniques rightly qualified as being inspired by a "holistic body approach" that aimed to "systematize matters and provide order to a rather messy area of the law".³⁹ First, a "quantitative" analysis of relevant practice was a driving factor for inspiring the content of the proposed provisions, whose final text has at times resulted in the need to opt for one of the different wording options provided by practice, especially when practice was not entirely consistent or required to be complemented to provide overall coherence to the DAs.⁴⁰ The extensive survey of practice broadly relevant for the topics under examination ranged from binding texts to numerous references to soft-law instruments, including documents elaborated by non-governmental actors, such as groups of experts, NGOs and the IFRC.⁴¹ Regardless of the character of such latter instruments as "even softer than soft law",⁴² their substantial relevance in light of their capacity to capture elements pertaining to this area of law and to provide oriented solutions for involved actors has been particularly emphasized in this project. Second, the Special Rapporteur⁴³ made use of analogy, taking inspiration from provisions belonging to other branches of international law – such as IHL, international human rights law, international environmental law and refugee

38 For comments made by States, international organizations, the ICRC and the IFRC, see above note 24.

39 S. Sivakumaran, above note 20, p. 1131.

40 See for instance, the analysis below regarding procedural obligations on notifications provided in Articles 12.2, 13.3 and 17 of the DAs.

41 As an example see Eduardo Valencia-Ospina, *Seventh Report on the Protection of Persons in the Event of Disasters*, UN Doc. A/CN.4/668, 27 February 2014, paras 15–24, with references to universal, regional and bilateral treaties, UN General Assembly resolutions, recommendations of the Council of Europe, and documents of the Institut de Droit International (IDI), IFRC, Inter-Agency Standing Committee and UN Office for the Coordination of Humanitarian Affairs.

42 Walter Kälin, "How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework", 19 December 2001, p. 6, available at: www.brookings.edu/wp-content/uploads/2016/06/20011219.pdf. The Guiding Principles on Internal Displacement are cited in the commentary to the DAs on several occasions: see DAs Report, above note 26, pp. 30–31, 60. On this issue see Arnold Pronto, "Understanding the Hard/Soft Distinction in International Law", *Vanderbilt Journal of Transnational Law*, Vol. 48, No. 4, 2015.

43 For a preliminary assessment that international disaster law shares fundamental principles with other branches of international law, see Eduardo Valencia-Ospina, *Preliminary Report on the Protection of Persons in the Event of Disasters*, UN Doc. A/CN.4/598, 5 May 2008, paras 20, 24.

law – in order to reinforce and provide a stronger legal basis for proposed solutions dealing with disaster settings, as exemplified by Articles 6 (humanitarian principles), 9 (disaster risk reduction), 12 (offers of assistance) and 13 (consent). Finally, concerning Article 5 dealing with human rights, the substantive legal framework underpinning some issues raised by relief operations was directly “outsourced” from other branches of international law.

As for their structure, the DAs are not comprehensively systematized, lacking separate sections or parts as provided in past ILC projects. Nonetheless, the provisions can be implicitly accommodated along different lines that align with the same “purpose” of the project as identified in Article 2, which makes reference to the DAs’ aim “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”.

This provision encompasses some of the main aspects addressed by the text. First, as the legal and operational challenges generated by disasters had brought attention to the overall disaster cycle,⁴⁴ the DAs not only included the traditional focus on the relief and recovery phases but also addressed disaster risk reduction, an additional key component of the institutional and legal discourse pertaining to this area. In such a manner, the ILC’s project favoured “a more holistic approach”⁴⁵ to disaster law issues.

Second, the ILC was required to balance the different and potentially diverging perspectives of involved actors, namely (a) the affected State, whose sovereignty represents one of the pillars of the text, as reaffirmed in the preamble;⁴⁶ (b) external assisting actors, such as States, international organizations, NGOs and “entities” (a term of art intended to include the different components of the International Red Cross and Red Crescent Movement⁴⁷); and (c) the victims of disasters. This latter perspective was potentially able to assume a more predominant role, both in light of the scope of the project and the increasing relevance of the so-called “rights-based” approach⁴⁸ that aimed to “integrate human rights into disaster responses”,⁴⁹ to make relief activities “operationally directed to promoting and protecting human

44 On this concept see Martin Nthakomwa, “Cycles of a Disaster”, in Bradley Penuel and Matt Statler (eds), *Encyclopedia of Disaster Relief*, SAGE Publications, New York, 2011.

45 Jacqueline Peel and David Fisher, “International Law at the Intersection of Environmental Protection and Disaster Risk Reduction”, in Jacqueline Peel and David Fisher (eds), *The Role of International Environmental Law in Disaster Risk Reduction*, Brill, Leiden and Boston, BA 2016, p. 11.

46 See para. 5 of the preamble, reproduced in Annex 1 below.

47 DAs Report, above note 26, p. 26, para. 20.

48 Dirk Salomons, “The Perils of Dunantism: The Need for a Rights-Based Approach to Humanitarianism”, in Andrej Zwitter (ed.), *Humanitarian Action: Global, Regional and Domestic Legal Responses*, Cambridge University Press, Cambridge, 2014; Karen da Costa and Paulina Pospieszna, “The Relationship between Human Rights and Disaster Risk Reduction Revisited: Bringing the Legal Perspective into the Discussion”, *Journal of International Humanitarian Legal Studies*, Vol. 6, No. 1, 2015, pp. 67–70.

49 Walter Kälin, “The Human Rights Dimension of Natural or Human-Made Disasters”, *German Yearbook of International Law*, Vol. 55, 2012, p. 132.

rights”,⁵⁰ and to empower affected individuals to claim their rights. However, an endorsement of this latter perspective, as opposed to the more traditional “needs-based” one, would have risked undermining States’ support for the ILC text. As a result, even if the commentary to Article 2 qualifies both approaches as complementary and not mutually exclusive,⁵¹ the rights-based approach has not been overemphasized in the project. Indeed, as recently recognized by Hafner, a striking difference between the codification efforts promoted by the ILC and the 2003 Resolution on Humanitarian Assistance⁵² adopted by the Institut de Droit International (IDI) is that “the IDI does not abstain from formulations that deviate from existing practice in favor of human rights. The IDI approach is still more under the influence of the right[s-based] approach than the ILC.”⁵³

Consequently, difficulties in balancing different perspectives finally resulted in a set of provisions implicitly accommodated along two main axes: a “vertical” axis, addressing relationships between victims, the affected State and assisting actors (Articles 4–6), so as to reflect “a vertical rights-duties approach in the classical human rights sense”;⁵⁴ and a “horizontal” axis, relating to cooperation between affected States and assisting actors (Articles 7–17).

Scope of the DAs and relationship with IHL

Concerning the content of the DAs, the first set of provisions provides the boundaries of the project. Apart from the preamble, which states the basic principles of the project, and Articles 1 (“Scope”) and 2 (“Purpose”), whose relevance relates only to their commentaries’ ability to provide some guidance clarifying the scope of application *ratione materiae, personae, temporis* and *loci* of the DAs, a key provision can be identified in Article 3 (“Use of Terms”).

In particular, Article 3(a) defines a disaster as “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”. The drafting process of this term was not an easy one, as recognized by the Special Rapporteur, according to whom “there is no generally accepted legal definition of the term in international law”.⁵⁵ Nonetheless, apart from isolated practice not providing a definition of this term,

50 Bertrand Ramcharan, “Human Rights and Human Security”, *Disarmament Forum*, Vol. 1, No. 1, 2004, p. 42.

51 DAs Report, above note 26, p. 20, para. 1.

52 The Resolution on Humanitarian Assistance, adopted by the IDI at the Bruges session held in 2003, is reproduced in *International Review of the Red Cross*, Vol. 86, No. 856, 2004, pp. 874–878. On this document, see Robert Kolb, “De l’assistance humanitaire: La Résolution sur l’assistance humanitaire adoptée par l’Institut de droit international lors de sa Session de Bruges en 2003”, *International Review of the Red Cross*, Vol. 86, No. 856, 2004.

53 Gerhard Hafner, “Doctrinal Views versus State Views on Humanitarian Assistance in the Event of Disasters: Comparing the Work of the Institut de Droit International with that of the International Law Commission”, in Rüdiger Wolfrum, Maja Seršić and Trpimir Šošić (eds), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas*, Brill, Leiden and Boston, MA, 2016, p. 520.

54 D. Tladi, above note 37, p. 429.

55 E. Valencia-Ospina, above note 43, p. 152.

as experienced with the 1991 Inter-American Convention to Facilitate Disaster Assistance, relevant instruments generally support descriptive approaches, such as pointing to distinctive characteristics of an event in order to legally qualify it as a “disaster”.⁵⁶ In light of recurring features broadly present in contemporary practice, the ILC requires the fulfilment of two cumulative criteria, namely the capacity of such events to both produce detrimental effects and to seriously disrupt the functioning of a society. Further details are provided in the commentaries to the DAs, highlighting relevant elements required by the definition.

Regarding the first element, although the ILC included the qualifier “calamitous” to raise the threshold to cover “only extreme events”,⁵⁷ negative outcomes affecting persons, property and the environment are not required to be ascertained on a cumulative basis, thus enlarging the category of events able to satisfy this criteria. Furthermore, disasters are not required to have a transnational character,⁵⁸ while reference to “a series of events” aims to include cumulative small-scale disasters incapable by themselves of meeting the high threshold set by the text.⁵⁹ Properly, the ILC has refused to circumscribe its focus to so-called “natural disasters”, unlike treaties such as the 2011 South Asian Association for Regional Cooperation Agreement on Rapid Response to Natural Disasters, thereby taking into account the complexity of separating the interactions between human activity and natural hazards, as emphasized by disaster studies.⁶⁰ Furthermore, mere situations of political and economic crisis are not included in this definition, and a clear statement added on second reading specifies that “[a] situation of armed conflict cannot be qualified *per se* as a disaster”.⁶¹ Indeed, even if, “[c]olloquially speaking, armed conflicts can be called disasters[,] ... from an international legal point of view, armed conflicts are distinct from other man-made or natural disasters”.⁶² The solution adopted by the ILC, subsequently confirmed by UN documents related to the Sendai Framework for Disaster Risk Reduction (Sendai Framework),⁶³ clarifies this element, thus rejecting claims made by some scholars in this regard.⁶⁴

56 For an overview, see Giulio Bartolini, “A Taxonomy of Disasters in International Law”, in F. Zorzi Giustiniani *et al.* (eds), above note 16.

57 DAs Report, above note 26, p. 22, para. 4.

58 *Ibid.*, p. 23, para. 4.

59 *Ibid.*, p. 23, para. 4.

60 See Enrico Louis Quarantelli (ed.), *What Is a Disaster? Perspectives on the Question*, Routledge, New York, 1998; Ronald Perry and Enrico Louis Quarantelli (eds), *What Is a Disaster? New Answers to Old Questions*, Xlibris, Philadelphia, PA, 2005.

61 DAs Report, above note 26, p. 24, para. 10.

62 Tilman Rodenhäuser and Gilles Giacca, “The International Humanitarian Law Framework for Humanitarian Relief during Armed Conflicts and Complex Emergencies”, in Susan Breau and Katja Samuel (eds), *Research Handbook on Disasters and International Law*, Edward Elgar, Cheltenham, 2016, p. 132.

63 See UN General Assembly, *Report of the Open-Ended Intergovernmental Expert Working Group on Indicators and Terminology relating to Disaster Risk Reduction*, UN Doc. A/71/644, 1 December 2016, p. 18, where the definition of disaster excludes “the occurrence or risk of armed conflict and other situations of social instability or tension which are subject to international humanitarian law and national legislation”.

64 For example, Susan Breau and Katja Samuel include in this term “financial, ‘natural’ and ‘man-made’ events (including armed conflict)”. See “Introduction”, in S. Breau and K. Samuel (eds), above note 62, p. 3.

This latter element brings attention to the relationship between IHL and the DAs, especially in light of the fact that the DAs could be translated into a treaty. In particular, potential challenges concerning the application of a proper normative framework might arise in so-called “complex emergencies” – namely, disasters occurring on territories already involved in an armed conflict – due both to the geographical scope of application of IHL and the difficulties of separately addressing the situations of a population in need as a result of an armed conflict and a disaster situation.⁶⁵ To address this scenario, Article 18(2) of the DAs provides that “[t]he present draft articles do not apply to the extent that the response to a disaster is governed by the rules of international humanitarian law”. This wording clarifies an aspect of the DAs which was not clearly spelt out at the first reading, namely to attribute primacy to IHL as regards the regulation of humanitarian assistance in such scenarios.⁶⁶ Nevertheless, Article 18 leaves unchanged the possibility for the DAs to apply as a residual legal framework for disaster scenarios not governed by IHL.⁶⁷

However, a comparative examination of the DAs and IHL norms affirms that potential conflicts would be quite limited. On the one hand, the ILC has confirmed the applicability of several solutions familiar to IHL in disaster settings, such as the humanitarian principles (Article 6) and the requirement to obtain the consent of the involved State for relief operations (Article 13.1). Still, the stricter regime provided by IHL in some circumstances,⁶⁸ as in case of humanitarian assistance involving occupied territories, could take precedence through the application of Article 18.2. In some cases, however, the DAs might additionally detail some aspects not exhaustively addressed by IHL, such as the procedural obligations to consult and notify on the termination of external assistance (Article 17). Nonetheless, it should be emphasized that the ICRC, expressing its position in relation to the text and commentary adopted on first reading, introduced some critical remarks, particularly concerning the content of Article 10.2, which provides that “[t]he affected State has the primary role in the direction, control, coordination and supervision of such relief assistance”. Even if this formula has been used by the ILC in light of a constant practice dealing with disaster settings, it has been argued that “this Draft Article is potentially very intrusive for impartial humanitarian organizations such as the ICRC IHL only authorizes the concerned parties to the armed conflict and States to verify the humanitarian nature of the assistance through a so-called right of control.”⁶⁹ In

65 On this debate, see Gabriella Venturini, “Disasters and Armed Conflicts”, in A. de Guttry, M. Gestri and G. Venturini (eds), above note 2; Daniela Gavshon, “The Applicability of IHL in Mixed Situations of Disaster and Conflict”, *Journal of Conflict and Security Law*, Vol. 14, No. 2, 2009; T. Rodenhäuser and G. Giacca, above note 62; Sarah Williams and Gabrielle Simm, “Assistance to Disaster Victims in an Armed Conflict: The Role of International Humanitarian Law”, in F. Zorzi Giustiniani *et al.* (eds), above note 16.

66 ILC, above note 25, pp. 137–138, paras 1–3.

67 *Ibid.*, p. 73, para. 10.

68 For a comparison of obligations to allow and facilitate international humanitarian relief in armed conflicts and disasters, see D. Fisher, above note 4, pp. 347–355.

69 The ICRC comments (January 2016) are available at: http://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/english/pop_icrc.pdf&lang=E. See, similarly, T. Rodenhäuser and G. Giacca, above note 62, p. 150.

this regard, however, the solution endorsed by the ILC in Article 18(2), attributing primacy to IHL, should finally permit IHL to take precedence. It should also be underlined that Article 18(1) contains a no-prejudice clause with regard to “other applicable rules of international law”, aimed to give application, for instance, to more detailed rules included in treaties having the same *ratione materiae* as the DAs, such as regional or bilateral treaties on mutual assistance.

Coming back to the definition of disaster in the DAs, such an event must also fulfil the additional criteria provided by Article 3(a), specifically its capacity to “seriously disrupt the functioning of a society”. This latter term has not been qualified in the commentary and might create some difficulties, especially if implied to cover only events having a very significant magnitude toward the entire society of the affected State.⁷⁰ Conversely, practice usually combines this additional criterion with other related notions, such as “community”, or emphasizes the potential limited geographical reach of calamities,⁷¹ as recently reiterated by the definition adopted by the intergovernmental group of experts requested to identify indicators for the Sendai Framework, which cited events producing “a serious disruption of the functioning of a community or a society at any scale”.⁷²

Article 3(b) also details other definitions relevant for determining the scope of application of the DAs. For example, the notion of “affected State”, outlined by the ILC through a twofold hypothesis, refers to “a State in whose territory, or in the territory under whose jurisdiction or control, a disaster takes place”, thus covering in the latter case situations where a State exercises “de jure jurisdiction, or de facto control, over another territory in which a disaster occurs”.⁷³ This exceptional situation might imply the possibility for two States to be equally qualified as “affected” as a result of the same disaster without providing guidance on solutions to solve potential problems raised by such overlapping. Other terms appear less problematic: Articles 3(c) and 3(d) define the “assisting State” and “other assisting actor”, namely a “competent intergovernmental organization or a relevant non-governmental organization or entity”, so as to recognize the plurality of external assistance actors. While the text adopted in 2014 only referred to the IFRC and ICRC, the commentary expressly mentions that the term entity “is to be understood as referring to entities such as the Red Cross and Red Crescent Movement”.⁷⁴ Such reference thus also covers National Red Cross

70 For some critical remarks see Jean-Marc Thouvenin, “La définition de la catastrophe par la CDI: Vers une catastrophe juridique?”, in Rafael Prieto Sanjuán and Jean-Marc Thouvenin (eds), *International Law and Disasters: Studies on Prevention and Assistance to Victims*, Grupo Editorial Ibáñez, Bogotá, 2011.

71 See, for instance, reference to the term “community” in the ASEAN Agreement on Disaster Management and Emergency Response, 26 July 2005 (entered into force 24 December 2009) (ASEAN Agreement), Art. 1(3), available at: <http://agreement.asean.org/media/download/20140119170000.pdf>; and in the South Asian Association for Regional Cooperation Agreement on Rapid Response to Natural Disasters, 11 November 2011 (entered into force 9 September 2016), Art. 1(3), available at: http://saarc-sec.org/uploads/digital_library_document/28_Rapid_response_to_Natural_disasters.pdf. For an overview of relevant practice, see G. Bartolini, above note 56, pp. 17–18.

72 UN General Assembly, above note 63, p. 13.

73 *Ibid.*, pp. 24–25, para. 14.

74 *Ibid.*, p. 26.

and Red Crescent Societies (National Societies) in light of their significant role in disaster settings.

Finally, “relief personnel” – namely civilian or military personnel sent by external actors – and “equipment and goods” are descriptive terms based on similar texts provided by practice. Still, some States, the European Union and the IFRC advanced some criticism on the definition of “relief personnel” and the commentary adopted on first reading, as the ILC did not underline how relevant policy documents, such as the Oslo Guidelines on the use of foreign military assets in disaster relief operations,⁷⁵ qualify the use of military personnel and assets as a “last resort” option in case of lack of comparable civilian alternatives. Although the Special Rapporteur proposed on second reading to include a reference to the “last resort” formula in the definition,⁷⁶ this solution was not endorsed by the ILC. Even if this express reference would have been redundant within the text of Article 3, a mention of this principle in the commentary would have reaffirmed a basic tenet of international relief operations.

Discovering the “vertical” and “horizontal” dimensions of the DAs

The “vertical” dimension

As mentioned above, it is possible to highlight a “vertical” dimension of the project, as seen in Articles 4 (“Human Dignity”), 5 (“Human Rights”) and 6 (“Humanitarian Principles”) relating to the relationships between the victims and assisting actors. On the one hand, these provisions reaffirm the relevance of the protection of affected individuals within the structure of the DAs, and are included in the opening provisions of the substantive section of this document. On the other hand, to some extent they act as mere “reminder[s]”⁷⁷ of relevant obligations provided by other sources, without laying down any substantive content themselves, in particular Articles 4 and 5.

According to Article 4, “[t]he inherent dignity of the human person shall be respected and protected in the event of disasters”. Reflecting its character as “a guiding principle for any action to be taken”,⁷⁸ the ILC preferred to address this element in an autonomous provision rather than including a mere reference to it in the preamble, as proposed by some States. However, the commentary lacks clarifications on the actual legal relevance of the norm in disaster contexts.

75 Piero Calvi Parisetti, “The Use of Civil and Military Defense Assets in Emergency Situations”, in A. de Guttry, M. Gestri and G. Venturini (eds), above note 2.

76 Eduardo Valencia-Ospina, *Eighth Report on the Protection of Persons in the Event of Disasters*, UN Doc. A/CN.4/697, 17 March 2016, para. 91.

77 See the commentary to Article 5 of the DAs: “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.” DAs Report, above note 26, p. 31, para. 1.

78 *Ibid.*, p. 28, para. 1.

More relevantly, Article 5 affirms that “[p]ersons affected by disasters will be entitled to respect for and protection of their human rights in accordance with international law”. Even if this provision appears self-evident, since “there is no doubt that international human rights law applies to natural disasters”,⁷⁹ it has the merit of emphasizing the critical relevance of human rights for the protection of persons affected by disasters. Indeed, although “from a strictly legal point of view, there is no *categorical* difference between disasters and any other situation to which human rights apply”,⁸⁰ calamities may nonetheless lead to interpretative tensions in the application of relevant rules. As emphasized by an increasing practice developed by human rights bodies,⁸¹ disasters might require a context-based interpretation of relevant obligations – for instance, implying the need for additional efforts to be made by States to address vulnerabilities raised or accentuated by disasters, or that States could request limitations or derogations from their existing obligations in order to deal with the effects of a disaster.⁸²

In this regard, the deliberate choice of the ILC was to include a mere reminder⁸³ on the potential relevance of the human rights legal framework, on the assumption that the drawing up of a comprehensive list of relevant rights was not feasible.⁸⁴ This approach, which may be qualified as minimal in the light of the purpose of the project, was nevertheless welcomed by States,⁸⁵ particularly those concerned with the possible shift of the project toward a rights-based approach. Nevertheless, Article 5 and its commentary provide some guiding elements.

Compared to the version adopted on first reading, the ILC outlined on the second reading the relevance of both negative and positive obligations, as underlined by the additional reference to the term “protection”, to accompany the original reference to “respect” for human rights. Indeed, positive obligations might be particularly relevant in disaster settings, given the need to adopt proactive measures, as emphasized by a series of relevant documents adopted by human rights bodies (in 2018 alone) confirming the growing attention paid to the protection of human rights in such scenarios.⁸⁶ The commentary to the

79 *Ibid.*, p. 28, para.1.

80 Kristian Cerdevall Lautu, “Human Rights and Natural Disasters”, in S. Breau and K. Samuel (eds), above note 62, p. 94.

81 See, in this regard, W. Kälin, above note 49; Dug Cubie and Marlies Hesselman, “Accountability for the Human Rights Implications of Natural Disasters: A Proposal for Systemic International Oversight”, *Netherlands Quarterly of Human Rights*, Vol. 33, No. 1, 2015; F. Zorzi Giustiniani *et al.* (eds), above note 16.

82 Human Rights Council, *Final Research-Based Report of the Human Rights Council Advisory Committee on Best Practices and Main Challenges in the Promotion and Protection of Human Rights in Post-Disaster and Post-Conflict Situations*, UN Doc. A/HRC/28/76, 10 February 2015.

83 DAs Report, above note 26, p. 31, para. 1.

84 *Ibid.*, p. 32, para. 5.

85 E. Valencia-Ospina, above note 76, paras 109–120.

86 See, for example, UN General Assembly, *Report of the Special Rapporteur on the Right to Food*, UN Doc. A/HRC/37/61, 25 January 2018 (focusing on the right to food in the context of natural disasters); Committee on the Elimination of Discrimination against Women, *General Recommendation No. 37 (2018) on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change*, UN Doc. CEDAW/C/GC/37, 13 March 2018; Human Rights Committee, *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, UN Doc. CCPR/C/GC/36, 30 October 2018, paras 26, 62.

DAs also identifies some potentially relevant human rights: the right to life, health, food, housing, education and information. This list can be extended to other significant issues, such as the right to a healthy environment. Furthermore, the commentary makes reference to specific challenges raised by vulnerable groups. Significantly, as recognized by Article 2 of the IDI's 2003 Resolution on Humanitarian Assistance,⁸⁷ the ILC also included "the right to receive humanitarian assistance" among relevant rights in the DAs, even though the commentary does not further develop this sensitive issue, which is particularly debated by scholars in relation to the possibility of identifying a potential individual right on this matter.⁸⁸

Finally, as requested by several States,⁸⁹ the commentary underlines how reference in Article 5 to the enjoyment of these rights "in accordance with international law" refers to an "affected State's right to suspend or derogate where it is recognized under existing international agreements".⁹⁰ In this case too, the ILC preferred to make a renvoi to the pertinent legal system rather than directly addressing this issue, reflecting recurring scenarios where States have limited or expressly derogated from their human rights obligations in times of disaster.⁹¹ Furthermore, it should be noted that the relevance of human rights for the DAs is not limited to Article 5. In particular, the basis of several provisions pertaining to the so-called "horizontal" dimension of the project have also been underpinned by relevant human rights obligations. This is the case, in particular, for Articles 7, 9, 10, 11, 12, 13 and 14, thus confirming the complementary relevance of human rights standards to justifying solutions endorsed by the ILC.⁹²

Article 6, addressing humanitarian principles, states that "[r]esponse to disasters will 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". The provision is particularly significant because although these principles, largely transposed from IHL, are reaffirmed in seminal soft-law instruments addressing disasters, such as UN General Assembly Resolution 46/182, or documents such as the 1994 Red Cross Code of Conduct, they have only been incorporated on a few occasions into binding texts, such as Article 214(2) of the Treaty on the Functioning of the EU or Article 3 of the Framework Convention on Civil

87 For a comment on this provision of the resolution, see R. Kolb, above note 52, pp. 861–863.

88 For further references to doctrine, see Annalisa Creta, "A (Human) Right to Humanitarian Assistance in Disaster Situations? Surveying Public International Law", in A. de Guttry, M. Gestri and G. Venturini (eds), above note 2.

89 E. Valencia-Ospina, above note 76, para. 113.

90 DAs Report, above note 26, p. 32, para. 7.

91 Emanuele Sommario, "Limitation and Derogation Provisions In International Human Rights Law Treaties and Their Use in Disaster Settings", in F. Forzi Giustiniani *et al.* (eds), above note 16.

92 Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, Cambridge University Press, Cambridge, 2016, pp. 240–246.

Defence Assistance.⁹³ The express recognition of humanitarian principles in Article 6 of the DAs must consequently be welcomed, since in disaster contexts “these principles and their underlying rationale are under increasing challenge”.⁹⁴

The material content of Article 6 has some peculiarities. First, there is an unusual difference between its text, which is limited to the response phase, and the commentary, where humanitarian principles are rightly qualified as being applicable “to the provision of disaster relief assistance, as well as in disaster risk reduction activities”,⁹⁵ as this latter scenario might also raise similar concerns. Equally significant is the qualification of non-discrimination as an “autonomous principle”⁹⁶ potentially infringed by biases of “ethnic origin, sex, nationality, political opinions, race, religion and disability”,⁹⁷ whereas on some occasions non-discrimination has been qualified as a sub-specification of the principle of impartiality.⁹⁸ The reference made to the “needs of the particularly vulnerable” in the DAs emphasizes the potential exigency to adopt positive discrimination towards certain individuals or groups.⁹⁹ While reference is made to girls, boys, women, older persons, and persons with disabilities or debilitating diseases, as well as to internally displaced persons through cross-references to UN General Assembly Resolution 69/135 and the IDRL Guidelines, this list could potentially be extended to other vulnerable groups during disasters, such as migrants or indigenous people as recognized by the International Organization for Migration and the UN Human Rights Council.¹⁰⁰

The “horizontal” dimension

A significant set of provisions can be grouped around the “horizontal” dimension of the project (Articles 7–17), which aims to regulate the legal relationships involving the affected State and assisting actors during the disaster cycle, focusing on disaster risk reduction (Article 9) and, subsequently, the relief/recovery phases (Articles 10–17).

93 According to Article 214(2) of the Treaty on the Functioning of the European Union, above note 13, the EU’s operations for victims of disasters “shall be conducted in compliance ... with the principles of impartiality, neutrality and non-discrimination”. Under Article 3 of the Framework Convention on Civil Defence Assistance, 2172 UNTS 213, 22 May 2000 (entered into force 23 September 2001), “[a]ssistance shall be provided without discrimination, particularly with regard to race, colour, sex, language, religion, political or any other opinion, to national or social origin, to wealth, birth, or any other criterion”, and “[a]ssistance shall be undertaken in a spirit of humanity, solidarity and impartiality”.

94 D. Fisher, above note 5, p. 101.

95 DAs Report, above note 26, p. 33, para. 1.

96 *Ibid.*, p. 34, para. 5.

97 *Ibid.*, p. 33, para. 4.

98 Jean Pictet, *The Fundamental Principles of the Red Cross*, ICRC, Geneva, 1979, pp. 23–28. On this theoretical debate, see Federico Casolari, “Addressing Discrimination in Disaster Scenarios”, in F. Zorzi Giustiniani *et al.*, above note 16.

99 With reference to disaster settings, see Mary Crock, “The Protection of Vulnerable Groups”, in S. Beau and K. Samuel (eds), above note 62.

100 Human Rights Council, *Promotion and Protection of the Rights of Indigenous Peoples in Disaster Risk Reduction, Prevention and Preparedness Initiatives*, UN Doc. A/HRC/27/66, 7 August 2014; Migrants in Countries in Crisis, *Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster*, 2016, available at: <https://micciniitiative.iom.int/guidelines>.

These relationships, according to Article 7, must be inspired by a duty to cooperate, which can be achieved through measures identified in Article 8, which deals with cooperation.¹⁰¹ Through this provision the ILC deemed it desirable to emphasize the relevance of the principle of solidarity, which significantly is reaffirmed in the preamble.¹⁰² However, the effective legal value of this provision, which some States argued should be deleted or redrafted in non-binding terms,¹⁰³ is rather uncertain, as already experienced in past ILC projects where similar rules have been included.¹⁰⁴ The commentary simply provides an overview of this principle in international law, highlighting the different nature of actors potentially affected, as this provision was not intended to identify “the level of cooperation being envisaged, but rather the actors with whom the cooperation should take place”.¹⁰⁵ Its scope can be better interpreted in light of other provisions. For instance, Article 7 (“Duty to Cooperate”) raises the question of whether, on its basis, a more timely obligation to provide cooperation might be inferred, a hypothesis excluded by the commentary both to Article 8 (“Forms of Cooperation in the Response to Disasters”), the purpose of which is merely to be “illustrative of possible forms of cooperation” and which “is not intended to create additional legal obligations for either the affected States or other assisting actors”,¹⁰⁶ and Article 12 (“Offers of External Assistance”), which underlines the non-existence of “a legal duty to assist”.¹⁰⁷ In a more incisive manner, the duty to cooperate is recalled among the rationales behind Article 11 on the obligation to seek assistance. For the ILC, “Draft Article 7 affirms that the duty to cooperate is incumbent upon ... affected States where such cooperation is appropriate”;¹⁰⁸ this scenario is raised once the affected state is unable to cope with the disaster, thus triggering the obligation provided by Article 12. In essence, Article 7 outlines a general principle allowing better framing of the activities that different actors may be called upon to put in place. In the present author’s view, Article 7 may impose a duty on the affected State to notify other States of disasters that may be potentially detrimental to them, a hypothesis admitted by the ILC only with reference to

101 Article 8 states: “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.”

102 Para. 3 of the preamble refers to the “fundamental value of solidarity in international relations and the importance of strengthening international cooperation in respect of all phases of a disaster”. On this concept, see Rüdiger Wolfrum and Chie Kojima (eds), *Solidarity: A Structural Principle of International Law*, Springer, Berlin, 2010.

103 On this debate, see E. Valencia-Ospina, above note 76, paras 142–157.

104 See, for instance, Owen McIntyre, *Environmental Protection of International Watercourses under International Law*, Routledge, New York, 2016, p. 319, on difficulties in providing concrete content to the “general obligation to cooperate” provided by Article 8 of the Draft Articles on the Law of the Non-Navigational Uses of International Watercourses.

105 DAs Report, above note 26, p. 39, para. 6.

106 *Ibid.*, p. 42, para. 5.

107 *Ibid.*, p. 57, para. 2.

108 *Ibid.*, p. 53, para. 1.

specific treaty obligations.¹⁰⁹ Such conduct might represent a concrete expression of the duty to cooperate.

Disaster risk reduction

Although disaster risk reduction (DRR) may historically qualify as a “second generation” in the development of the legal and policy framework pertaining to disasters (which originally focused mainly on the relief phase), this area has since acquired a high degree of relevance as DRR activities are able to significantly reduce the negative impact of potential disasters. The universal approach to DRR has, however, been addressed mainly by non-binding instruments in line with informal international law-making trends, as expressed in the past and current strategies developed by world conferences on DRR (Yokohama, Hyogo, Sendai¹¹⁰), which aim to foster domestic activities in this area and enhance international governance aimed at implementing such goals.¹¹¹ These universal initiatives have been able to play a significant role in shaping the activities of States, international organizations and non-State entities, including through voluntary report mechanisms aimed at assessing at the domestic level the fulfilment of goals provided by the strategies, and attempts to identify indicators to better assess States’ performance. In addition, recent binding international disaster law instruments have increasingly imposed on State measures in this area,¹¹² thus confirming the possibility of translating DRR activities into concrete obligations. Other instruments, such as the IFRC/United Nations Development Programme (UNDP) *Checklist on Law and Disaster Risk Reduction* presented to the 32nd International Conference of the Red Cross and Red Crescent in 2015,¹¹³ have aimed to play a guiding role for States.

Consequently, the ILC devoted Article 9(1) of the DAs to DRR, claiming that “[e]ach State shall reduce the risk of disasters by taking appropriate measures, including through legislation and regulations, to prevent, mitigate and prepare for disasters”. Undoubtedly this provision is one of the most significant in the project, although it should be recalled that some States have been critical, requesting its

109 See Convention for the Protection of the Mediterranean Sea against Pollution, 1102 UNTS 27, 16 February 1976 (entered into force 12 February 1978), Art. 9(2); International Convention on Oil Pollution Preparedness, Response and Cooperation, 1891 UNTS 77, 30 November 1990 (entered into force 13 May 1995), Art. 5(1); World Health Organization (WHO), International Health Regulations, 2005 (entered into force 15 June 2007) Art. 6.1, available at: <https://tinyurl.com/y9e2xqjr>.

110 For the Sendai Framework adopted in 2015, see above note 17.

111 For an overview of relevant practice, see DAs Report, above note 26, pp. 44–47. For the qualification of DRR practices as informal international law-making approaches, see Luca Corredig, “Effectiveness and Accountability of Disaster Risk Reduction Practices: An Analysis through the Lens of IN-LAW”, in Ayelet Berman, Sanderijn Duquet, Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds), *Informal International Lawmaking: Case Studies*, TOAEP, The Hague, 2012.

112 See, for instance, ASEAN Agreement, above note 71, Arts 5, 6, 7; Decision No. 1313/2013 of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, *Official Journal of the European Union*, L 347/924, 20 December 2013, Arts 5, 6.

113 IFRC and UNDP, *The Checklist on Law and Disaster Risk Reduction*, October 2015, available at: <https://tinyurl.com/pklojko>.

deletion or the use of “should” instead of “shall”.¹¹⁴ Contrariwise, the ILC linked this obligation to multiple potential bases, in particular (a) the “widespread practice of States reflecting their commitment to reduce the risk of disasters”;¹¹⁵ (b) positive human rights obligations, as recently also emphasized by the Human Rights Committee; and (c) the due diligence principle expressed in international environmental law.¹¹⁶ In this case, the context-based character of the relevant obligation, as expressed by the due diligence standard provided by the wording of this provision, would determine a certain margin of appreciation on States concerning the extent of measures to fulfil this obligation. Still, especially regarding the increasing practice developed by human rights bodies in this context,¹¹⁷ it might be claimed that positive obligations imposed by some human rights provisions, as regarding the right to life, might provide a strong legal basis for requiring States to properly act to prevent and mitigate disasters in some concrete circumstances.

Measures to be adopted have a distinct character in comparison to those pertaining to the relief/recovery phases. Reference could be made to the development of technical prevention standards at the domestic level – for example, sectoral laws dealing with development planning, construction, land use and environmental protection, as enucleated in the abovementioned IFRC/UNDP *Checklist*, or to measures identified by Article 9(2), 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”. Such latter measures have mostly been adopted by the ILC from similar examples provided by the Sendai Framework, thus confirming the close relationship between these two instruments. Indeed, as explicitly recognized by the UN International Strategy for Disaster Reduction’s comment on the DAs, there is a “functional relationship between the draft articles and the Sendai Framework in that the former articulates the duty to reduce the risk of disasters and to cooperate, and the latter articulates the modalities and measures that States need to adopt to discharge such duty”.¹¹⁸ Through Article 9(2), there is the possibility of enunciating a proper legal obligation in this area that is able to override the soft-law approach endorsed by States in elaborating the universal DRR strategies.

The “checks and balances” approach between the interests of the affected State and assisting actors in the relief phase

As mentioned above, the “horizontal” dimension of the project (Articles 10–17) governs the response/recovery phases and the relationships between the affected State and

114 E. Valencia-Ospina, above note 76, paras 177–186.

115 DAs Report, above note 26, p. 44, para. 5.

116 *Ibid.*, p. 43, para. 4; Human Rights Committee, above note 86, para. 26.

117 Emanuele Sommario and Silvia Venier, “Human Rights Law and Disaster Risk Reduction”, *Questions of International Law*, Zoom-In 49, 2018.

118 See “UNISDR’s Comments and Observations on the Draft Articles on the ‘Protection of Persons in the Event of Disasters’”, December 2015, para. 5, available at: http://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/english/pop_unsdr.pdf&lang=E.

external assisting actors. These provisions establish a complex mechanism of “checks and balances” between the potentially diverging perspectives of relevant actors, namely the affected State, whose sovereignty in the affected area has a series of legal implications, and external actors interested in operationalizing the values of cooperation and solidarity expressed in Article 7. This complex equilibrium is reflected in these provisions, characterized by a drafting tension expressed through different techniques. For example, parallel provisions can counterbalance measures required of different actors, such as Article 11, which obliges the affected State to seek international assistance in some circumstances, coupled with Article 12(2), which conversely imposes on external actors a duty to evaluate requests for assistance from an affected State. This contrast can also be expressed in the same provision, as in Article 13: on the one hand, para. 1 reiterates that external assistance can only be performed with the consent of the affected State; on the other, para. 2 highlights an obligation of the affected State not to arbitrarily deny such assistance.

The first focal point for any disaster operation is certainly the affected State, in light of legal implications of the customary rule on sovereignty. As remarked in para. 5 of the preamble and its commentary, “the principle of the sovereignty of States ... is a core element of the draft articles. The reference to sovereignty ... provides the background against which the entire set of draft articles is to be understood.”¹¹⁹ Therefore, the ILC aimed to balance the different perspectives inherent in this rule.

On the one hand, the ILC included provisions linked to traditional “sovereignty duties”¹²⁰ related to sovereignty in order to limit the activities of external actors in the territory of the affected State, as well as requiring the State to protect against detrimental acts carried out in its own territory. In the first case, reference could be made to provisions requiring the consent of the affected State to provide external assistance (Article 13) or permitting it to impose conditions on such assistance (Article 14), while the duty to protect relief personnel (Article 17) is an example of the second hypothesis. Likewise, sovereignty is a sound legal basis for Article 10(2), according to which “[t]he affected State has the primary role in the direction, control, coordination and supervision of such relief assistance”, reflecting the State’s role in managing different coordination models of external actors offered by bilateral and regional assistance treaties or by the complex UN coordination system.¹²¹

On the other hand, the ILC has emphasized “positive” duties associated with sovereignty, thus inferring a series of obligations for the affected State aimed at strengthening protection for victims. Similarly to the approach adopted in UN General

119 DAs Report, above note 26, p. 18, para. 6.

120 Samantha Besson, “Sovereignty”, in *Max Planck Encyclopedia of Public International Law* (online edition), Oxford University Press, Oxford, 2012, paras 123–127.

121 Giovanni De Siervo, “Actors, Activities, and Coordination in Emergencies”, in A. de Guttry, M. Gestri and G. Venturini (eds), above note 2.

Assembly Resolution 46/182,¹²² Article 10(1) states that “[t]he affected State shall have the duty to ensure the protection of persons and the provision of disaster relief assistance on its territory, or on territory under its jurisdiction or control”. In this manner the ILC transposes into this area solutions endorsed by the UN Secretary-General’s High Level Panel on Threats, Challenges and Change, according to which sovereignty “clearly carries with it the obligation of a State to protect the welfare of its peoples and to meet its obligations to the wider international community”.¹²³

To reach this outcome, the development of dedicated and efficient national structures capable of managing disasters is a basic requirement, as implied by policy standards pertaining to DRR.¹²⁴ However, where national capacities are insufficient, Article 11 states that “[t]o the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance”. According to the ILC, this obligation originates both from duties expressed by the rule on sovereignty and by positive human rights obligations, which may impose on the affected State a proactive duty to look for international support to protect victims.¹²⁵ However, the ILC, to avoid sensitive issues and solutions not grounded in concrete practice, did not focus on the potential involvement of third-party actors, such as the United Nations Emergency Relief Coordinator, in assessing the inability of the affected State to seek assistance. Such assessment will still be based on self-evaluations made by the concerned State which “must be carried out in good faith”, thus emphasizing a potential legal parameter.¹²⁶ The relevance of this rule should not be underestimated, as in past disasters States have unduly delayed requests of external support for reasons of national prestige.¹²⁷ Furthermore, this provision could be an example of the ILC’s preference for a “holistic” approach to relevant legal issues and providing a systemic solution toward aspects not clearly addressed in disaster law instruments, as emphasized by this duty only previously being recognized in non-binding documents such as the IDI’s Resolution on Humanitarian Assistance and the IDRL Guidelines.¹²⁸

As mentioned, the “horizontal” dimension of the project aims to balance the interests of the affected State with those of assisting actors, and consequently a number of provisions address the latter’s role. First of all, Article 12(2) states

122 UN General Assembly, *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, UN Doc. A/RES/46/182, 19 December 1991, para. 4.

123 UN General Assembly, *A More Secure World: Our Shared Responsibility. Report of the High Level Panel on Threats, Challenges and Change*, UN Doc. A/RES/59/565, 2 December 2004, para. 29. With reference to the doctrine of the responsibility to protect, see International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, International Development Research Centre, Ottawa, 2001.

124 See Priorities for Action 2 and 5 of the Hyogo Framework for Action, World Conference on Disaster Reduction, *Report of the World Conference on Disaster Reduction*, UN Doc. A/CONF.206/6, 16 March 2005, para. 14; Sendai Framework, above note 17.

125 See, for instance, Economic, Social and Cultural Rights Committee, General Comment No. 3, “The Nature of States Parties Obligations”, UN Doc. E/1991/23, 14 December 1990, para. 13.

126 DAs Report, above note 26, p. 57, para. 7.

127 IFRC, above note 12, p. 89: “For example, significant delays were reported after various storm events in Fiji and after the 1999 earthquake in Turkey before international assistance was requested.”

128 For an analysis, see Eduardo Valencia-Ospina, *Fourth Report on the Protection of Persons in the Event of Disasters*, UN Doc. A/CN.4/643, 11 May 2011, pp. 13–14.

that “in the event of disasters, States, the United Nations and other potential assisting actors may provide assistance to the affected State”. This provision is primarily intended to underline that such offers cannot be regarded as interference in the affected State’s internal affairs,¹²⁹ according to the similar solution elaborated for humanitarian assistance in armed conflicts.¹³⁰ On the other hand, the Commission has expressly maintained that “[s]uch offers ... are essentially voluntary and should not be construed as a recognition of the existence of a legal duty to assist”.¹³¹ Consequently, the ILC denied the existence of a legal obligation to provide assistance, in light of refusals expressed by States on earlier solutions suggested by the Special Rapporteur which aimed to identify a duty for assisting States as a legal obligation of conduct.¹³²

Nonetheless, even in this case, the ILC offered a balance between various interests, specifying in Article 12(2) that “[w]hen 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”. This rule, echoing practice aimed to facilitate the activities of regional coordination mechanisms,¹³³ assumes a far-reaching character in this context, aiming to limit the discretion of assisting actors. Through the procedural obligation laid out in para. 2, the affected State might increase political-diplomatic pressure on potential assisting actors, as they are obliged “first, to give due consideration to the request; and, second, to inform the affected State of ... their reply”.¹³⁴

Consent of the affected State

The effective implementation of international relief activities ultimately depends on the consent of the affected State. However, the ILC has sought to keep a complex balance between basic prerogatives provided by sovereignty and the need to protect victims through international support. This normative tension is expressed in Article 13, which provides:

1. The provision of external assistance requires the consent of the affected State.
2. Consent to external assistance shall not be withheld arbitrarily.

129 DAs Report, above note 26, p. 57, para. 3.

130 International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, *ICJ Reports 1986*, para. 242.

131 DAs Report, above note 26, p. 57, para. 2.

132 Eduardo Valencia-Ospina, *Fifth Report on the Protection of Persons in the Event of Disasters*, UN Doc. A/CN.4/652, 9 April 2012, para. 81. For comments on this provision, see E. Valencia-Ospina, above note 76, paras 230–247.

133 See Decision No. 1313/2013, above note 112, Art. 15.4, according to which “[a]ny Member State to which a request for assistance is addressed through the Union Mechanism shall promptly determine whether it is in a position to render the assistance required and inform the requesting Member State of its decision”. See ASEAN Agreement, above note 71, Art. 11, involving a similar regional coordinating centre.

134 DAs Report, above note 26, pp. 58–59, para. 10.

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.

The drafting process of this provision has been particularly contentious in light of similar problems encountered by efforts to regulate humanitarian assistance in armed conflicts, where a similar ongoing debate is evidenced by the recent elaboration of the *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* (Oxford Guidance) commissioned by the UN Office for the Coordination of Humanitarian Affairs (OCHA).¹³⁵ As a result, the solution provided by Article 13 deserves particular attention.

First, para. 1 reinforces the sovereignty of the affected State, subordinating the provision of assistance to its consent in line with practice provided by international disaster law instruments.¹³⁶ This basic requirement also satisfies another rationale, namely the possibility of regulating the influx of humanitarian actors in order to avoid situations where “open door” policies “have encountered problems of supply-driven thinking, non-professional relief workers (often with their own particular goals) and the blocking of appropriate aid”.¹³⁷ Indeed, through the consent requirement, the affected State can eventually better regulate the flow of international actors, avoiding cases where the activism of non-professional actors or the massive presence of assisting actors could create bottleneck effects for assistance effectively required by the affected State. Such practice is reflected in the decision of the Chilean authorities to pose limitations in the aftermath of the 2010 earthquake. The limitations aimed to allow consent only for limited forms of assistance and related assisting actors in light of targeted needs.¹³⁸ This rule, when applied in good faith, can therefore indirectly contribute to the protection of affected communities.

However, the ILC, despite the opposition of some States,¹³⁹ has maintained the inclusion of para. 2 in order to underline how the affected State cannot refuse consent in an arbitrary manner. The ILC, in line with Article 8 of the IDI's Resolution on Humanitarian Assistance, has therefore significantly transposed

135 OCHA, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, 2016 (Oxford Guidance), available at: <https://tinyurl.com/yc76p7nh>. The Oxford Guidance reiterates that “[t]he consent of the concerned states is required before offers to conduct humanitarian relief operations may be implemented” (p. 16). However, under Article 59 of Geneva Convention IV of 1949, the Occupying Power shall agree to relief schemes on behalf of the population of occupied territories inadequately supplied. In this case, however, it seems that there is still a possibility of prescribing technical arrangements. In this regard it should be emphasized that Article 18(2) of the DAs attributes primacy to solutions provided by IHL.

136 Sandesh Sivakumaran, “Arbitrary Withholding of Consent to Humanitarian Assistance in Situations of Disaster”, *International and Comparative Law Quarterly*, Vol. 64, No. 3, 2015, pp. 504–509.

137 Craig Allan and Therese O'Donnell, “An Offer You Cannot Refuse? Natural Disasters, the Politics of Aid Refusal and Potential Legal Implications”, *Amsterdam Law Forum*, Vol. 5, 2013, p. 40.

138 See “Press Conference on Chile by Deputy Emergency Relief Coordinator”, 2 March 2010, available at: www.un.org/press/en/2010/100302_Bragg.doc.htm.

139 See E. Valencia-Ospina, above note 76, paras 250–272.

into this area a solution already proposed in IHL,¹⁴⁰ identifying its origin in positive obligations under human rights law and in duties of protection implied in the principle of State sovereignty.

The commentary to the DAs also better defines the scope of application of Article 13(2), providing an interpretation on the concept of arbitrariness. For example, the ILC qualifies as non-arbitrary refusals situations where the affected State is able to cope with the disaster or obtain appropriate support by other actors, or cases where offers are not in line with the humanitarian principles expressed in Article 6. One can see how the application of such principles – for instance, in the US refusal of Cuban offers of medical support in the aftermath of hurricane Katrina – might be justified, provided the affected State was able to obtain similar assistance from other entities.¹⁴¹ Conversely, the ILC suggested that if the affected State does not provide motivation concerning its decision to refuse offers of external assistance, this attitude might demonstrate absence of good faith, thus raising doubts about the fulfilment of the criteria expressed in para. 2.¹⁴² Consequently, the ILC provided the procedural obligation expressed by para. 3 concerning a duty to promptly evaluate offers of assistance. Given potential practical difficulties, the ILC admits that this provision “encompass[es] a wide range of possible means of response, including a general publication of the affected State’s decision regarding all offers of assistance”,¹⁴³ in light of practice where States have made generic declarations qualifying international assistance as “welcomed”.¹⁴⁴

Overall, the ILC has sought a complex balance on a sensitive issue that has recently become intertwined with the responsibility to protect doctrine. This doctrine was initially considered applicable also to disaster contexts,¹⁴⁵ but despite the support

140 According to Article 8 of the Resolution on Humanitarian Assistance, above note 52, “[a]ffected 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”. During the negotiations of the 1977 Additional Protocols, the requirement that consent must not be arbitrarily denied was discussed in-depth by the delegations. Indeed, even if both Article 70 of Additional Protocol I and Article 18 of Additional Protocol II affirm that relief activities are subject to the agreement of the parties/high contracting party concerned in such relief actions, the Commentary is clear in restating, on the basis of the official records of the diplomatic conference, that this clause “did not imply that the Parties concerned had absolute and unlimited freedom to refuse their agreement to relief actions. A Party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones.” See Yves Sandoz, “Article 70”, in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p. 816, para. 2085. For a similar approach, see Sandesh Sivakumaran, “Article 3”, in ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016, paras 832–839. This element is reaffirmed in the Oxford Guidance, above note 135, pp. 21–25.

141 Mary Murray, “Katrina Aid From Cuba? No Thanks, Says US”, *NBC News*, 14 September 2005, available at: <https://tinyurl.com/yc8yy6hk>.

142 DAs Report, above note 26, p. 62, para. 10.

143 DAs Report, above note 26, p. 63, para. 12.

144 Rebecca Barber, “Legal Preparedness for the Facilitation of International Humanitarian Assistance in the Aftermath of Vanuatu’s Cyclone Pam”, *Asian Journal of International Law*, Vol. 8, No. 1, 2016, p. 10.

145 See ICISS, above note 123, p. 33, para. 4.20.

expressed by some scholars,¹⁴⁶ the Special Rapporteur immediately refused this hypothesis;¹⁴⁷ this position was later confirmed by the UN Secretary-General, who maintained that “to try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus”.¹⁴⁸ Nevertheless, some issues have not been addressed by the ILC itself – for example, Article 20 of the ILC Draft Articles on State Responsibility, concerning authorities legitimized to provide consent, and its modalities.¹⁴⁹

A more complex issue is defining consequences in case of an arbitrary denial of consent. Indeed, as exemplified by IHL, even if a party to the conflict denies its consent in an arbitrary manner, such a decision would not give entities intended to provide humanitarian assistance a right to provide assistance in its territory regardless of lack of consent. Non-authorized operations, even if carried out with an arbitrary denial of consent by the relevant authorities, would indeed conflict with State sovereignty. In the recent Oxford Guidance, a series of solutions were proposed to cope with such stalemate situations, such as possible authorizations provided by UN Security Council resolutions, as obtained during the Syrian conflict,¹⁵⁰ or, in exceptional cases, recourse to circumstances precluding wrongfulness, such as state of necessity or countermeasures.¹⁵¹ It is not surprising, therefore, that the commentary to the DAs avoided taking a stance on this sensitive issue with regard to disaster scenarios.

Finally, Article 14 on “Conditions on the Provision of External Assistance” is strictly linked to Article 13, emphasizing how the affected State can impose additional limitations on the activities of assisting actors provided those limitations are “in accordance with the present draft articles, applicable rules of international law and the national law of the affected State” and in line with “the identified needs of the persons affected by disasters and the quality of the assistance”. Indeed, the general consent to international relief activities under Article 13 does not translate into an automatic possibility of action for external actors. Failure to comply with conditions provided by Article 14 might justify a

146 Rebecca Barber, “The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study”, *Journal of Conflict and Security Law*, Vol. 14, No. 1, 2009; Jarrod Wong, “Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism”, *Tulane Law Review*, Vol. 84, No. 2, 2009. Doubts are expressed by Milena Costas Trascas, “Access to the Territory of Disaster-Affected State”, in A. de Guttry, M. Gestri and G. Venturini (eds), above note 2; A. Peters, above note 92, pp. 246–250.

147 E. Valencia-Ospina, above note 43, para. 55.

148 UN General Assembly, *Implementing the Responsibility to Protect: Report of the Secretary-General*, UN Doc. A/63/677, 12 January 2009, para. 10(b). At the 2005 World Summit, States limited the possibility of applying the responsibility to protect doctrine to cases involving genocide, war crimes, ethnic cleansing and crimes against humanity.

149 Affef Ben Mansour, “Consent”, in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility*, Oxford University Press, Oxford, 2010.

150 See UN Security Council Resolutions 2139 (22 February 2014), 2165 (14 July 2014) and 2393 (19 December 2017) providing authorization for cross-border and cross-conflict-line humanitarian access to Syria. On this issue, see Phoebe Wynn-Pope, “Humanitarian Access in International Humanitarian Law: The Case of Syria and Security Council Resolution 2139 (2014)”, in Jadranka Petrovic (ed.), *Accountability for Violations of International Humanitarian Law*, Routledge, London, 2016.

151 Oxford Guidance, above note 135, pp. 51–55. More extensively, see Emanuela-Chiara Gillard, “The Law Regulating Cross-Border Relief Operations”, *International Review of the Red Cross*, Vol. 95, No. 890, 2014.

denial of consent under Article 13(2). The ILC therefore has preferred to provide in Article 14 a guidance on the characteristics and rationale of conditions which might be imposed by affected States regarding provision of external assistance.

Crucially, Article 14 balances different considerations: the possibility for the affected State to impose specific conditions is opposed by the requirement according to which these limitations should be in line with “humanitarian and legal principles already addressed elsewhere, notably, sovereignty, good faith and the humanitarian principles dealt with in draft article 6”.¹⁵² This provision thus addresses one of the most common problems in contemporary international assistance, namely ensuring quality and effectiveness of international support.¹⁵³ As such, it draws inspiration from existing practice such as Article 12(4) of the Association of Southeast Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response, which expressly refers to the quality of assistance.¹⁵⁴ Although there are no universally binding technical standards in this area, humanitarian actors have developed a series of relevant documents intended to ensure that assistance meets minimal requirements and humanitarian principles, such as the *Sphere Handbook*, the 2014 Core Humanitarian Standards on Quality and Accountability, or, most recently, the World Health Organization (WHO) initiative on classification and minimum standards for emergency medical teams.¹⁵⁵

The “operational” provisions

The final set of provisions (Articles 15–17) is more directly related to the operational management of relief activities. Article 15 addresses capabilities potentially attributed by the affected State to assisting actors. Indeed, as amply testified to by research carried out by the IFRC,¹⁵⁶ ordinary legislation and regulations of the affected State may represent a significant obstacle jeopardizing the effective provision of international assistance. Article 15(1) provides that “[t]he affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance”, making reference to issues such as “privileges and immunities, visa and entry requirements, work permits, and freedom of movement”. This list has an obvious non-exhaustive character in light of the multifaceted problems faced by external assisting actors, extending to areas such as recognition of professional qualifications and liability issues.¹⁵⁷

¹⁵² DAs Report, above note 26, p. 64, para. 3.

¹⁵³ For recent examples see R. Barber, above note 144, pp. 11–16.

¹⁵⁴ See ASEAN Agreement, above note 71, Art. 12: “The relief goods and materials provided by the Assisting Entity should meet the quality and validity requirements of the Parties concerned for consumption and utilization.” Similarly, Article 3(b) of the Framework Convention on Civil Defence Assistance, above note 93, refers to “ways and customs” of the affected State.

¹⁵⁵ On this initiative, see information available at: www.who.int/hac/techguidance/preparedness/emergency_medical_teams/en/. The 2017 joint IFRC/WHO study on this topic is available at: www.ifrc.org/PageFiles/115542/EMT%20Report%20HR.PDF.

¹⁵⁶ IFRC, above note 12, pp. 89–157.

¹⁵⁷ Giulio Bartolini, “Attribution of Conduct and Liability Issues Arising from International Disaster Relief Missions: Theoretical and Pragmatic Approaches to Guaranteeing Accountability”, *Vanderbilt Journal of Transnational Law*, Vol. 48, No. 4, 2015.

The ILC therefore refrained from developing autonomous and standardized solutions, preferring to adopt a bottom-up approach requiring States to adopt relevant legislative, administrative or executive measures. Unfortunately, few States have developed a coherent domestic system fit for facilitating international assistance, as evidenced by shortcomings emphasized in reports elaborated by the IFRC and National Societies comparing domestic frameworks with good practice standards suggested by the IDRL Guidelines.¹⁵⁸ As a result, although the ILC suggested that States should take into account relevant documents to modify their domestic framework, such as the IDRL Guidelines and the related 2013 Model Act,¹⁵⁹ difficulties inherent in the bottom-up approach are notable. As recently recognized by the IFRC, significant weaknesses persist¹⁶⁰ and the margin of appreciation left to States by the ILC is unlikely to result in a uniform approach towards such challenges.

Equally relevant is Article 16, according to which “[t]he affected State shall take the appropriate measures to ensure the protection of personnel and equipment and goods”. The purpose of this provision is twofold. On the one hand, by virtue of “sovereignty duties”, it imposes on the affected State a duty to protect international assisting actors, in light of security concerns linked to performance of their activities, the value of their assets, and fragile safety situations. On the other hand, this provision is an indirect protection for the affected population, as it facilitates the inflow of international assistance which would potentially be slowed down without such guarantees. As for actors that may represent a security threat, two hypotheses emphasize the different characteristics of the relevant obligations. The first case deals with wrongful actions attributable to organs of the affected State, where an obligation of result can be identified. Regarding harmful activities carried out by private individuals, a duty of due diligence conversely imposes a duty on the affected State to adopt appropriate measures to avoid prejudices towards relief personnel, for instance through the exchange of relevant information or the provision of specific protection. In this regard, the ILC made a proper reference to standards endorsed by members of the Inter-Agency Standing Committee in the 2013 *Non-Binding Guidelines on the Use of Armed Escorts for Humanitarian Convoys*,¹⁶¹ in order to avoid an over-securitization of relief activities.

Finally, Article 17 underlines the temporal limits of relief activities: the affected State and assisting actors “may terminate external assistance at any time. Any such State or actor intending to terminate shall provide appropriate notification.” Article 17 also imposes an obligation for the affected State and assisting actors to consult each other “with respect to the termination of external assistance and the modalities

158 See the dozens of reports available at: www.ifrc.org/what-we-do/disaster-law/research-tools-and-publications/disaster-law-publications. For example, see IFRC, *International Disaster Response Law (IDRL) in Samoa*, Geneva, 2016.

159 IFRC, Model Act on Disaster Relief, available at: www.ifrc.org/en/what-we-do/disaster-law/about-disaster-law/international-disaster-response-laws-rules-and-principles/model-act-on-idrl/.

160 See IFRC, above note 22.

161 DAs Report, above note 26, p. 69, para. 9. The text of the *Non-Binding Guidelines* is available at: <https://tinyurl.com/y8f774vp>.

of termination”. Regardless of the lack of coherent treaty practice making reference to this scenario, the ILC elaborated a provision which aimed both to favour a holistic approach, by imposing a clear standard in this area, and to balance the different perspectives of relevant actors. For the affected State, this provision is a further reaffirmation of its sovereignty, and since external actors do not have an obligation to provide assistance, Article 17 therefore simply reiterates their option to freely decide when to withdraw their services. As premature and uncoordinated disengagement might be detrimental to victims, the ILC introduced both the procedural obligation to provide notification that is “appropriate” in terms of its “form and timing, preferably early”,¹⁶² and a duty of consultation, the rationale for which pursues the same goal as, and represents a further expression of, the principle of cooperation provided by Article 7.

The way forward

Against this background, States were requested in 2016 by UN General Assembly Resolution 71/141 to provide their comments on the proposal made by the ILC to adopt a treaty on the basis of the DAs. In this regard, both during the meeting of the General Assembly Sixth Committee recently devoted to this topic and in advance of it,¹⁶³ States have expressed mixed positions on the recommendation made by the ILC, which did not directly reflect their geopolitical interests or status as disaster-prone or donor States.

A relevant number of States have voiced their preference for a treaty in this area, and are ready to foster discussions in view of such a goal. This has been the case for El Salvador¹⁶⁴ (speaking on behalf of the thirty-three member States of the Community of Latin American and Caribbean States, as supported by additional similar individual statements made by Argentina,¹⁶⁵ Brazil,¹⁶⁶ Colombia,¹⁶⁷ El Salvador,¹⁶⁸ Honduras¹⁶⁹ and Peru¹⁷⁰), Iceland¹⁷¹ (on behalf of the five Nordic countries, which have declared themselves favourable

162 DAs Report, above note 26, p. 71, para. 7.

163 See comments included in UN General Assembly, *Protection of Persons in the Event of Disasters: Report of the Secretary-General*, UN Doc. A/73/229, 24 July 2018 (Secretary-General’s Report); and statements delivered on 1 November 2018 at the UN General Assembly Sixth Committee, available at: <https://papersmart.unmeetings.org/en/ga/sixth/73rd-session/agenda/>.

164 See remarks by El Salvador on behalf of the Community of Latin American and Caribbean States, available at: <https://papersmart.unmeetings.org/media2/20305329/el-salvador-e-celac-.pdf>.

165 See remarks by Argentina, available at: <https://papersmart.unmeetings.org/media2/20305351/argentina-s-90-.pdf>.

166 See remarks by Brazil, available at: <https://papersmart.unmeetings.org/media2/20305365/brazil-90-.pdf>.

167 See remarks by Colombia, available at: <https://papersmart.unmeetings.org/media2/20305355/colombia-s-90-.pdf>.

168 See remarks by El Salvador, Secretary-General’s Report, above note 163, p. 2.

169 See remarks by Honduras, available at: <https://papersmart.unmeetings.org/media2/20305333/honduras-s-90-.pdf>.

170 See remarks by Peru, available at: <https://papersmart.unmeetings.org/media2/20305359/peru-s-90-.pdf>.

171 See remarks by Iceland on behalf of the five Nordic Countries, available at: <https://papersmart.unmeetings.org/media2/20305379/iceland-90-.pdf>.

to discussing the proposal made by the ILC), Italy,¹⁷² the Philippines,¹⁷³ Portugal,¹⁷⁴ Qatar,¹⁷⁵ Togo¹⁷⁶ and Sri Lanka.¹⁷⁷ Other States, such as Japan and Singapore,¹⁷⁸ have expressed generally positive evaluations on the DAs, without however adopting a clear stance on the notion of a treaty. In other cases a more cautious approach was endorsed, either emphasizing the need to better assess the DAs in light of current practice, as expressed by Austria and Bangladesh,¹⁷⁹ or voicing uncertainties as to whether the time would be right for convening a diplomatic conference on this topic, as maintained by Iran.¹⁸⁰ Finally, some States, such as the Czech Republic,¹⁸¹ Russia¹⁸² and the United States,¹⁸³ have opposed the recommendation to adopt a treaty. Still, several of the opposing States expressed appreciation for the large majority of provisions included in the DAs, suggesting that the text could act as a guideline for international cooperation efforts,¹⁸⁴ or maintained that “the draft articles could be seen as the focal reference point internationally with regard to disaster relief and management”.¹⁸⁵ In this regard, Switzerland suggested that the DAs should be translated into regional agreements and domestic legislation, though it cautioned on their possible application in complex emergencies.¹⁸⁶

In light of the stalemate created by the divergent attitudes presented by States, with several UN member States still having to express their views on the recommendation made by the ILC, the General Assembly has finally decided, through its Resolution 73/209, both to require further comments by States and to inscribe this item in its seventy-fifth session planned for 2020.¹⁸⁷ At this stage

172 See remarks by Italy, available at: <https://papersmart.unmeetings.org/media2/20305334/italy-90-.pdf>.

173 See remarks by the Philippines, available at: <https://papersmart.unmeetings.org/media2/20305368/philippines-90-.pdf>.

174 See remarks by Portugal, available at: <https://papersmart.unmeetings.org/media2/20305348/portugal-90-.pdf>.

175 See remarks by Qatar, Secretary-General's Report, above note 163, p. 3.

176 See remarks by Togo, available at: <https://papersmart.unmeetings.org/media2/20305353/togo-f-90.pdf>.

177 See remarks by Sri Lanka, available at: <https://papersmart.unmeetings.org/media2/20305345/sri-lanka-90-.pdf>.

178 See remarks by Japan, available at: <https://papersmart.unmeetings.org/media2/20305502/japan-90-.pdf>.

See remarks by Singapore, available at: <https://papersmart.unmeetings.org/media2/20305349/singapore-90-.pdf>.

179 See remarks by Austria, Secretary-General's Report, above note 163, p. 2; remarks by Bangladesh, available at: <https://papersmart.unmeetings.org/media2/20305370/bangladesh-90-.pdf>.

180 See remarks by Iran, available at: <https://papersmart.unmeetings.org/media2/20305396/iran-islamic-republic-of-90-.pdf>.

181 See remarks by the Czech Republic, Secretary-General's Report, above note 163, p. 2.

182 See remarks by Russia, available at: <https://papersmart.unmeetings.org/media2/20305363/russian-federation-r-90-.pdf>.

183 See remarks by the United States of America, available at: <https://papersmart.unmeetings.org/media2/20305354/united-states-of-america-90-.pdf>.

184 See remarks by Israel, available at: <https://papersmart.unmeetings.org/media2/20305507/israel-90-.pdf>; remarks by the United Kingdom, Secretary-General's Report, above note 163, p. 4.

185 See remarks by Malaysia, available at: <https://papersmart.unmeetings.org/media2/20305357/malaysia-90-.pdf>.

186 See remarks by Switzerland, available at: <https://papersmart.unmeetings.org/media2/20305341/switzerland-f-e-90-.pdf>.

187 UN General Assembly, *Protection of Persons in the Event of Disasters*, UN Doc. A/Res/73/209, 20 December 2018.

such a solution was probably opportune, permitting States and other actors involved in humanitarian activities to further reflect on the opportunities and challenges of developing the long-awaited flagship treaty on disaster prevention and response and take a final position on the proposal made by the ILC.

Concluding remarks

The protection of persons in disasters has represented a challenge for the ILC, given the dynamic and partly still embryonic character of the relevant regulatory framework and the need to reconcile the various perspectives of involved actors.

The current text of the DAs certainly has points of merit, as it aims to elaborate a coherent framework for a non-homogenous area of law in order to cover the main legal issues pertaining to the disaster cycle, including several contentious ones. It has allowed the provision of a general framework that is able to highlight the main challenges related to disasters, attracting attention to the legal complexities raised by such events with regard to both disaster risk reduction and post-disaster activities. Several points can be commended, such as the holistic attitude characterizing the law-making approach followed by the ILC, aimed at finding comprehensive solutions even with regard to elements not yet crystallized in coherent and consistent practice, and the complex balance maintained with regard to different perspectives of actors involved in disaster scenarios, namely the affected State, assisting actors and victims. On some issues, such as DRR or arbitrary denial of consent, the adopted solutions aim to favour progressive trends, still grounded on coherent legal foundations, while in other circumstances, for example concerning humanitarian principles, the text has established basic elements aimed at guiding the activities of relevant stakeholders.

At the same time, the text has some weaknesses, partly linked to its structure. The preference for the adoption of a short document, aimed at sketching out basic principles in this area, has finally resulted in a series of provisions able to represent a potential framework convention, without a specific focus towards detailed provisions. This situation is hardly suited to entirely solving the common regulatory challenges raised in relief activities. Still, the reinforcement of the “operational” side of the current project might be achieved in the subsequent diplomatic negotiation process, in light of the original proposal made by the ILC Secretariat for the 1946 Convention on the Privileges and Immunities of the United Nations,¹⁸⁸ characterized by its exhaustive provisions, as a reference model for the activities of the ILC on this topic.

For instance, potential uncertainties resulting from the “bottom-up” approach adopted in Article 15 concerning facilitation of external assistance, where States are requested to support assisting actors through measures to be adopted at the domestic level without imposing specific obligations on them in this regard, could

188 ILC, above note 29, p. 210, para. 24. The “Proposed Outline”, *ibid.*, p. 213, included several areas of interest for potential rules dealing with the provision of disaster relief and access to the affected State.

be reduced through detailed provisions. Similarly, the development of technical annexes, to be periodically updated by a committee of experts, might allow for the creation of universal standards for quality of assistance, an issue which up until now has been limited to non-binding initiatives managed by relevant humanitarian professionals.¹⁸⁹ Such technical annexes might pursue multiple purposes, maintaining a balance between the diverging perspectives of involved actors.

On the one hand, technical annexes could facilitate the activities of assisting actors by ensuring predictable standards and therefore promoting easier access to affected States once they are able to satisfy such requirements. Several solutions could be proposed for such purposes – for example, there could be certification process managed under the auspices of the universal treaty, aimed at verifying the consistency of assisting actors' activities according to a set of technical standards. Similarly, assisting actors, especially those formally unable to become parties to the future treaty, such as NGOs or components of the International Red Cross and Red Crescent Movement, could be granted the opportunity to provide unilateral acceptance to such technical requirements and the core features of the future treaty, including the humanitarian principles mentioned in Article 6, in light of similar experiences concerning Deeds of Commitment developed in the framework of IHL¹⁹⁰ or the abovementioned non-binding initiatives related to disaster scenarios. On the other hand, affected States might decide to attribute privileges to assisting actors, currently to be identified at the domestic level according to Article 15, primarily to those entities willing and able to comply with such minimal requirements. For the affected State, this solution might increase the quality of assistance for its own population and minimize the current phenomenon of inappropriate assistance, creating a mutual trade-off.

As mentioned, in 2020 the UN General Assembly will have another opportunity to evaluate the possibility of a universal treaty for the protection of persons in disasters on the basis of the DAs. For “international lawyers ... the Holy Grail would be the adoption and widespread ratification of a flagship global treaty”,¹⁹¹ and the capacity of the DAs to represent the missing overarching convention capable of effectively facilitating relief operations would finally be tested by States. It is hard to predict the final outcome. Some elements militate against such a possibility, such as the current lack of appeals for multilateral treaties and the criticisms made by some States regarding the progressive character of some provisions that go beyond the codification of international law in this area. At the same time, the increasing frequency of disasters and their magnitude, accompanied by a rising awareness of the relevance of the legal component in DRR and relief and recovery activities, as well as the balanced character of the text adopted by the ILC, could be the very elements pressing States to finally adopt a universal treaty in this area. The DAs might act as a valid and solid starting point of reference for further

189 See above note 155.

190 Pascal Bongard and Jonathan Somer, “Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call Deed of Commitment”, *International Review of the Red Cross*, Vol. 93, No. 883, 2011.

191 D. Fisher, above note 5, p. 114.

negotiations aimed at strengthening their contents. Even if a treaty could not finally be achieved on the basis of activities performed by the ILC, the DAs and their commentaries will nonetheless act as a framework reference document capable of influencing future legal and political debates concerning humanitarian action in the event of disasters.

Annex 1: Draft Articles on the Protection of Persons in the Event of Disasters

*Adopted by the International Law Commission at its sixty-eighth session, in 2016, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/71/10), para. 48. The report will appear in Yearbook of the International Law Commission, 2016, vol. II, Part Two.
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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.

