



**INTER-SESSIONAL MEETING OF LEGAL EXPERTS TO DISCUSS
MATTERS RELATING TO INTERNATIONAL LAW COMMISSION TO
BE HELD ON 10TH APRIL 2012 AT AALCO SECRETARIAT, NEW
DELHI**

Protection of Persons in the Event of Disasters

Background Paper

1. INTRODUCTION

Disaster response law addresses the obligation of states to accept disaster relief. The international community has long recognized the need for coordination and cooperation in disaster response, however the efforts to codify the law of disaster response by the International Law Commission (ILC or ‘the Commission’) was a very recent development. There are three approaches to disaster response law: (i) fragmented approaches, which deal only with specific regions or subject matterS; (ii) bottom-up approaches, which attempt to generate common practice by developing norms at the national and regional levels; and (iii) top-down approaches, which address the problem with universal norms on all aspects of disaster assistance¹.

The League of Nations, in 1922, undertook efforts to establish an International Relief Union (IRU), to furnish aid and coordinate relief operations in the event of disasters. The Preamble to the Convention Establishing an International Relief Union² indicated that the States Parties desired “to render aid to each other in disasters, to encourage international relief by a methodical co-ordination of available resources, and to further the progress of international law in this field.” The activity of the International Relief Union remained limited and ceased at the outbreak of the Second World War. Another major attempt to

¹ See J. Benthon Heath (2011), “Disasters, Relief, and Neglect: the Duty to Accept Humanitarian Assistance and the work of the International Law Commission” *Journal of International Law and Politics*, vol. 43, pp: 419-477; See also Jiri Toman (2006), “International Disaster Response Law: Treaties, Principles, Regulations and Remaining Gaps” Available at SSRN: <http://ssrn.com/abstract=1312787>, accessed on 8 March 2012.

² The text of the Convention establishing an International Relief Union, 1927 is accessible at <http://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=564&lang=en>.

formulate a convention was scrapped before the process truly began. In 1984, the Office of the United Nations Disaster Relief Coordinator (UNDRO) submitted a Draft Convention on Expediting the Delivery of Emergency Assistance, to the Economic and Social Council, but, these efforts also failed to see the result.

The role of the Red Cross and Red Crescent movement advocating from its very beginning peacetime relief activities through National Societies cannot be undermined. In 1954, the Board of Governors of the League of Red Cross Societies adopted a resolution containing the governing principles and few rules were approved. Two major instruments in that regard were the *Declaration of principles relating to relief actions for the benefit of civilian populations in disaster situations*, and *Principles and rules for Red Cross Disaster Relief*, adopted at the 1969 Conference. In 1994, the International Federation (previously known as the League of Red Cross) together with 8 other world's largest disaster response agencies agreed on the *Code of Conduct for The International Red Cross and Red Crescent Movement and NGOs in Disaster Relief*. This code set standards which were being used by the International Federation to monitor its own standards of relief delivery and to encourage other agencies to set similar standards.

There are few non-binding guidelines and statements of principle, which is known as "soft law." The United Nations General Assembly and the International Law Association offerED some such attempts. In 2003, the *Institut de Droit International* published a resolution regarding the rights and obligations of States and assisting actors in the event of natural and man-made disasters, including armed conflicts. This resolution vide Article III, para 3³; and other soft-law instruments drew on existing practice in the field of disaster relief, and referred to analogous rules and principles in the laws of armed conflict, human rights law, and refugee law.

On the other hand, there are ranges of bilateral and plurilateral treaties that govern specific interstate relationships during natural and technological disasters, and more treaties have been developed to address specific issues, such as responding to nuclear accidents or providing telecommunications assistance.

On the bottom-up approaches, the International Federation of Red Cross and Red Crescent Societies (IFRC) has published a set of guidelines on the domestic facilitation of disaster relief, in 2007, addressing the necessary preconditions for international aid, as well as the granting of legal facilities, such as customs exemptions, domestic legal personality, and privileges and immunities, to international relief personnel.

In this regard, a review of the work of the ILC, which is currently developing a draft convention on the subject is pragmatic. It is imperative at this instance to note that the field of disaster response has few guidelines, statements of principles, criteria, declarations, and resolutions, with very few binding treaties, suggesting that a renewed attempt at treaty-making could play a valuable role. Such a convention would develop in a manner that affects all States equally, reaffirming the external dimensions of State

³ "Humanitarian Assistance" Sixteenth Commission of the Institute of International Law, Bruges Session dated 2 September 2003.

sovereignty. Finally, the obligation to accept disaster relief, a duty that is grounded in fundamental rights and materialized through international cooperation, should aspire to the same universality as the international human rights regime.

2. DELIBERATIONS ON THIS TOPIC AT THE INTERNATIONAL LAW COMMISSION (ILC)

The topic on “Protection of Persons in the Event of Disasters” had been decided to be included in the agenda at the Fifty-ninth session of the Commission in 2007. Mr. Eduardo Valencia-Ospina (Colombia) has been appointed as Special Rapporteur for the topic. At the same session, the Commission had requested the Secretariat to prepare a background study on the topic, which focused and was limited to ‘natural disasters’ only. The Special Rapporteur has, since then, presented a Preliminary report and four reports on this topic. The Commission has provisionally adopted 11 draft articles with commentaries at its Sixty-second (2010) and Sixty-third session (2011) respectively. Draft article 12 is still under consideration by the Commission and that provision deals with “right to offer assistance” to the affected state.

Draft article 12 read as follows:

Right to offer assistance

“In responding to disasters, States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations shall have the right to offer assistance to the affected State.”

The preliminary report of the Special Rapporteur⁴ presented during the Sixtieth session (2008), traced the evolution of the protection of persons in the event of disasters, identifying the sources of law on the topic, prior efforts towards codification and development of the law in the area, and a broad outline on various aspects of the general scope with a view to identifying the main legal questions. On sources of international disaster protection and assistance, three areas of international law have been identified: (i) international humanitarian law; (ii) international human rights law; and (iii) international law on refugees and internally displaced persons. The attempt while addressing the issue is to provide a “rights-based approach” to protection as dealt within the international human rights regime.

The second report of the Special Rapporteur⁵ was considered during the sixty-first session (2009), which analysed the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, and issues relating to the definition of “disaster” for purposes of the topic, as well as undertaking a consideration of the basic duty to cooperate. The report further contained proposals for draft articles 1 on Scope, 2 on Definition of “disaster” and 3 on Duty to cooperate.

⁴ A/CN.4/598 dated 5 May 2008.

⁵ A/CN.4/615 dated 7 May 2009.

The third report of the Special Rapporteur⁶ considered during the Sixty-second session of the Commission, the draft articles on “humanitarian principles in disaster response” which includes the principles like neutrality, impartiality and humanity as the basic principles of humanitarian concern during disaster. Further, these principles were considered because humanitarian assistance must comply with the requirements to balance the interests of the affected State and the assisting actors. Draft article 8 deals with the primary responsibility of affected State which addresses the issue of sovereignty and non-intervention. The fourth report of the Special Rapporteur⁷ dealt in detail with draft articles 10, 11 and 12. Draft articles 10 and 11 on “Duty of the affected State to seek assistance” and “Duty of the affected State not to arbitrarily withhold its consent” were adopted with commentaries.

The ILC has already developed a useful framework for addressing the issue of consent in its preliminary work on the topic. Draft article 2, on the purpose of the project, grounds the work in the rights of individual persons, and the Special Rapporteur has argued that this provision reflects a “rights-based approach” to the topic. Also central to the project is the duty of states to cooperate with each other, with the United Nations, and with civil society to protect individuals affected by a disaster (draft article 5). Read in light of draft article 2 (“Purpose”), this article indicates that States must cooperate with one another and with other international actors to fulfill essential needs and fully respect the rights of victims of disaster, and it recalls the general obligation to cooperate that is spelled out in the U.N. Charter (Article 1(3) read with Article 55 and 56 of the Charter of the United Nations). The Special Rapporteur has rejected the direct applicability of the Responsibility to Protect to this topic. Taken together, these developments demonstrate that the International Law Commission is in the process of developing a framework for disaster response that is based in human rights and oriented toward international cooperation, and that it seems to be adhering to the principles of State sovereignty and territorial integrity.

3. SUMMARY OF THE ISSUES RAISED AT THE SIXTH COMMITTEE (2011) BY THE MEMBER STATES OF AALCO

The Special Rapporteur Mr. Eduardo Valencia-Ospina listed out key features on this topic:

- (i) For the comments that it should be extended to a wider range of activities, covering the pre-disaster phase relating to risk reduction, prevention, preparedness and mitigation, it was noted that the Commission had already endorsed to first undertake work on response to disasters, followed by work on the pre-disaster response.
- (ii) On draft article 12 on offers of assistance, the focus should be on the duty of the State to give serious consideration to offers of assistance. The United Nations and intergovernmental and nongovernmental organizations should be treated on the same juridical footing.

⁶ A/CN.4/629 dated 31 March 2010.

⁷ A/CN.4/643 dated 11 May 2011

- (iii) There was another viewpoint regarding the inclusion of draft articles 10 and 11 in their current form, which said that States “shall” seek external assistance and that consent to external assistance “shall” not be withheld arbitrarily. In this regard, “Shall” meant that it was the legal obligation for affected States to accept outside assistance, but accepting this assistance was at most a moral obligation and not a legal duty. Rather than an infringement, draft articles 10 through 12 reaffirmed the fundamental international legal principles of sovereignty and non-intervention.

The following Member States of AALCO made their comments on this agenda item: Sri Lanka, Pakistan, India, Arab Republic of Egypt, People’s Republic of China, Islamic Republic of Iran, Indonesia, Republic of Korea, Thailand, Japan and Singapore.

One delegation appreciated the Special Rapporteur for avoiding “politically contentious” issues. Agreed that it was the affected State which could best determine when a disaster exceeded its national capacity to provide assistance and that State consent to receive assistance was a crucial requirement. The language “duty to seek assistance” was more appropriate than “duty to request assistance”, as was “duty to offer assistance” rather than “right to offer assistance”.

Another delegation said that the principle of independence and territorial sovereignty of States was enshrined in international law. The primary responsibility of the State affected by a disaster flowed from its obligation to its citizens. Only the affected State could assess its need for international assistance. The delegation supported Special Rapporteur’s observation on the topic: that the State was primarily responsible for overseeing relief operations, and that relief operations required State consent. Any legal right to provide assistance should therefore be avoided. Draft articles 10 and 11 on the topic, in that regard, were based on the assumption that States which did not seek international assistance would undermine the practice of international cooperation during disasters. Also to consider whether States, the United Nations, other intergovernmental organizations and nongovernmental organizations, as referenced in article 12, should be treated as if they were on the same juridical footing.

One delegation noted the provision in the draft articles recognizing the duty of the affected State to seek assistance from third parties. These articles also indicated the duty of the State to protect and provide relief to its citizens and the responsibility of the State to oversee aid relief and assistance. Emphasized the importance of State sovereignty, and assistance could be provided only with the consent of the affected State.

Another delegation opined that it was a State’s responsibility to request help when its national capacity was overwhelmed, and it was equally important to respect the sovereignty of States when discussing this important topic and to ensure that any rules and regulations do not infringe on the rights of States.

One other delegation observed that the affected States bore the primary responsibility when responding to natural disasters. This not only facilitated more effective

international cooperation but motivated affected States to assume responsibilities on their own initiative, and to be more committed to building disaster-relief capacities. Further, disaster relief should never be politicized and become an excuse for interfering in the internal affairs of a State, as that would be a violation of the principles of humanity, neutrality and impartiality, contradicting the “spirit of relief” and compromising relief activities.

Commenting on the same principle one of the delegation’s observed that the dual nature of a State’s sovereignty, which entailed both rights and obligations to take all measures to provide assistance to its nationals and other persons living in its territory, could not be “disproportionately broadened” to a legal obligation to seek external assistance. The obligation to cooperate when receiving aid did not oblige the State to accept relief, as such humanitarian aid remained subject to the consent of the affected State. The affected State had the right, in accordance to its domestic law to direct, control, supervise and coordinate the assistance provided in its territory.

It was expressed by one of the delegation’s that the core principles of sovereignty, non-intervention, State consent, and the need to ensure balance between those principles and the duty of protection were not accurately reflected in the draft articles. Assistance should be carried out based on national legislation, political independence, sovereignty and territorial integrity.

One delegation stated that such protection was not considered as a duty but a right of the aid donor. International organizations such as the United Nations should be active in requesting assistance for the affected States. The texts of the draft articles could have been “less obscure”. By the wording of draft article 10 it was not clear when a disaster exceeded the national response capacity of the affected State or not.

Further, one delegation agreed with the Commission that the new concept of “responsibility to protect” must not be extended to cover response to natural disasters and related matters. Commentary to the draft articles should further clarify which human rights were to be protected in those instances. In draft article 12, the word “right” in the phrase “right to offer assistance”, be substituted with the word “duty” because offers of assistance from the international community were part of international cooperation, as opposed to assertion of rights.

Another delegation said that the Commission could codify and elaborate rules and norms to facilitate “the flow of international assistance to those in need”. In that context, the primary responsibility to protect victims of a disaster lay with the affected State. The Commission should deepen its discussion as to whether it was justifiable to characterize seeking assistance as a “duty” of the affected State, while offering assistance was considered the “right” of other States. He also highlighted the importance of and need for international solidarity during disasters.

One other delegation said that the focus of this concept should be on the duty of the State that received offers of assistance to give serious consideration to such offers, whether

they emanated from States or such referenced organizations. On the question raised by the Commission of whether the duty to cooperate included a duty on States to provide assistance when requested by the affected States, the Commission's attention was drawn to the 2005 agreement of the Association of Southeast Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response; the relevant article stated that the parties would "promptly respond to a request for assistance from an affected Party". This regional agreement did not oblige State parties to provide assistance, but did require them to respond promptly to such a request.

4. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

Humanitarian assistance has been defined in the Bruges resolution adopted by the *Institut de droit international* in 2003 as:

"all acts, activities and the human and material resources for the provision of goods and services of an exclusively humanitarian character indispensable for the survival and fulfillment of the essential needs of victims"

The issue of contention is with regard to draft article 12, which speaks of offering assistance to the affected State by States, UN and other International Organizations as a matter of 'right'. Draft article 12 states that 'offers of assistance' should not be viewed as interference in the internal affairs of the affected State. Such offer of assistance shall be subject to the condition that the assistance offered does not affect the sovereignty of the affected State, as well as its primary role in the direction, control, coordination and supervision of such relief and assistance (draft article 9, paragraph 2). The right to offer assistance during a disaster by the international community is the practical manifestation of solidarity and a positive duty. At the same time, it should be proposed that the provision more clearly defines the circumstances where an affected State could reject offers of assistance and ensure that it has the appropriate freedom to do so.

Hence, the right to offer assistance should not extend to assistance to which conditions are attached that are unacceptable to the affected State. Furthermore, the assistance offered has to be consistent with the provisions of the draft article and, in particular, should not be offered or delivered on a discriminatory basis. It is also pointed out that draft article 12 should not be interpreted to imply permission to interfere in the internal affairs of the affected State - it merely reflected a right to offer assistance, which the affected State may refuse, subject to draft article 11.

In order to decipher the practice of States, it was essential to include examples of domestic legislation under this topic. In addition to a handful of multilateral, mainly regional, agreements and a somewhat larger number of bilateral treaties on mutual assistance, the bulk of the available material on what is termed as the law of disaster relief was constituted by non-binding instruments, adopted primarily at the intergovernmental level but also by private institutions and entities. Henceforth, the very notion of a disaster relief law is an emerging one whose consolidation would depend in great measure on the work of progressive development being carried out by the Commission. The State has the predominant right under its national law, to direct,

control, coordinate, and supervise such assistance within its territory as enshrined in draft article 10 of this topic.

Draft article 11 para 3 read as:

“When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known” and majorly depends on the consent of the affected State (draft article 11 para 1).

It plays a significant role in affirming the right of the affected State to restrict the entry of other States or international organizations that has the potential to interfere with the internal affairs of the affected State, subject to its consent. Therefore, one of the major concerns of the AALCO Member States with respect to preserving the integrity and sovereignty of the affected State is addressed. Primarily, the burden of proof is on the State to provide assistance to its people during the disaster situation, however, it is upto the State, based on its own determination may or may not choose to receive external assistance. The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected State and in principle on the basis of an appeal by the affected State.

As per United Nations General Assembly Resolution 63/139 adopted in 2008, para 8 reads that it

“encourages Member States and, where applicable, regional organizations to strengthen operational and legal frameworks for international disaster relief, taking into account, as appropriate, the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, adopted at the Thirtieth International Conference of the Red Cross and Red Crescent, held in Geneva from 26 to 30 November 2007;”

Henceforth, it is desirable to note that Member States of AALCO which have domestic legislation/policy that deal with disaster relief could kindly transmit the same to the Special Rapporteur for analyzing the State practice on this topic. The AALCO Secretariat could also consider drafting a Model Law on this agenda item after conducting an in-depth study of the national legislations of the Member States of AALCO on this subject-matter. This would in turn add to the inclusion of the practices from other civilizations while drafting the further draft articles on this pertinent topic.

ANNEX

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

Protection of persons in the event of disasters

Article 1

Scope

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

Article 2

Purpose

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

Article 3

Definition of disaster

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

Article 4

Relationship with international humanitarian law

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

Article 5

Duty to cooperate

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

Article 6

Humanitarian principles in disaster response

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

Article 7

Human dignity

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

Article 8

Human rights

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

Article 9

Role of the affected State

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

Draft article 10

Duty of the affected State to seek assistance

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

Draft article 11

Duty of the affected State not to arbitrarily withhold its consent

1. Consent to external assistance shall not be withheld arbitrarily if the affected State is unable or unwilling to provide the assistance required.
2. When an offer of assistance is extended pursuant to draft article 12, paragraph 1, of the present draft articles, the affected State shall, without delay, notify all concerned of its decision regarding such an offer.

Draft article 12⁸

Right to offer assistance

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

⁸ This draft article has not yet been adopted.