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Chapter VI Protection of persons in the event of disasters

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

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Draft article 16
Duty to reduce the risk of disasters

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

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

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-fifth session (*continued*)

Draft article 5 *ter*
Cooperation for disaster risk reduction

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

Commentary

(1) While draft article 5 *bis* concerns the various forms which cooperation may take in the disaster relief or post-disaster phase of the disaster cycle, draft article 5 *ter* indicates that the scope of application *ratione temporis* of the duty to cooperate, enshrined in general terms in draft article 5, also covers the pre-disaster phase. Thus, while draft article 5 *bis* deals with the response to a disaster, draft article 5 *ter* addresses the reduction of disaster risk.

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

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

Draft article 16
Duty to reduce the risk of disasters

1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.
2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.

Commentary

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

(2) Draft article 16 represents the acknowledgement of the need to cover in the draft articles on Protection of Persons in the Event of Disasters, not only the response phase of a disaster, but also the pre-disaster duties of States. Disaster risk reduction has its origins in a number of General Assembly resolutions and has been further developed through the 1994 World Conference on Natural Disaster Reduction in Yokohama, the 2005 Hyogo Framework for Action 2005–2015, and four sessions of the Global Platform for Disaster Risk Reduction, the latest of which took place in May of 2013.

(3) As stated in the 2005 Hyogo Declaration: “a culture of disaster prevention and resilience, and associated pre-disaster strategies, which are sound investments, must be fostered at all levels, ranging from the individual to the international levels ... Disaster risks, hazards and their impacts pose a threat, but appropriate response to this can and should lead to actions to reduce risks and vulnerabilities in the future”. At the fourth session of the Global Platform for Disaster Risk Reduction in 2013, the concluding summary by the Chair drew attention to the “growing recognition that the prevention and reduction of disaster risk is a legal obligation, encompassing risks assessments, the establishment of early warning systems, and the right to access risk information”.

(4) The rule embodied in draft article 16 draws inspiration from among the sources of law identified by Article 38.1 of the Statute of the International Court of Justice. The Commission bases itself on the fundamental principles of State sovereignty and non-intervention and relies in part upon principles emanating from international human rights law, including the States’ obligation to respect, protect, and fulfil human rights, in particular the right to life. Protection not only relates to actual violations of human rights but also entails an affirmative obligation on States to prevent the occurrence of such violations, no matter the source of the threat. In addition, draft article 16 draws from a number of international environmental law principles, including the “due diligence” principle, and from decisions of international tribunals, notably the European Court of Human Rights decisions in the *Öneriyildiz v. Turkey*¹ and *Budayeva and Others v. Russia*² cases, which affirmed the duty to take preventive measures.

(5) The primary foundation for draft article 16 lays in the widespread practice of States reflecting their recognition of an obligation to reduce the risk of disasters. A large number

¹ European Court of Human Rights, Grand Chamber, *Öneriyildiz v. Turkey*, Case No. 48939, Judgment, 30 November 2004.

² European Court of Human Rights, Chamber (First Section), *Budayeva and Others v. Russia*, Case Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment, 20 March 2008.

of States have entered into multilateral, regional and bilateral binding agreements concerned with reducing the risk of disasters. This is complemented by a number of non-binding instruments which have been adopted on the same topic. Such agreements and instruments include a call on States parties to adopt and implement appropriate legislative and regulatory measures to prevent, mitigate, and prepare for disasters. Recognition of this obligation is further shown by the States' incorporation of disaster risk reduction measures into their national policies and legal frameworks.

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

Paragraph 1

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

(8) The word "shall" signifies the existence of the international legal obligation to act in the manner described in the paragraph and is the most succinct way to convey the sense of that legal obligation. This is confirmed by the title of the draft article, which refers to the "duty" to reduce the risk of disasters. The obligation is not only one of conduct (to take the "necessary and appropriate measures"), but also one of result ("to reduce the risk of disasters" by preventing, mitigating and preparing for them). While each State bears the same obligation, the question of different levels of capacity among States to implement the obligation is dealt with under the phrase "by taking the necessary and appropriate measures".

(9) The obligation is to "reduce the risk of disasters". In this connection, the Commission notes the existence of a linguistic difference involving the United Nations official translation into French of the term "Disaster Risk Reduction" (DRR). The Commission adopted the present formula in recognition of the fact that the contemporary view of the international community, as reflected in several major pronouncements, most recently in the Hyogo Declaration issued at the 2005 World Conference on Disaster Reduction, was that the focus should be placed on the reduction of the risk of harm caused by a hazard, as distinguished from the prevention of disasters themselves. Accordingly, the emphasis in paragraph 1 is placed on the reduction of the risk of disasters. This is achieved by taking certain measures so as to prevent, mitigate and prepare for such disasters.

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

concept of “necessary and appropriate”. It is, therefore, further understood that the question of the effectiveness of the measures is implied in that formula.

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

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

(13) The phrase “through the adoption of legislation and regulations” imports a reference to ensuring that mechanisms for implementation and accountability for non-performance be defined within domestic legal systems. Since such issues, though important, are not the only ones which could be the subject of legislation and regulations in the area of disaster risk reduction, singling them out in the text of paragraph 1 might lead to a lack of clarity. Nevertheless, such reference could possibly be included in a definition of “legislation and regulations” to be inserted in a use of terms provision at a subsequent stage of work on the present topic.

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

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

- (i) “*Prevention* is ‘the outright avoidance of adverse impacts of hazards and related disasters’...

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

(ii) “*Mitigation* is ‘the lessening or limitation of the adverse impacts of hazards and related disasters’ ...

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

The Commission is conscious of the discrepancy in the concordance between the English and French versions of the official United Nations use of the term “mitigation”. It may be acknowledged that conceptually not only mitigation but also prevention and preparedness, if successfully implemented, would serve to limit the exposure to risk and thereby reduce the harmful effects experienced during the post-disaster phase. However, what are being referred to in draft article 16 are specific measures aimed at mitigating “risk”. To align the English with the French versions by adding in the former to the term “mitigation”, the qualifying phrase “of the effects of a disaster” would introduce unnecessary complexity into a draft article devoted to dealing with activities to be undertaken during the pre-disaster phase. For the purposes of draft article 16, the English and French versions of the term “mitigation” are to be treated as synonymous;

(iii) “*Preparedness* is ‘the knowledge and capacities developed by governments, professional response and recovery organizations, communities and individuals to effectively anticipate, respond to and recover from the impacts of likely, imminent or current hazard events or conditions’ ...

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

Paragraph 2

(16) Paragraph 2 lists three categories of disaster risk reduction measures, namely: the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems. As noted in paragraph (3) of the present Commentary, these three measures were singled out in the Chair’s summary at the conclusion of the fourth session of the Global Platform for Disaster Risk Reduction held in May 2013. The Commission decided to limit the paragraph to the listed three examples as reflecting the most prominent types of contemporary disaster risk reduction efforts. The word “include” serves to indicate that the list is non-exhaustive. The listing of the three measures is without prejudice to other activities aimed at the reduction of the risk of disasters which are being undertaken at present, or which may be undertaken in the future.

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

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

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

(20) The second measure — *the collection and dissemination of risk and past loss information* — is the next step. Reducing disaster risk requires action by all actors in the public and private sectors and civil society. Collection and dissemination should result in the free availability of risk and past loss information, which is an enabler of effective action. It allows all stakeholders to assume responsibility for their actions and to make a better determination of priorities for planning purposes; it also enhances transparency in transactions and public scrutiny and control. The Commission wishes to emphasize the desirability of the dissemination and free availability of risk and past loss information, as it is the reflection of the prevailing trend focusing on the importance of public access to such information. The Commission, while recognizing the importance of that trend, felt that it was best dealt with in the commentary and not in the body of paragraph 2, since making it a uniform legal requirement could prove burdensome for States.

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

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