United Nations A/CN.4/768

General Assembly

Distr.: General
26 January 2024

Original: English

International Law Commission
Seventy-fifth session
Geneva, 15 April–31 May and 1 July–2 August 2024

Sea-level rise in relation to international law

Elements in the previous work of the International Law Commission that could be particularly relevant to the topic

Memorandum by the Secretariat

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24-01433 (E) 060324

I. Introduction

1. At its seventieth session (2018), the Commission decided to recommend the inclusion of the topic "Sea-level rise in relation to international law" in its long-term programme of work.[1] At its seventy-first session (2019), the Commission decided to include the topic in its programme of work.[2] The Commission also decided to establish an open-ended Study Group on the topic, to be co-chaired, on a rotating basis, by Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria.

2. At its seventy-second session (2021), the Commission considered the first issues paper on the topic, prepared by Ms. Oral and Mr. Aurescu, concerning issues related to the law of the sea.[3] At its seventy-fourth session (2023), the Commission considered an additional paper to the first issues paper, concerning the same subtopic.[4]

3. At its seventy-third session (2022), the Commission considered the second issues paper on the topic, prepared by Ms. Galvão Teles and Mr. Ruda Santolaria, concerning issues related to statehood and to the protection of persons affected by sea-level rise.[5] At the same session, the Commission requested the Secretariat to prepare a memorandum identifying elements in the previous work of the Commission that could be relevant for its future work on the topic, in particular in relation to statehood and the protection of persons.[6]

4. To fulfil the request from the Commission, the Secretariat has engaged in a review of the work of the Commission work since 1949 with a view to identifying aspects relevant for its consideration of the subtopics of statehood and the protection of persons affected by sea-level rise. In preparing the present memorandum, the Secretariat was guided by the issues identified as part of the Study Group's future programme of work in relation to the subtopics of statehood and the protection of persons affected by sea-level rise, reflected in the 2022 report of the Commission.[7]

5. The Secretariat has focused primarily on texts adopted on second reading with commentaries,[8] as well as the final reports of the Study Group. Given the volume of material reviewed for the purpose of preparing the present memorandum, what is presented is a selection of examples intended to illustrate the approach of the Commission.

6. In preparing the present memorandum, the Secretariat sought to identify and compile elements in the Commission's prior work that, while not addressing sea-level rise specifically, could nonetheless assist the Commission in its consideration of the specific questions of statehood and the protection of persons. As indicated in the syllabus for the topic, references to sea-level rise have been made in the work of the Commission only in recent years, and to a limited extent. Examples of such references

[1] *Yearbook ... 2018*, vol. II (Part Two), para. 369.
[2] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 265.
[3] A/CN.4/740 and Corr.1 and Add.1.
[4] A/CN.4/761 and Add.1.
[5] A/CN.4/752 and Add.1.
[6] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 246.
[7] *Ibid.*, paras. 235–236.
[8] The review also included the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading at its seventy-third session (A/77/10, para. 68) and the draft conclusions on general principles of law adopted by the Commission on first reading at its seventy-fourth session (*Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 40).

can be found in specific commentaries adopted in the context of the topics on the protection of the atmosphere[9] and the protection of persons in the event of disasters.[10]

7. As regards statehood, the Commission has not directly considered certain questions, including the criteria for statehood or for the recognition of States. As such, the elements identified from the review of the Commission's work, as presented herein (sect. II), are primarily of indirect relevance to the topic of sea-level rise in relation to international law. Those elements found in the review of the work of the Commission that could be of greater relevance to the topic pertain to issues related to the protection of persons in other vulnerable circumstances (sect. III).

II. Statehood

A. Notion of State and the elements of statehood, including the recognition of States

8. This section presents a historical recollection of instances in which the Commission expressly referred to questions of statehood or the recognition of States. At its first session, in 1949, the Commission selected the recognition of States and Governments as one of a provisional list of topics for codification, although it was not included in the programme of work.[11]

9. At the same session, the Commission adopted the draft declaration on rights and duties of States.[12] It expressly excluded the task of defining "State" from the scope of the draft declaration:

> The Commission concluded that no useful purpose would be served by an effort to define the term "State", though this course has been suggested by the Governments of the United Kingdom [of Great Britain and Northern Ireland] and of India. In the Commission's draft, the term "State" is used in the sense commonly accepted in international practice. Nor did the Commission think that it was called upon to set forth in this draft Declaration the qualifications to be possessed by a community in order that it may become a State.[13]

10. The Commission also decided not to include a reference to the right of a State to exist and to preserve its existence, recalling that the draft declaration contained references to self-defence and non-intervention by other States:

> It was proposed that the draft Declaration should be introduced by an article providing that "Each State has the right to exist and to preserve its existence". This was urged as a mainspring for other rights to be declared, and its importance was thought to be underscored because the right had been denied and trampled upon by the Axis Powers in the last war. On the other hand, a majority of the members of the Commission deemed it to be tautological to say

[9] Draft guidelines on the protection of the atmosphere and commentaries thereto, *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), paras. 39–40.

[10] Draft articles on the protection of persons in the event of disasters and commentaries thereto, *Yearbook ... 2016*, vol. II (Part Two), paras. 48–49. A "disaster" is defined in draft article 3, subparagraph (*a*), 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". Slow-onset events, such as drought or sea-level rise, were given as examples of disasters covered by the draft articles (para. (4) of the commentary to draft article 3).

[11] *Yearbook ... 1949*, report to the General Assembly, at p.281, para. 16.

[12] *Ibid.*, at p. 286, para. 46.

[13] *Ibid.*, at p. 289, para. 49.

> that an existing State has the right to exist; that right is in a sense a postulate or presupposition underlying the whole draft Declaration. They also thought it superfluous to declare the right of a State to preserve its existence in view of articles in the draft Declaration concerning self-defence and non-intervention by other States.[14]

11. The Commission further decided to refrain from dealing with the question of recognition of States:

> Another proposed article would have provided that "Each State has the right to have its existence recognized by other States". The supporters of this proposal took the view that, even before its recognition by other States, a State has certain rights in international law; and they urged that, when another State on an appraisal made in good faith considers that a political entity has fulfilled the requirements of statehood, it has a duty to recognize that political entity as a State; they appreciated, however, that, in the absence of an international authority with competence to effect collective recognition, each State would retain some freedom of appraisal until recognition had been effected by the great majority of States. On the other hand, a majority of the members of the Commission thought that the proposed article would go beyond generally accepted international law in so far as it applied to new-born States; and that in so far as it related to already established States the article would serve no useful purpose. The Commission concluded that the whole matter of recognition was too delicate and too fraught with political implications to be dealt with in a brief paragraph in this draft Declaration, and it noted that the topic was one of the fourteen topics the codification of which has been deemed by the Commission to be necessary or desirable.[15]

12. During the study of the topic on the law of treaties, in 1956, the Special Rapporteur, Sir Gerald Fitzmaurice, presented a report with draft articles, of which draft article 3 contained several definitions, including a proposed definition of "State":

> Article 3. Certain related definitions
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> For the purpose of the present Code:
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> (a) In addition to the case of entities recognized as being States on special grounds, the term "State":
>
> (i) Means an entity consisting of a people inhabiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity as such, either directly or through some other State; but this is without prejudice to the question of the methods by, or channel through which a treaty on behalf [of] any given State must be negotiated – depending on its status and international affiliations;
>
> (ii) Includes the government of the State …[16]

13. In the commentary to draft article 3, the Special Rapporteur explained the rationale behind the proposed definition of "State":

> 11. … [T]his article is mainly concerned to define the term "State", in order to make it clear by implication that semi-sovereign or protected States can be parties to treaties (though in many cases only mediately), while at the same time

[14] *Ibid.*, para. 49

[15] *Ibid.*, para. 50.

[16] *Yearbook…1956*, vol. II, document A/CN.4/101, para. 10.

> bringing out the limitations on, and modalities of this position. Apart from international organizations, only States can be parties to treaties; and only those entities are States that are capable as such (and not merely as part of a larger entity) of being bound by a treaty. For this reason, a constituent State of a Federation can never be a State internationally or, as such, party to a treaty – for the treaty will bind the Federation, and will bind the constituent State not as such, but only as an (internationally) indistinguishable part of the Federation. But an internationally self-contained State, even if it is a protected State, can be bound as such, even if only with the consent, general or specific, or through the medium, of the protecting State.
>
> 12. " … entities recognized as being States on special grounds…": this would include the Vatican State.[17]

14. At the conclusion of the debate in the Commission at its eighth session, in 1956, the Special Rapporteur indicated the following in relation to the possible inclusion of a definition of "State":

> In one sense, he agreed with those who held that the term "State" did not require definition. However, the view put forward by Faris Bey el-Khouri that semi-sovereign and protected entities had no treaty-making capacity rather suggested that it did. He was afraid that he could not agree with that view. In the interests of semi-sovereign entities it was most desirable that they should be free to enter into treaty relations with other countries. And to make that possible, the doctrine that such entities could repudiate past agreements on changing their status must be rejected; otherwise States would be reluctant to conclude treaties with them.[18]

The draft articles on the law of treaties adopted by the Commission in 1966,[19] which subsequently served as the basis for the 1969 Vienna Convention on the Law of Treaties,[20] did not contain a definition of "State". The commentary simply indicated that the term was used "with the same meaning as in the Charter of the United Nations, the Statute of the International Court of Justice, the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations".[21]

15. The Commission again addressed the question of the definition of "State" during the consideration of the topic of jurisdictional immunities of States and their property.

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[17] *Ibid.*, at p. 118.

[18] *Yearbook ... 1956*, vol. I, 370th meeting, p. 226, para. 4.

[19] *Yearbook ... 1966*, vol. II, document A/6309/Rev.l, part II, p. 177, para. 38.

[20] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[21] *Yearbook ... 1966*, vol. II, document A/6309/Rev.l, part II, p. 177, para. 38, at p. 192, para. (4) of the commentary to draft art. 5. Convention on the High Seas (Geneva, 29 April 1958), *United Nations*, Treaty Series, vol. 450, No. 6465, p. 11; Convention on the Continental Shelf (Geneva, 29 April 1958), *ibid.*, vol. 499, No. 7302, p. 311; Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958), *ibid.*, vol. 516, No. 7477, p. 205; Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958), *ibid.*, vol. 559, No. 8164, p. 285; and Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), *ibid.*, vol. 500, No. 7310, p. 95.

In his second report, in 1980, first Special Rapporteur on the topic, Mr. Sompong Sucharitkul, proposed the use of the terms "territorial State"[22] and "foreign State".[23]

16. The Commission subsequently included a definition of "State" in the draft articles that it adopted on the same topic in 1991.[24] However, the definition did not address the elements of statehood, but rather sought to identify the entities that would be considered to be parts of a sovereign State and thus entitled to immunities from the jurisdiction of the domestic courts of another State:

> The term "State" should be understood in the light of its object and purpose, namely to identify those entities or persons entitled to invoke the immunity of the State where a State can claim immunity and also to identify certain subdivisions or instrumentalities of a State that are entitled to invoke immunity when performing acts in the exercise of sovereign authority. Accordingly, in the context of the present articles, the expression "State" should be understood as comprehending all types or categories of entities and individuals so identified which may benefit from the protection of State immunity.[25]

17. In 1971, the Secretariat undertook a survey of international law intended to update the Commission's long-term programme of work.[26] Among the topics identified for possible study by the Commission was "the position of States in international law", which included, *inter alia*, the sovereignty, independence and equality of States, the territorial domain of the State, and the recognition of States and Governments.

18. In 1996, at the request of the General Assembly,[27] the Commission undertook a review of the topics that it had addressed since its first session, in 1949. It was noted that of the 14 initial topics provisionally selected in 1949 for study by the Commission, three – including the topic of recognition of States and Governments – had never been included in its programme of work.[28] The resulting report on the long-term programme of work contained a list of the topics already completed and possible future topics, in which the questions of statehood and recognition of Governments remained among the future possibilities (dates of initial proposal are shown in square brackets):

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[22] *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/331 and Add.l, para. 23:
> To invoke the application of the maxim *par in parem imperium non habet* there must be two equals, i.e. two equal sovereign States. The term "territorial State" is adopted for practical convenience to denote the State before whose authorities proceedings have been brought and jurisdictional immunities invoked. A "territorial State" is therefore the State in whose territorial jurisdiction a dispute has arisen involving another State claiming exemption from the exercise of such jurisdiction over an unwilling or unconsenting State from outside the boundary of the territorial State. The State of the territory is therefore the State the exercise of whose jurisdiction is being questioned, if not challenged, because a party before its authorities enjoys an equally sovereign status and as such is not subject or amenable to its jurisdiction without consent.

[23] *Ibid.*, para. 25:
> The expression "foreign State" does not require much clarification. The term is practically self-evident if not self-explanatory. It signifies a State foreign to the jurisdiction of the territorial State. It has an identity distinct from the local State whose territorial jurisdiction has been invoked in legal proceedings against the external or foreign State or involving the property of that State. The foreign State is therefore a *sine qua non* in the situation in which the question of immunity of equals arises. It is the other equal in the duality of equality of States.

[24] *Yearbook ... 1991*, vol. II (Part Two), para. 28.

[25] *Ibid.*, para. (5) of the commentary to draft art. 2.

[26] *Yearbook ... 1971*, vol. II (Part Two), document A/CN.4/245.

[27] General Assembly resolution 50/45 of 11 December 1995, para. 9 (a).

[28] *Yearbook ... 1996*, vol. II (Part Two), para. 161.

II. Subjects of international law

…

2. Possible future topics:

(a) Subjects of international law [1949];

(b) Statehood:

(i) Position of States in international law [1971];

(ii) Criteria for recognition [1949];

(iii) Independence and sovereignty of States [1962];

(c) Government:

(i) Recognition of Governments [1949];

(ii) Representative Governments.[29]

To date, the Commission has not included any such topics in its programme of work.[30]

B. Measures for the maintenance of the *status quo* related to the recognition of States

19. While the Commission has not addressed the elements of statehood, it has, on occasion, considered provisions aimed at maintaining the *status quo* in circumstances involving exceptional situations such as changes in the status of recognition, or the non-recognition, of States or Governments.

20. Draft article 79 of the draft articles on the representation of States in their relations with international organizations, adopted in 1971, concerns the non-recognition of States or Governments or absence of diplomatic or consular relations.[31] The provision was subsequently adopted as article 82 of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, concluded in 1975.[32]

21. Draft article 31 of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier, adopted in 1989, concerns the non-recognition of States or Governments or absence of diplomatic or

[29] *Ibid.*, annex II.

[30] In 2016, the Secretariat included "recognition of States" among possible topics for consideration by the Commission. *Yearbook … 2016*, vol. II (Part Two), para. 313; see also document A/CN.4/679/Add.1.

[31] *Yearbook … 1971*, vol. II (Part One), document A/8410/Rev.1, para. 60, at pp. 330–332. In paragraph (1) of the corresponding commentary, the Commission noted that draft article 79 was included following the discussion of a working paper presented by the Special Rapporteur on the topic, Mr. Abdullah el-Erian (*Yearbook … 1971*, vol. II (Part Two), document A/CN.4/L.166), in which he addressed the question of the possible effects of exceptional situations on the representation of States in international organizations. In paragraph (4) of the same commentary, the Commission noted that provisions concerning situations deriving from the recognition or non-recognition of States or Governments were not included in the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations (Vienna, 24 April 1963, United Nations, *Treaty Series*, vol. 596, no. 8638, p. 261) or the Convention on Special Missions (New York, 8 December 1969, United Nations, *Treaty Series*, vol. 1400, No. 23431, p. 231).

[32] Vienna, 14 March 1975. *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations, Vienna, 4 February–14 March 1975*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207, document A/CONF.67/16; or United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.

consular relations.[33] In the commentary to the provision, the Commission indicated the following:

> (1) The basic concept that the rights and obligations of the sending State and of the host State of an international organization are not affected by non-recognition or by the non-existence of diplomatic or consular relations between them is contained in article 82 of the 1975 Vienna Convention on the Representation of States, which is therefore one of the sources for article 31.[34]

C. References to the transfer of territory from one State to another State and its effects

22. One of the issues identified during the work of the Study Group concerned the possible alternatives in the future for States where sea-level rise may affect the possibility of inhabiting the territory. The Commission has not addressed criteria for the creation or extinction of States. However, it has studied several topics related to the consequences of succession of States, when the disappearance or transformation of statehood is a fact.

23. In paragraph (3) of the commentary to draft article 2 of the draft articles on succession of States in respect of treaties, the Commission noted that "the term 'succession of States' … is used as referring exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event".[35] In its work on the topics concerning succession of States, the Commission has therefore addressed the legal effects of situations where there has been already a change in the legal existence of one entity to another.

24. One of the issues that could be of relevance for the Study Group concerns the succession of part of the territory of one State. In the commentary to draft article 14 of the draft articles on succession of States in respect of treaties, concerning succession in respect of part of territory, the Commission noted that it was aware that the scope of the draft articles might exclude their application to a case in which a depending territory was transferred from one administering Power to another:

> (8) … [The Commission] recognized that such cases might occur, but observed that they were likely to be very rare. During the course of the second reading, other instances of unusual cases were mentioned which might require the application of special rules. In general, the Commission considered that it would be wiser not to complicate the present draft articles by adding detailed provisions to cover such cases. In the instance of a change in the responsibility for the international relations of a territory from one administering Power to another, the Commission considered that the moving treaty-frontiers rule would not necessarily apply. In such a case, regard should be had to the circumstances in which the change occurred and so far as necessary the rules set out in the present articles should be applied by analogy.[36]

25. In 1981, in the draft articles on succession of States in respect of State property, archives and debts, the Commission elaborated further on the effects of the transfer of territory from one State to another State, and distinguished it from the separation

[33] *Yearbook … 1989*, vol. II (Part Two), para. 72.
[34] *Ibid.*
[35] *Yearbook … 1974*, vol. II (Part One), document A/9610/Rev.1, para. 85, at p. 175.
[36] *Ibid.*, at p. 209.

of part of the territory of a State. In the commentary to draft article 13, on transfer of territory of a State, the Commission noted the following:

> (6) … The cases of transfer of territory envisaged are those where the fact of the replacement of the predecessor State by the successor State in the responsibility for the international relations of the part of the territory concerned does not presuppose the consultation of the population of that part of the territory, in view of its minor political, economic or strategic importance, or the fact that it is scarcely inhabited, if at all.[37]

26. The Commission emphasized that in most such cases, the passing of State property would normally be settled by the agreement of the predecessor and the successor States.[38] It further noted the following:

> (9) The situation covered by the provisions of article 13 is to be distinguished from that of a part of the territory of a State which separates from that State and unites with another State, contemplated in paragraph 2 of article 16 … In the case of such separation, as opposed to the case of transfer of a part of territory, the fact of the replacement of the predecessor State by the successor State in the responsibility for the international relations of the part of the territory concerned presupposes the expression of a conforming will on the part of the population of the separating part of the territory, in consequence of its extent and large number of inhabitants or of its importance from a political, economic, strategic or other point of view. … An agreement between the predecessor and successor States is certainly to be envisaged, but not with the primacy that is accorded it in article 13, since what is paramount in the case to which paragraph 2 of article 16 relates is the will of the population expressed in the exercise of the right to self-determination.[39]

D. Avoidance of statelessness in the event of transfer of territory

27. Draft article 10 of the draft convention on the elimination of future statelessness and the draft convention on the reduction of future statelessness provides the following:

> 1. Every treaty providing for the transfer of a territory shall include provisions for ensuring that, subject to the exercise of the right of option, the inhabitants of that territory shall not become stateless.
>
> 2. In the absence of such provisions, a State to which territory is transferred, or which otherwise acquires territory, or a new State formed on territory previously belonging to another State or States, shall confer its nationality upon the inhabitants of such territory unless they retain their former nationality by option or otherwise or have or acquire another nationality.[40]

28. In the commentary to the version of the provision adopted the previous year, the Commission had indicated the following:

> 154. The first paragraph of this article lays upon the parties the obligation to endeavour, in any treaties which they may conclude in the future with respect to transfers of territory, to include provisions ensuring that the inhabitants of the territories concerned do not become stateless. In the nature of things, no more stringent obligation can be imposed upon them in cases in which the other

[37] *Yearbook … 1981*, vol. II (Part Two), para. 87.
[38] *Ibid.*
[39] *Ibid.*
[40] *Yearbook … 1954*, vol. II, document A/2693, para. 25.

contracting party is not a party to either convention on statelessness. However, the obligation of paragraph 1 is fully operative in cases in which both parties to the treaty transferring territory are parties to one of the two conventions on statelessness.

155. In making the provision ensuring the avoidance of statelessness subject to safeguarding the right of option, the draft conventions go outside their primary purpose, namely, the elimination or reduction of statelessness. However, the Commission is of the opinion that the right of option of nationality has acquired a degree of recognition so general that a failure to safeguard it in a convention of this type would signify a retrogressive step or, at least, that it would lend itself to misinterpretation.[41]

III. Protection of persons affected by sea-level rise

A. Consideration in the second issues paper and future work identified by the Study Group

29. In the second issues paper,[42] the Co-Chairs addressed the subtopics of statehood and the protection of persons affected by sea-level rise. On the latter subtopic, the paper presented a mapping exercise of the existing legal frameworks potentially applicable to the protection of persons affected by sea-level rise, and a preliminary mapping exercise of State practice and the practice of relevant international organizations and bodies regarding the protection of persons affected by sea-level rise. The paper also contained certain preliminary observations and guiding questions for the Study Group's future work on the subtopic.

30. The Secretariat has taken account of the issues addressed in the paper and the proposed course of action while carrying out its review of the prior work of the Commission that could be relevant for the Study Group.

B. Works of the Commission relevant to the subtopic of the protection of persons affected by sea-level rise

1. General human rights obligations

(a) General obligations

31. In some of its past work, the Commission addressed general human rights and humanitarian obligations of States that could also be applicable in the sea-level rise context and therefore of use to the Study Group's work on the topic. As previously observed by the Study Group, the draft articles on the protection of persons in the event of disasters,[43] adopted in 2016, are of particular relevance for the Commission's work on the present topic.[44] The following selected provisions address States' general human rights and humanitarian obligations in the context of the protection of persons in the event of disasters.

32. Draft article 4, entitled "Human dignity", provides the following: "The inherent dignity of the human person shall be respected and protected in the event of disasters." In the corresponding commentary, the Commission observed the following:

[41] *Yearbook ... 1953*, vol. II, document A/2456, paras. 154–155.
[42] A/CN.4/752 and Add.1.
[43] *Yearbook ... 2016*, vol. II (Part Two), para. 48
[44] A/77/10, para. 223.

> (1) … In the context of the protection of persons in the event of disasters, human dignity is situated as a guiding principle for any action to be taken in the context of the provision of relief assistance, in disaster risk reduction and in the ongoing evolution of applicable laws.
>
> …
>
> (6) … [T]he terms "respect" and "protect" connote a negative obligation to refrain from injuring the inherent dignity of the human person and a positive obligation to take action to protect human dignity.[45]

33. Draft article 5, entitled "Human rights" provides the following: "Persons affected by disasters are entitled to the respect for and protection of their human rights in accordance with international law." In its commentary to this provision, the Commission reiterated the link between human rights and the principle of human dignity, as reflected in draft article 4. It further observed the following:

> (2) The general reference to "human rights" encompasses human rights obligations expressed in relevant international agreements and those in customary international law. … Protection under national law (such as that provided in the constitutional law of many States) is also envisaged. The formulation adopted by the Commission indicates the broad field of human rights obligations, without seeking to specify, add to or qualify those obligations.
>
> …
>
> (7) The draft article intentionally leaves open the question of how rights are to be enforced to the relevant rules of international law themselves. It is understood that there is often an implied degree of discretion in the application of rights, conditioned by the severity of the disaster, depending on the relevant rules recognizing or establishing the rights in question. Furthermore, the Commission considered that the reference to "human rights" incorporates both the rights and limitations that exist in the sphere of international human rights law. The reference to "human rights" is, accordingly, to the whole of international human rights law, including in particular its treatment of derogable and non-derogable rights. As such, the provision contemplates an affected State's right of suspension or derogation where recognized under existing international agreements, which is also confirmed by the concluding phrase "in accordance with international law".[46]

34. In the commentary to draft article 13, entitled "Consent of the affected State to external assistance", the Commission also emphasized the following:

> (4) The Commission considers that the duty of an affected State to ensure protection and assistance to those within its territory, or in territory under its jurisdiction or control, in the event of a disaster, is aimed at preserving the life and dignity of the persons affected by the disaster and guaranteeing the access of persons in need to humanitarian assistance. This duty is central to securing the right to life of those within an affected State's territory, or in territory under its jurisdiction or control.[47]

35. The Commission also addressed the general human rights obligations of States, and their relationship with other international obligations, in the context of climate change while working on the topic of the protection of the atmosphere. While the

[45] *Yearbook … 2016*, vol. II (Part Two), para. 49.
[46] *Ibid.*
[47] *Ibid.*

issue of climate change *per se* was excluded from the scope of the present topic,[48] the following provisions could serve, *mutatis mutandis*, as a source of inspiration to the Commission.

36. According to draft guideline 9 of the draft guidelines on the protection of the atmosphere, adopted in 2021:

> 1. The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including, *inter alia*, the rules … of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties, including articles 30 and 31, paragraph 3 (*c*), and the principles and rules of customary international law.
>
> 2. States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.
>
> 3. When applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, *inter alia*, indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise.[49]

37. In the commentary to draft guideline 9, the Commission observed the following:

> (10) As for international human rights law, environmental degradation, including air pollution, climate change and ozone layer depletion, "has the potential to affect the realization of human rights". The link between human rights and the environment, including the atmosphere, is acknowledged in practice. The [Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)] recognizes, in its principle 1, that everyone "has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being". …
>
> (11) In this regard, relevant human rights include "the right to life", "the right to private and family life" and "the right to property", as well as the other rights listed in the eleventh preambular paragraph of the Paris Agreement …
>
> …
>
> (13) One of the difficulties in the relationship between the rules of international law relating to the atmosphere and human rights law is the "disconnect" in their application *ratione personae*. While the rules of international law relating to the atmosphere apply not only to the States of victims but also to the States of origin of the harm, the scope of application of human rights treaties is limited to the persons subject to a State's jurisdiction. Thus, where an environmentally harmful activity in one State affects persons in another State, the question of the interpretation of "jurisdiction" in the context of human rights obligations arises. In interpreting and applying the notion, regard may be had to the object and purpose of human rights treaties. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian*

[48] *Yearbook … 2018*, vol. II (Part Two), annex II, para. 14.
[49] A/76/10, para. 39.

Territory, the International Court of Justice said, when addressing the issue of extraterritorial jurisdiction, "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions".

…

(18) The phrase in the second sentence of paragraph 3 "may include, *inter alia*" denotes that the examples given are not necessarily exhaustive. Indigenous peoples are, as was declared in the Report of the Indigenous Peoples' Global Summit on Climate Change, "the most vulnerable to the impacts of climate change because they live in the areas most affected by climate change and are usually the most socio-economically disadvantaged". People of the least developed countries are also placed in a particularly vulnerable situation as they often live in extreme poverty, without access to basic infrastructure services and to adequate medical and social protection. People of low-lying areas and small-island developing States affected by sea-level rise are subject to the potential loss of land, leading to displacement and, in some cases, forced migration.[50]

(b) Particularly vulnerable groups

38. Draft article 6, entitled "Humanitarian principles", of the draft articles on protection of persons in the event of disasters provides the following: "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." In the commentary to draft article 6, the Commission, *inter alia*, explained the phrase "the needs of the particularly vulnerable":

(7) … The term "vulnerable" encompasses both groups and individuals. For this reason, the neutral expression "vulnerable" was preferred to either "vulnerable groups" or "vulnerable persons". The qualifier "particularly" was used in recognition of the fact that those affected by disaster are by definition vulnerable. …The Commission decided against including a list of vulnerable groups within the draft article itself in recognition of the relative nature of vulnerability. What was important was less a fixed iteration of particularly vulnerable subgroups of individuals within the broader body of persons affected, or potentially affected, by a disaster, and more a recognition that the principle of non-discrimination includes within it the positive obligation to give specific attention to the needs of the particularly vulnerable. The term "particularly vulnerable" is deliberately open-ended to include not only the categories of individuals usually associated with the concept, … but also other possible individuals that might find themselves being particularly vulnerable in the wake of a disaster, such as non-nationals.[51]

[50] *Ibid.*, para. 40. Stockholm Convention (Stockholm, 16 June 1972), *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14) (A/CONF.48/14/Rev.1 and Corr.1); Paris Agreement (Paris, 12 December 2015), United Nations, *Treaty Series*, vol. 3156, No. 54113, p. 259; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136; and International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

[51] *Yearbook … 2016*, vol. II (Part Two), para. 49.

39. The plight of vulnerable persons is also dealt with in the draft articles on the expulsion of aliens, adopted in 2014. Draft article 15 sets out particular requirements concerning the expulsion of vulnerable persons:

> 1. Children, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion shall be considered as such and treated and protected with due regard for their vulnerabilities.
>
> 2. In particular, in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration.[52]

40. In the corresponding commentary, the Commission explained the following:

> (3) It is hardly possible to list in a draft article all categories of vulnerable persons that might merit special protection in the context of an expulsion procedure. Aside from the categories of persons explicitly mentioned, there might be other individuals, such as those suffering from incurable diseases or an illness requiring particular care which, *ex hypothesi*, could not be provided – or would be difficult to provide – in the possible State or States of destination. The addition of the phrase "and other vulnerable persons" clearly indicates that the list included in paragraph 1 is not exhaustive.[53]

(c) Protection of lands and territories of Indigenous peoples

41. The Commission could find useful to its work on the topic certain elements of the draft principles on protection of the environment in relation to armed conflicts, adopted in 2022.[54] Although the scope of the draft principles is limited "to the protection of the environment before, during or after an armed conflict, including in situations of occupation", some of the draft principles contained therein, as well as the Commission's observations, could be applied, *mutatis mutandis*, in the sea-level rise context.

42. Paragraph 2 of draft principle 5 contains a requirement that States engage in consultations and cooperation with Indigenous peoples when their lands and territories suffer certain adverse effects, albeit in the context of armed conflict:

> 2. When an armed conflict has adversely affected the environment of the lands and territories that indigenous peoples inhabit or traditionally use, States shall undertake appropriate and effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.[55]

43. In the commentary to draft principle 5, the Commission noted the following:

> (4) The special relationship between indigenous peoples and their environment has been recognized, protected and upheld by international instruments such as the Indigenous and Tribal Peoples Convention, 1989 (No. 169), of the International Labour Organization and the United Nations Declaration on the Rights of Indigenous Peoples, as well as in the practice of States and in the jurisprudence of international courts and tribunals. To this end, the lands of indigenous peoples have been recognized as having a fundamental importance for their collective physical and cultural survival as peoples.

[52] *Yearbook … 2014*, vol. II (Part Two), para. 44.
[53] *Ibid.*, para. 45.
[54] A/77/10, para. 58.
[55] *Ibid.*

(5) Paragraph 1 is based on article 29, paragraph 1, of the United Nations Declaration on the Rights of Indigenous Peoples, which expresses the right of indigenous peoples to "the conservation and protection of the environment and the productive capacity of their lands or territories and resources", and article 7, paragraph 4, of ILO Convention No. 169, which recognizes that "Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit".

…

(10) [In the case of harm caused as a result of an armed conflict], the concerned States shall undertake appropriate and effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and, in particular, through their own representative institutions. The word "shall" reflects the established nature of the obligation of consultation.

(11) … The consultations must in any event be effective in practice in order not to put in jeopardy the substantive right of indigenous peoples to redress.[56]

(d) Right to access to information

44. In the draft articles on prevention of transboundary harm from hazardous activities,[57] adopted in 2001, the Commission included several provisions containing general human rights obligations, including on the right to access to information, that could be of relevance for the Commission's work on the present topic.

45. According to draft article 13, entitled "Information to the public", States are under an obligation to "provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views".[58] In paragraph (1) of the corresponding commentary, the Commission further explained that the obligation enshrined in the draft article was twofold: "(*a*) to provide information to the public regarding the activity and the risk and the harm it involves; and (*b*) to ascertain the views of the public".[59]

46. Later in the commentary to draft article 13, the Commission noted the following:

(3) This article is inspired by new trends in international law, in general, and environmental law, in particular, of seeking to involve, in the decision-making processes, individuals whose lives, health, property and environment might be affected by providing them with a chance to present their views and be heard by those responsible for making the ultimate decisions.

…

(10) … [G]iven the development of human rights law, public participation could also be viewed as a growing right under national law as well as international law.[60]

47. Draft article 15, on non-discrimination, provides for the following obligation on States:

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[56] *Ibid.*, para. 59. International Labour Organization, Convention concerning Indigenous and Other Tribal Peoples in Independent Countries (Geneva, 27 June 1989) (Indigenous and Tribal Peoples Convention, 1989 (No. 169)); and United Nations Declaration on the Rights of Indigenous Peoples, General Assembly resolution 61/295 of 13 September 2007, annex.

[57] *Yearbook … 2001*, vol. II (Part Two), para. 97.

[58] *Ibid.*, para. 97.

[59] *Ibid.*, para. 98.

[60] *Ibid.*, para. 98.

> Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of an activity within the scope of the present articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.[61]

In paragraph (2) of the commentary to that provision, the Commission confirmed that any such person should "receive the same treatment as that afforded by the State of origin to its nationals in case of possible domestic harm".[62]

48. Lastly, draft principle 23 of the draft principles on protection of the environment in relation to armed conflicts also provides for an obligation for States and relevant international organizations to "share and grant access to relevant information in accordance with their obligations under applicable international law" in order to "facilitate measures to remediate harm to the environment resulting from an armed conflict".[63]

49. In its commentary to draft principle 23, the Commission, *inter alia*, provided additional information on the origins of the right to access to information, as follows:

> (7) The origins of the right to access to information in modern international human rights law can be found in article 19 of the Universal Declaration of Human Rights, as well as in article 19 of the International Covenant on Civil and Political Rights. General comment No. 34 on article 19 of the International Covenant on Civil and Political Rights provides that article 19, paragraph 2, should be read as including a right to access to information held by public bodies.
>
> (8) A right to environmental information has also developed within the context of the European Convention on Human Rights, as exemplified in the case of *Guerra and Others v. Italy*, in which the European Court of Human Rights decided that the applicants had a right to environmental information on the basis of article 8 of the Convention (the right to family life and privacy). Reference can also be made to the European Union directive on public access to environmental information and to a related judgment of the European Court of Justice of 2011. In addition to the right to privacy, a right to environmental information has also been based on the right to freedom of expression (as in e.g. *Claude-Reyes et al. v. Chile* before the Inter-American Court of Human Rights).
>
> (9) Article 2 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) defines "environmental information" as any information pertaining to the state of elements of the environment, factors affecting or likely to affect elements of the environment, as well as the state of human health and safety insofar as it may be affected by these elements. Article 4 of the Aarhus Convention stipulates that State parties must "make such [environmental] information available to the public, within the framework of national legislation". Such an obligation implies a duty for States to collect such environmental information for the purposes of making it available to the public if and when requested to do so. In addition, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in

[61] *Ibid.*, para. 97.
[62] *Ibid.*, para. 98.
[63] A/77/10, para. 58.

Latin America and the Caribbean (Escazú Agreement), adopted on 4 March 2018, contains similar provisions."[64]

2. Principle of *non-refoulement* in the context of sea-level rise

(a) General considerations and applicability of the principle of *non-refoulement*

50. The principle of *non-refoulement* was addressed in the second issues paper, in particular with regard to the Views adopted by the Human Rights Committee in *Teitiota v. New Zealand*,[65] in which the Committee concluded the following:

> The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the [International Covenant on Civil and Political Rights], thereby triggering the *non-refoulement* obligations of sending States. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.[66]

51. The principle of *non-refoulement* was recognized in the Convention relating to the Status of Refugees,[67] as a prohibition on the return (*refoulement*) of refugees to States in which their life or freedom would be threatened because of persecution on certain grounds. While initially employed as a term of art applicable only to refugees, the principle of *non-refoulement* may have attained a broader understanding and application, potentially applicable also to individuals seeking protection from climate-induced changes such as sea-level rise.

52. For example, an explicit reference to the principle was subsequently also included in various human rights instruments – such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [68] and the International Convention for the Protection of All Persons from Enforced

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[64] *Ibid.* European Court of Human Rights, *Guerra and Others v. Italy*, Judgment, 19 February 1998, *Reports of Judgments and Decisions* 1998-I; Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information; European Court of Justice, *Office of Communications v. Information Commissioner*, case C-71/10, Judgment, 28 July 2011; Inter-American Court of Human Rights, *Case of Claude-Reyes et al. v. Chile*, Judgement (merits, reparations and costs) 19 September 2006, Series C, No. 151 (2006); Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (Aarhus, Denmark, 25 June 1998), United Nations, *Treaty Series*, vol. 2161, No. 37770, p. 447; and Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú, 4 March 2018) (Escazú Agreement), *ibid.*, No. 56654 (volume number has yet to be determined), available from https://treaties.un.org.

[65] CCPR/C/127/D/2728/2016.

[66] *Ibid.*, para. 9.11.

[67] Convention relating to the Status of Refugees (Geneva, 28 July 1951), United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137, art. 33.

[68] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85, art. 3.

Disappearance[69] – with a broader scope, applicable also to aliens not necessarily entitled to refugee status.[70]

53. Since such a broader understanding of the principle of *non-refoulement* includes not only return but also expulsion, the draft articles on the expulsion of aliens are also of particular relevance to the topic at hand. Paragraph 1 of draft article 1 provides the following: "The present draft articles apply to the expulsion by a State of aliens present in its territory."[71] In the corresponding commentary, the Commission explained the scope of the draft articles *ratione personae*:

> (2) In stating that the draft articles apply to the expulsion by a State of aliens who are present in its territory, paragraph 1 defines the scope of the draft articles both *ratione materiae* and *ratione personae*. … With regard to scope *ratione personae*, that is, the persons covered by the draft articles, it follows from paragraph 1 that the draft articles apply in general to the expulsion of all aliens present in the territory of the expelling State, with no distinction between the various categories of persons involved, for example, aliens lawfully present in the territory of the expelling State, aliens unlawfully present, displaced persons, asylum seekers, persons granted asylum and stateless persons. …
>
> …
>
> (5) … [Some] categories of aliens who enjoy special protection under international law, such as refugees, stateless persons and migrant workers and their family members, are not excluded from the scope of the draft articles. It is understood, however, that the application of the provisions of the draft articles to those categories of aliens is without prejudice to the application of the special rules that may govern one aspect or another of their expulsion from the territory of a State. Displaced persons, in the sense of relevant resolutions of the United Nations General Assembly, are also not excluded from the scope of the draft articles.[72]

(b) Requirement of lawfulness

54. Draft article 3 of the draft articles on the expulsion of aliens, in its second sentence, provides the following: "Expulsion shall be in accordance with the present draft articles, without prejudice to other applicable rules of international law, in particular those relating to human rights."[73] In the corresponding commentary, the Commission observed the following:

> (2) The second sentence of draft article 3 is a reminder that the exercise of this right of expulsion is regulated by the present draft articles, without prejudice to other applicable rules of international law. … [T]he specific

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[69] International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3, art. 16.

[70] The Human Rights Committee, in its general comment No. 31 (2004) (para. 12), confirmed that there was also an implicit obligation of this nature in the International Covenant on Civil and Political Rights:

> [T]he article 2 obligation requiring that States parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.

[71] *Yearbook … 2014*, vol. II (Part Two), para. 44.

[72] *Ibid.*, para. 45.

[73] *Ibid.*, para. 44.

> mention of human rights is justified by the importance that respect for human rights assumes in the context of expulsion, an importance also underlined by the many provisions of the draft articles devoted to various aspects of the protection of the human rights of aliens subject to expulsion.[74]

55. While acknowledging the inherent right of a State to expel an individual from its territory, the draft articles provide for a number of corresponding obligations with a view to guaranteeing the rights of an alien subject to expulsion.

56. Draft article 4 sets out a fundamental condition of lawfulness to which a State's exercise of its right to expel aliens from its territory is subject: "An alien may be expelled only in pursuance of a decision reached in accordance with law."[75]

57. In the corresponding commentary, the Commission explained the following:

> (3) The requirement of conformity with the law follows logically from the fact that expulsion is to be exercised within the framework of law. The State's prerogative of regulating conditions of expulsion on its territory within the limits of international law entails the obligation to comply with the rules it has laid down or subscribed to in this area. … Moreover, the requirement is well established in international human rights law, both universal and regional.[76]

58. The requirement of lawfulness is also to be found in draft article 5, entitled "Grounds for expulsion". Under paragraph 2 of that draft article, a State "may only expel an alien on a ground that is provided for by law", and under paragraph 4, a State "shall not expel an alien on a ground that is contrary to its obligations under international law."[77]

59. In the corresponding commentary, the Commission confirmed the following:

> (3) Draft article 5, paragraph 2, sets out the fundamental requirement that the ground for expulsion must be provided for by law. The reference to "law" here is to be understood as a reference to the internal law of the expelling State. In other words, international law makes the lawfulness of an expulsion decision dependent on the condition that the decision is based on a ground provided for in the law of the expelling State.
>
> …
>
> (5) The purpose of draft article 5, paragraph 4, is simply to recall the prohibition against expelling an alien on a ground contrary to the expelling State's obligations under international law. The prohibition would apply, for example, to expulsion based on a ground that was discriminatory in the sense of draft article 14 [on prohibition of discrimination] below. It should be specified that the expression "to its obligations under international law" does not mean that a State may interpret such obligations in a restrictive manner, to avoid other obligations under international law that are opposable to it.[78]

(c) Procedural guarantees

60. The draft articles on the expulsion of aliens set out a number of rights and guarantees for aliens subject to expulsion and corresponding obligations on the expelling State, which may be relevant for the Study Group's consideration of the

[74] *Ibid.*, para. 45.
[75] *Ibid.*, para. 44.
[76] *Ibid.*, para. 45.
[77] *Ibid.*, para. 44.
[78] *Ibid.*, para. 45.

principle of *non-refoulement* in the context of the protection of persons affected by sea-level rise.

61. A general prohibition of collective expulsion of aliens is provided for in draft article 9, whose first three paragraphs read as follows:

> 1. For the purposes of the present draft article, collective expulsion means expulsion of aliens, as a group.
>
> 2. The collective expulsion of aliens is prohibited.
>
> 3. A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of an assessment of the particular case of each individual member of the group in accordance with the present draft articles.[79]

62. In paragraph (2) of the corresponding commentary, the Commission recalled that the prohibition of collective expulsion was "expressly embodied in several international human rights treaties",[80] including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the American Convention on Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the African Charter on Human and Peoples' Rights and the Arab Charter on Human Rights.[81]

63. The Commission went on to explain the following:

> (4) The prohibition of the collective expulsion of aliens set out in paragraph 2 of the present draft article should be read in the light of paragraph 3, which elucidates it by specifying the conditions under which the members of a group of aliens may be expelled concomitantly without such a measure being regarded as a collective expulsion within the meaning of the draft articles.[82]

64. Draft articles 13 to 25 form Part Three of the draft articles, covering the protection of the rights of aliens subject to expulsion.

65. Draft article 13 contains a general and overarching obligation for the expelling State to respect the human dignity and human rights of aliens subject to expulsion, as follows:

> 1. All aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process.
>
> 2. They are entitled to respect for their human rights, including those set out in the present draft articles.[83]

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[79] *Ibid.*, para. 44.

[80] *Ibid.*, para. 45.

[81] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990), United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3; American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969), *ibid.*, vol. 1144, No. 17955, p. 123; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), *ibid.*, vol. 213, No. 2889, p. 221; African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), *ibid.*, vol. 1520, No. 26363, p. 217; and Arab Charter on Human Rights, adopted at Tunis in May 2004, at the 16th Summit of the League of Arab States (CHR/NONE/2004/40/Rev.1; for a revised and updated version (Tunis, 22 and 23 May 2004), see Boston University International Law Journal, vol. 24, No. 2 (2006), p. 147).

[82] *Yearbook ... 2014*, vol. II (Part Two), para. 45.

[83] *Ibid.*, para. 44.

66. In the commentary to draft article 13, the Commission explained the following:

> (2) The general principle of respect for the dignity of any alien subject to expulsion is of particular importance in view of the fact that, in the course of the expulsion process, aliens are not infrequently subjected to humiliating treatment offensive to their dignity as human beings that does not necessarily amount to cruel, inhuman or degrading treatment. The phrase "the inherent dignity of the human person", drawn from article 10 of the International Covenant on Civil and Political Rights, is intended to make it clear that the dignity referred to in this draft article is to be understood as an attribute that is inherent in every human being.
>
> (3) … It goes without saying that the expelling State is required, in respect of an alien subject to expulsion, to meet all the obligations incumbent upon it concerning the protection of human rights, both by virtue of international conventions to which it is a party and by virtue of general international law. That said, mention should be made in particular in this context of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by the General Assembly on 13 December 1985.[84]

67. Draft article 14 reflects the prohibition of discrimination, as follows: "The expelling State shall respect the rights of the alien subject to expulsion without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law."[85]

68. In the commentary to draft article 14, the Commission provided the following clarifications regarding the list of prohibited grounds for discrimination:

> (3) The list of prohibited grounds for discrimination contained in draft article 14 is based on the list included in article 2, paragraph 1, of the International Covenant on Civil and Political Rights, with the addition of the ground of "ethnic origin" and a reference to "any other ground impermissible under international law". The express mention of "ethnic origin" in the draft article is justified because of the undisputed nature of the prohibition in contemporary international law of discrimination on this ground and in view of the particular relevance of ethnic issues in the context of the expulsion of aliens. The reference to "any other ground impermissible under international law" clearly indicates the non-exhaustive nature of the list of prohibited grounds for discrimination included in draft article 14.[86]

69. Draft articles 16 to 20 relate to the protection required in the expelling State, covering the obligation of the expelling State to protect the right to life of an alien subject to expulsion, prohibition of torture or cruel, inhuman or degrading treatment or punishment, the obligation to respect the right to family life, obligations with regard to the detention of an alien for the purpose of expulsion, and protection of the property of an alien subject to expulsion.

70. With regard to the grounds on which expulsion is prohibited, draft article 23, entitled "Obligation not to expel an alien to a State where his or her life would be threatened". provides the following in paragraph 1: "No alien shall be expelled to a State where his or her life would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin,

[84] *Ibid.*, para. 45. See also General Assembly resolution 40/144 of 13 December 1985, annex.
[85] *Yearbook … 2014*, vol. II (Part Two), para. 44.
[86] *Ibid.*, para. 45.

property, birth or other status, or any other ground impermissible under international law."[87]

71. In the corresponding commentary the Commission observed the following:

> (1) Draft article 23 deals with protection of the life of an alien subject to expulsion in relation to the situation in the State of destination. Paragraph 1 prohibits the expulsion of an alien "to a State where his or her life would be threatened" on one of the grounds set out in draft article 14, which establishes the obligation not to discriminate. The wording referring to a State "where his or her life would be threatened", which delimits the scope of this prohibition of expulsion, corresponds to the content of article 33 of the Convention relating to the Status of Refugees of 28 July 1951, which establishes the prohibition of return (*refoulement*), without extending to all aliens the prohibition of expulsion or return (*refoulement*) of a refugee to a State where his or her freedom would be threatened.
>
> (2) The prohibited grounds of discrimination set out in draft article 14 and reproduced in draft article 23 are those contained in article 2, paragraph 1, of the International Covenant on Civil and Political Rights. There is no valid reason why the list of discriminatory grounds in draft article 23 should be less broad in scope than the list contained in draft article 14. In particular, the list of grounds contained in article 33 of the Convention relating to the Status of Refugees was too narrow for the present draft article, which addresses the situations not only of persons who could be defined as "refugees", but of aliens in general, and in a wide range of possible situations. As for the prohibition of any discrimination on grounds of sexual orientation, there is a trend in that direction in international practice and case law, but the prohibition is not universally recognized.[88]

72. Draft article 24, entitled "Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment", indicates the following: "A State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment."[89]

73. In the corresponding commentary, the Commission explained the following:

> (1) The wording of draft article 24 … is inspired by article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 3 of the Convention restricts the obligation of non-expulsion to acts of torture. It does not therefore extend this obligation to situations in which there are substantial grounds for believing that an alien subject to expulsion would be subjected to cruel, inhuman or degrading treatment or punishment. However, draft article 24 broadens the scope of the protection afforded by this provision of the Convention, since the obligation not to expel contained in the draft article covers not only torture, but also other cruel, inhuman or degrading treatment or punishment.[90]

[87] *Ibid.*, para. 44.
[88] *Ibid.*, para. 45.
[89] *Ibid.*, para. 44.
[90] *Ibid.*, para. 45.

(d) State of destination and expulsion of stateless individuals

74. Draft article 22 of the draft articles on the expulsion of aliens concerns the question of the State of destination and the expulsion of stateless individuals. Paragraph 2 could be of particular interest to the Study Group, as it could be applicable, *mutatis mutandis*, to a situation in which a State's territory has been rendered uninhabitable, or the State has completely ceased to exist, owing to the consequences of sea-level rise:

> 2. Where the State of nationality or any other State that has the obligation to receive the alien under international law has not been identified and no other State is willing to accept the alien, that alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State.[91]

75. In the corresponding commentary, the Commission specified the following:

> (3) Draft article 22, paragraph 2, addresses the situation where it has not been possible to identify either the State of nationality or any other State that has the obligation to receive the alien under international law. In such cases, it is stated that the alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State. The last phrase ("the State from where he or she has entered the expelling State") should be understood primarily to mean the State of embarkation, although the chosen wording is sufficiently general also to cover situations where an alien has entered the territory of the expelling State by a mode of transport other than air transport.
>
> (4) Readmission agreements are of particular interest in determining the State of destination of an expelled alien. These agreements fall within the broad scope of international cooperation, in which States exercise their sovereignty in the light of variable considerations that in no way lend themselves to normative standardization through codification. That said, such agreements should be implemented in compliance with the relevant rules of international law, particularly those aimed at protecting the human rights of the alien subject to expulsion.
>
> (5) Determination of the State of destination of the alien subject to expulsion under draft article 22 must be done in compliance with the obligations contained in draft article 6, subparagraph (b) (prohibition of *refoulement*), and in draft articles 23 and 24, which prohibit expulsion of an alien to a State where his or her life would be threatened or to a State where the alien may be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[92]

76. When addressing a particular situation where individuals might face return or expulsion to a third country after having lost their nationality and become stateless as a result of sea-level rise, the Study Group might also find relevant draft article 7 of the draft articles on the expulsion of aliens: "The present draft articles are without prejudice to the rules of international law relating to stateless persons, and in particular to the rule that a State shall not expel a stateless person lawfully in its territory save on grounds of national security or public order."[93]

77. In the commentary to draft article 7, the Commission explained the following:

[91] *Ibid.*, para. 44.
[92] *Ibid.*, para. 45.
[93] *Ibid.*, para. 44.

(3) By analogy with subparagraph (*a*) of draft article 6 concerning refugees, draft article 7 is patterned after article 31, paragraph 1, of the Convention relating to the Status of Stateless Persons. Here, too, the limitation on the grounds for expulsion applies only to stateless persons lawfully present in the territory of the expelling State.

(4) Draft article 7 does not contain a parallel provision to subparagraph (*b*) of draft article 6 concerning refugees, which refers to the obligation of *non-refoulement*. Stateless persons, like any other alien subject to expulsion, are entitled to the protection recognized by draft articles 23 and 24 below, which apply to aliens in general.[94]

3. Definition of "refugee"

78. While addressing further issues of the protection of persons in the context of sea-level rise, the Study Group might also find relevant the following provisions of the draft articles on the expulsion of aliens, which relate to international law concerning refugees and, specifically, the definition of a "refugee".[95]

79. Draft article 6 provides the following as regards the expulsion of refugees:

> The present draft articles are without prejudice to the rules of international law relating to refugees, as well as to any more favourable rules or practice on refugee protection, and in particular to the following rules:
>
> (*a*) a State shall not expel a refugee lawfully in its territory save on grounds of national security or public order;
>
> (*b*) a State shall not expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where the person's life or freedom would be threatened ….[96]

80. In the corresponding commentary, the Commission addressed the definition of "refugee" in broader terms than that of the Convention relating to the Status of Refugees of 28 July 1951:

> (2) The term "refugee" should be understood not only in the light of the general definition contained in article 1 of the Convention relating to the Status of Refugees of 28 July 1951, as amended by article 1 of the Protocol relating to the Status of Refugees of 31 January 1967, which eliminated the geographic and temporal limitations of the 1951 definition, but also having regard to subsequent developments in the matter, including the practice of the Office of the United Nations High Commissioner for Refugees … In that regard, the broader definition of "refugee" adopted in the [Organization of African Unity] Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969 merits particular mention.
>
> (3) The terms "rules of international law relating to refugees" should be understood as referring to all of the treaty rules at the universal, regional and subregional levels that relate to refugees, as well as to relevant customary rules, to which the draft articles are without prejudice.[97]

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[94] *Ibid.*, para. 45.

[95] See also A/CN.4/752, paras. 262–270.

[96] *Yearbook … 2014*, vol. II (Part Two), para. 44.

[97] *Ibid.*, para. 45. Convention Governing the Specific Aspects of Refugee Problems in Africa (Addis Ababa, 10 September 1969), United Nations, *Treaty Series*, vol. 1001, No. 14691, p. 45.

4. International cooperation and assistance in emergency situations and disaster risk reduction

(a) International cooperation

81. The Commission has addressed the issue of international cooperation on several occasions in its past work. The selection of extracts below is compiled of elements that, while not addressing sea-level rise specifically, could be applicable, *mutatis mutandis*, in the sea-level rise context and might therefore assist the Commission in its consideration of the two subtopics.

82. The Study Group has stressed that the draft articles on the protection of persons in the event of disasters constitute one of the most directly relevant texts of the Commission for its work on the present topic. [98] The draft articles are primarily concerned with international cooperation. In particular, the importance of cooperation is highlighted in the fourth preambular paragraph: "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". [99]

83. In its commentary to the preamble, the Commission explained the following:

> (5) The fourth preambular paragraph recalls the fundamental value of solidarity in international relations, and the importance of strengthening international cooperation in respect of all phases of a disaster, both of which are key concepts underlying the topic and which cannot be interpreted as diminishing the sovereignty of affected States and their prerogatives within the limits of international law. Mention of "all phases of disasters" recognizes the reach of the articles into each component phase of the entire disaster cycle, as appropriate.[100]

84. Draft article 7 of the draft articles deals directly with the duty to cooperate, and provides as follows: "In the application of the present draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the International Red Cross and Red Crescent Movement, and with other assisting actors."[101]

85. In its commentary to the draft article 7, the Commission specified the following:

> (1) Effective international cooperation is indispensable for the protection of persons in the event of disasters. The duty to cooperate is well established as a principle of international law and can be found in numerous international instruments. The Charter of the United Nations enshrines it, not least with reference to the humanitarian context in which the protection of persons in the event of disasters places itself. …
>
> (2) Cooperation takes on special significance with regard to international human rights obligations that have been undertaken by States. The International Covenant on Economic, Social and Cultural Rights refers explicitly to international cooperation as a means of realizing the rights contained therein. This has been reiterated by the Committee on Economic, Social and Cultural Rights in its general comments relating to the implementation of specific rights guaranteed by the Covenant. International cooperation gained particular prominence in the 2006 Convention on the Rights of Persons with Disabilities, which reaffirms existing international obligations in relation to persons with

[98] A/77/10, para. 223.
[99] *Yearbook … 2016*, vol. II (Part Two), para. 48.
[100] *Ibid.*, para. 49.
[101] *Ibid.*, para. 48.

disabilities "in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters".

…

(5) A key feature of activity in the field of disaster relief assistance is international cooperation not only among States, but also with intergovernmental and non-governmental organizations. …

(6) Draft article 7 recognizes the central importance of international cooperation to international disaster relief assistance activities, as well as in the reduction of disaster risk. It reflects a legal obligation for the various parties concerned. The nature of the obligation of cooperation may vary, depending on the actor and the context in which assistance is being sought and offered. … The Commission inserted the phrase "as appropriate", which qualifies the entire draft article, both as a reference to existing specific rules that establish the nature of the obligation to cooperate among the various actors mentioned in the draft article, and as an indication of a degree of latitude in determining, on the ground, when cooperation is or is not "appropriate". It does not qualify the level of cooperation being envisaged, but rather the actors with whom the cooperation should take place.[102]

86. The Commission addressed forms of cooperation in the response to disasters in draft article 8, which reads as follows: "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."[103]

87. In its commentary to draft article 8, the Commission provided additional clarification as to the various forms that cooperation between affected States, assisting States and other assisting actors may take in the context of response to disasters:

(4) While the draft article highlights specific forms of cooperation, the list is not meant to be exhaustive, but is instead illustrative of the principal areas in which cooperation may be appropriate according to the circumstances. The non-exhaustive nature of the list is emphasized by the use of the word "includes" and its equivalent in the other official languages. The Commission determined that the highlighted forms are the main areas in which cooperation may be warranted and that the forms are broad enough to encapsulate a wide variety of cooperative activities. Cooperation may, therefore, include the activities mentioned, but is not limited to them; other forms of cooperation not specified in the present draft article are not excluded, such as: financial support; technology transfer covering, among others, technology relating to satellite imagery; training; information-sharing; joint simulation exercises and planning; and undertaking needs assessments and situation overview.

…

(6) The forms that cooperation may take will necessarily depend upon a range of factors, including, *inter alia*, the nature of the disaster, the needs of the affected persons and the capacities of the affected State and other assisting actors involved. … The draft article is therefore not intended to be a list of

[102] *Ibid.*, para. 49. International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966), *United Nations*, Treaty Series, vol. 993, No. 14531, p. 3; and Convention on the Rights of Persons with Disabilities (New York, 13 December 2006), *ibid.*, vol. 2515, No. 44910, p. 3.

[103] *Yearbook … 2016*, vol. II (Part Two), para. 48.

activities in which an assisting State may engage, but rather areas in which harmonization of efforts through consultation on the part of both the affected State and other assisting actors may be appropriate.[104]

88. The Commission further addressed the issue of international cooperation, including in emergency situations, in the draft articles on the law of transboundary aquifers, adopted in 2008.[105] While the draft articles concern international cooperation in relation to the utilization and protection of aquifers and not to the protection of persons *per se*, some provisions might nonetheless still be of interest to the Study Group in its work on sea-level rise in relation to international law.

89. Draft article 7, on the general obligation to cooperate, provides the following in its paragraph 1: "Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith in order to attain equitable and reasonable utilization and appropriate protection of their transboundary aquifers or aquifer systems."[106]

90. Draft article 17, on emergency situations, provides the following:

> 4. States shall provide scientific, technical, logistical and other cooperation to other States experiencing an emergency. Cooperation may include coordination of international emergency actions and communications, making available emergency response personnel, emergency response equipment and supplies, scientific and technical expertise and humanitarian assistance.[107]

91. In its commentary to draft article 17, the Commission noted the following:

> (9) Paragraph 4 sets forth an obligation of assistance for all the States regardless of whether they are experiencing in any way the serious harm arising from an emergency. … Assistance required would relate to coordination of emergency actions and communication, providing trained emergency response personnel, response equipment and supplies, extending scientific and technical expertise and humanitarian assistance.[108]

92. The Commission also addressed the question of international cooperation in its work on the draft articles on prevention of transboundary harm from hazardous activities.[109] While the subject matter of the draft articles falls outside the scope of the subtopic of the protection of persons affected by sea-level rise, some of the provisions and commentaries thereto might be of relevance for the Study Group's work.

93. Draft article 4 of the draft articles on prevention of transboundary harm from hazardous activities, provides the following with regard to cooperation: "States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof."[110]

94. In the corresponding commentary, the Commission observed the following:

> (1) The principle of cooperation between States is essential in designing and implementing effective policies to prevent significant transboundary harm or at

[104] *Ibid.*, para. 49.
[105] *Yearbook … 2008*, vol. II (Part Two), para. 53.
[106] *Ibid.*, para. 53.
[107] *Ibid.*, para. 53.
[108] *Ibid.*, para. 54.
[109] *Yearbook … 2001*, vol. II (Part Two), para. 97.
[110] *Ibid.*, para. 97.

any event to minimize the risk thereof. The requirement of cooperation of States extends to all phases of planning and of implementation.[111]

95. Draft article 9, covering consultations on preventive measures, provides the following in its paragraph 1: "The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof."[112] In paragraph (2) of the corresponding commentary, the Commission emphasized the following: "The parties must enter into consultations in good faith and must take into account each other's legitimate interests."[113]

96. According to draft article 16: "The State of origin shall develop contingency plans for responding to emergencies, in cooperation, where appropriate, with the State likely to be affected and competent international organizations."[114]

97. In the corresponding commentary, the Commission explained the following:

> (2) While States of origin bear the primary responsibility for developing contingency plans, in many cases it will be appropriate to prepare them in cooperation with other States likely to be affected and competent international organizations. … In addition, the coordination of response efforts might be most effectively handled by a competent international organization of which the States concerned are members.[115]

98. The Commission also addressed the issue of international cooperation in its draft guidelines on the protection of the atmosphere, adopted in 2021.[116] According to draft guideline 8:

> 1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.
>
> 2. States should cooperate in further enhancing scientific and technical knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.[117]

99. In the corresponding commentary, the Commission observed the following:

> (1) International cooperation is at the core of the whole set of the present draft guidelines. The concept of international cooperation has undergone a significant change in international law, and today is to a large extent built on the notion of common interests of the international community as a whole. …
>
> …
>
> (5) … Cooperation could take a variety of forms. Paragraph 2 of the draft guideline stresses, in particular, the importance of cooperation in enhancing scientific and technical knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Paragraph 2 also highlights the exchange of information and joint monitoring.[118]

[111] *Ibid.*, para. 98.
[112] *Ibid.*, para. 97.
[113] *Ibid.*, para. 98.
[114] *Ibid.*, para. 97.
[115] *Ibid.*, para. 98.
[116] A/76/10, para. 39.
[117] *Ibid.*, para. 39.
[118] *Ibid.*, para. 40.

(b) External assistance

100. In draft article 11 of the draft articles on the protection of persons in the event of disasters, the Commission addressed the question of the 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."[119]

101. In its commentary to the draft article, the Commission made the following clarifications:

> (1) … The draft article affirms the obligation of the affected State to do its utmost to provide assistance to persons in a territory under its jurisdiction or control. The duty to cooperate also underlies an affected State's duty to the extent that a disaster manifestly exceeds its national response capacity. Draft article 7 affirms that the duty to cooperate is incumbent upon not only potential assisting States or other potential assisting actors, but also affected States where such cooperation is appropriate. The Commission considers that where an affected State's national capacity is manifestly exceeded seeking assistance is both appropriate and required.
>
> …
>
> (3) The Commission considers that the duty to seek assistance in draft article 11 also derives from an affected State's obligations under international human rights instruments and customary international law. Recourse to international support may be a necessary element in the fulfilment of a State's international obligations towards individuals where the resources of the affected State are inadequate to meet protection needs. …
>
> …
>
> (9) The existence of a duty to seek assistance to the extent that national capacity is manifestly exceeded does not imply that affected States should not seek assistance in disaster situations of a lesser magnitude. The Commission considers cooperation in the provision of assistance at all stages of disaster relief to be central to the facilitation of an adequate and effective response to disasters and a practical manifestation of the principle of solidarity. Even if an affected State is capable and willing to provide the required assistance, cooperation and assistance by international actors will in many cases ensure a more adequate, rapid and extensive response to disasters and an enhanced protection of affected persons.[120]

102. According to draft article 12, on 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.[121]

103. In the commentary to draft article 12, the Commission specifies the following:

> (2) Draft article 12 is only concerned with "offers" of assistance, not with the actual "provision" thereof. Such offers, whether made unilaterally or in response

[119] *Yearbook … 2016*, vol. II (Part Two), para. 48.
[120] *Ibid.*, para. 49.
[121] *Ibid.*, para. 48.

> to a request, are essentially voluntary and should not be construed as recognition of the existence of a legal duty to assist. Nor does an offer of assistance create for the affected State a corresponding obligation to accept it. In conformity with the principle of the sovereignty of States and the primary role of the affected State, stressed in the preamble and which inform the whole set of draft articles, an affected State may accept in whole or in part, or not accept, offers of assistance from States or non-State actors in accordance with the conditions set forth in draft article 13.[122]

104. Draft article 13, in turn, addresses 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.[123]

105. In the commentary to draft article 13, the Commission, while noting that the "principle that the provision of external assistance requires the consent of the affected State is fundamental to international law", observed the following:

> (3) The recognition, in paragraph 2, that an affected State's right to refuse an offer is not unlimited reflects the dual nature of sovereignty as entailing both rights and obligations. This approach is reflected in paragraph 1 of draft article 10, which affirms that an affected State "has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control".
>
> (4) The Commission considers that the duty of an affected State to ensure protection and assistance to those within its territory, or in territory under its jurisdiction or control, in the event of a disaster, is aimed at preserving the life and dignity of the persons affected by the disaster and guaranteeing the access of persons in need to humanitarian assistance.[124]

106. Addressing the issue of when the withholding of consent may be deemed to be arbitrary, the Commission explained the following:

> (8) … The determination of whether the withholding of consent is arbitrary must be made on a case-by-case basis, although as a general rule several principles can be adduced. First, the Commission considers that withholding consent to external assistance is not arbitrary where a State is capable of providing, and willing to provide, an adequate and effective response to a disaster on the basis of its own resources. Second, withholding consent to assistance from one external source is not arbitrary if an affected State has accepted appropriate and sufficient assistance from elsewhere. Third, the withholding of consent is not arbitrary if the relevant offer is not made in accordance with the present draft articles. In particular, draft article 6 establishes that humanitarian assistance must take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination. Conversely, where an offer of assistance is made in accordance with the draft articles and no alternate sources of assistance are

[122] *Ibid.*, para. 49.
[123] *Ibid.*, para. 48.
[124] *Ibid.*, para. 49.

available, there would be a strong inference that a decision to withhold consent is arbitrary.[125]

107. In draft article 14, the Commission acknowledges the right of the affected State to place conditions on the provision of external assistance, in accordance with the draft articles and with applicable rules of international and national law:

> 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.[126]

108. In the commentary to draft article 14, the Commission observed the following:

> (2) The draft article furthers the principle enshrined in draft article 10, which recognizes the primary role of the affected State in the direction, control, coordination and supervision of disaster relief assistance in its territory, or in territory under its jurisdiction or control. …
>
> …
>
> (7) The right to condition assistance is the recognition of a right of the affected State to deny unwanted or unneeded assistance, and to determine what and when assistance is appropriate. The third sentence of the draft article gives an explanation of what is required of conditions set by affected States, namely, that they must "take into account" not only the identified needs of the persons affected by disasters but also the quality of the assistance. Nevertheless, the phrase "take into account" does not denote that conditions relating to the identified needs and the quality of assistance are the only ones that States can place on the provision of external assistance.
>
> …
>
> (9) The inclusion of the word "quality" is meant to ensure that affected States have the right to reject assistance that is not necessary or that may be harmful. Conditions may include restrictions based on, *inter alia*, safety, security, nutrition and cultural appropriateness.[127]

109. In draft article 15, the Commission addresses the 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.[128]

[125] *Ibid.*, para. 49.
[126] *Ibid.*, para. 48.
[127] *Ibid.*, para. 49.
[128] *Ibid.*, para. 48.

110. In the commentary to draft article 15, the Commission provided examples of the measures necessary to facilitate the prompt and effective provision of assistance, including, *inter alia*, legislative, executive or administrative measures.

(c) Disaster risk reduction

111. The Commission deals with the duty to reduce the risk of disasters in draft article 9 of the draft articles on the protection of persons in the event 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.[129]

112. In the commentary to draft article 9, the Commission elaborated on its understanding of the origins of the concept of disaster risk reduction:

> (4) The Commission bases itself on the fundamental principles of State sovereignty and non-intervention and, at the same time, draws on principles emanating from international human rights law, including the obligations undertaken by States to respect and protect human rights, in particular the right to life. Protection entails a positive obligation on States to take the necessary and appropriate measures to prevent harm from impending disasters.[130]

In paragraphs (5) and (6) of the commentary to the same draft article, the Commission went on to provide multiple examples of the widespread practice of States seeking to reduce the risk of disasters.

113. Later in the commentary to the same draft article, the Commission noted the following:

> (8) … In contrast to those draft articles dealing directly with disaster response where a distinction exists between an affected State or States and other States, in the pre-disaster phase the obligation in question applies to every State. Furthermore, as is evident from paragraph 2 [of the draft article], the obligation to reduce risk implies measures primarily taken at the domestic level.[131]

114. With respect to the three categories of disaster risk reduction measures identified in paragraph 2 of draft article 9, the Commission specified in the commentary that they constituted examples rather than a non-exhaustive list of categories, and observed the following:

> (18) The practical structural and non-structural measures that can be adopted are innumerable and depend on the social, environmental, financial, cultural and other relevant circumstances. Practice in the public and private sectors, as well as instruments, such as the Sendai Framework [for Disaster Risk Reduction 2015–2030], provide a wealth of examples, among which may be cited: community-level preparedness and education; the establishment of disaster risk governance frameworks; contingency planning; setting-up of monitoring mechanisms; land-use controls; construction standards; ecosystems

[129] *Ibid.*, para. 48.
[130] *Ibid.*, para. 49.
[131] *Ibid.*

management; drainage systems; social safety-nets addressing vulnerability and resilience; risk disclosure; risk-informed investments; and insurance.[132]

115. With regard to international cooperation and disaster risk reduction, the Commission went on to observe the following:

> (23) … [D]raft article 9 concerns the taking of the envisaged measures within the State. Any inter-State component would be covered by the duty to cooperate in draft article 7. Accordingly, the extent of any international legal duty relating to any of the listed or not listed measures that may be taken in order to reduce the risk of disasters is to be determined by way of the relevant specific agreements or arrangements each State has entered into with other actors with which it has the duty to cooperate.[133]

116. In its commentary to draft article 7, the Commission recalled the following:

> (8) … In the reduction of the risk of disasters, the cooperation with other actors is enshrined in the Sendai Framework's paragraph 19 (*b*), which indicates that "[d]isaster risk reduction requires that responsibilities be shared by central Governments and relevant national authorities, sectors and stakeholders", and paragraph 19 (*d*), which indicates that "[d]isaster risk reduction requires an all-of-society engagement and partnership".[134]

117. The Commission also addressed disaster prevention in its draft articles on prevention of transboundary harm from hazardous activities.[135] In draft article 9, the Commission envisaged a mechanism for consultations on preventive measures:

> 1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof. The States concerned shall agree, at the commencement of such consultations, on a reasonable time frame for the consultations.
>
> …
>
> 3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.[136]

118. The Commission observed the following in its commentary to draft article 9:

> (8) Article 9 has a broad scope of application. It is to apply to all issues related to preventive measures. For example, when parties notify under article 8 or exchange information under article 12 and there are ambiguities in those communications, a request for consultations may be made simply in order to clarify those ambiguities.
>
> …
>
> (10) Paragraph 3 deals with the possibility that, despite all efforts by the parties, they cannot reach an agreement on acceptable preventive measures. … [T]he article maintains a balance between the two considerations, one of which is to

[132] *Ibid.* Sendai Framework for Disaster Risk Reduction 2015–2030, General Assembly resolution 69/283 of 3 June 2015, annex II.
[133] *Yearbook … 2016*, vol. II (Part Two), para. 49.
[134] *Ibid.* See also Sendai Framework (see footnote 132 above).
[135] *Yearbook … 2001*, vol. II (Part Two), para. 97.
[136] *Ibid.*, para. 97.

deny the States likely to be affected a right of veto. In this context, the *Lake Lanoux* award may be recalled where the tribunal noted that, in certain situations, the party that was likely to be affected might, in violation of good faith, paralyse genuine negotiation efforts. To take account of this possibility, the article provides that the State of origin is permitted to go ahead with the activity, for the absence of such an alternative would, in effect, create a right of veto for the States likely to be affected. The State of origin, while permitted to go ahead with the activity, is still obligated, as measure of self-regulation, to take into account the interests of the States likely to be affected. As a result of consultations, the State of origin is aware of the concerns of the States likely to be affected and is in a better position to seriously take them into account in carrying out the activity. The last part of paragraph 3 preserves the rights of States likely to be affected.[137]

119. Draft article 16, on emergency preparedness, reads as follows: "The State of origin shall develop contingency plans for responding to emergencies, in cooperation, where appropriate, with the State likely to be affected and competent international organizations."[138]

120. The Commission observed the following in its corresponding commentary:

(2) While States of origin bear the primary responsibility for developing contingency plans, in many cases it will be appropriate to prepare them in cooperation with other States likely to be affected and competent international organizations. …

(3) Development of contingency plans are also better achieved through establishment of common or joint commissions composed of members representing all States concerned.[139]

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[137] *Ibid.*, para. 98. *Lake Lanoux* case, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281.

[138] *Yearbook … 2001*, vol. II (Part Two), para. 97.

[139] *Ibid.*, para. 98.