بسم الله الرحمن الرحيم

In the Name of God, the Most Compassionate, the Most Merciful

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Before the Sixth Committee of Seventy-ninth Session of General Assembly

Working Group on Protection of Persons in the Event of Disasters

Cluster I: Preamble, draft articles 1,2,3 and 18

October 2024-New York

Mr. Chair.

On this cluster, in line with our previous positions, I would like to highlight the importance of the preamble of the draft articles in outlining the overall purposes of the document; it has been within the interpretative practice of the International Court of Justice to examine preambles, amongst others, to determine the object of a framework. The preamble of the draft articles should properly reflect and provide the context of the discussion and rationale for elaboration of the instrument so as to shed more light on its provisions and to the extent possible elucidate the purposes. That being said we would like to briefly discuss the preamble in tandem with draft articles 2 and 3 on purpose and scope of the instrument.

As opined in the commentary, the scope *ratione materiae* of the draft articles is the "rights and obligations of affected States" (emphasis added) in respect of protection of persons in the event of disasters. It is understood that duties surrounding protection of persons within a territory exclusively rest with affected States as per their domestic laws and relevant applicable international legal instruments, yet this does not preclude the obligations of assisting States in supporting affected States when the former request and give consent to such assistance. To adopt a coherent and consistent approach and to ensure legal clarity, it is essential that the scope of draft article and other provisions corresponds to the subject matter as elaborated. Nevertheless, draft article 2 does not commensurate with the view made in the commentary which has considered "rights and obligations of affected states" as the scope *ratione materiae*.

In other words, the scope *ratione personae* and *ratione temporis* is reflected in the draft articles; also, the Commission does not consider its *ratione loci* to be limited, thus all these three elements expressed by the Commission in contemplating the scope have been in one way or another accommodated, nevertheless, the scope *ratione materiae* which in the view of the commentary is centered on affected States is absent in draft article 2. The

scope needs to be clear and unambiguous in respect of what the document addresses, the Commission has recognized this important matter in the commentary yet has not converted it into a proper language in draft article 2.

Similarly, given this very subject matter of the draft articles as expounded above, the centrality of the role of affected States and national ownership should be reiterated in the preamble as well as the scope. This is in line with the Guiding Principles stipulated in the General Assembly resolution 48/162 as well as other relevant General Assembly resolutions in this area including resolution 78/120. The role of affected states has also been highlighted in other relevant instruments and documents. For the purpose of discussions under this cluster, the following paragraph could be considered:

> "Reaffirming the exclusive role and national ownership of affected States in initiation, organization, coordination, authorization and implementation of humanitarian assistance and all other relevant activities within their territory and in the facilitation of the work of humanitarian organizations in mitigating the consequences of natural disasters."

Mr. Chair.

As delineated in the yearbook 2006, the Commission was of the view that this topic to be located within the "contemporary reflection on an emerging principle entailing responsibility to protect". Almost two decades have passed since then and the reflection on this matter never arrived at a common ground, views are at conjecture, no such principle nor any sufficient and consistent practice in this regard exists in international law. As such the language utilized in the draft article need to be revisited to gain approval from all delegations, the term "protection" could not serve for this purpose unless it is strictly limited to affected States, part of the commentary conforms with this perspective. Divergent views on this matter leads to the conclusion that the Commission had better replace this term with the term "assisting" which carries more neutral tone and is legally accurate. In light of this and of nature of the document, we are of the view that draft articles 2 and 3 could have mainly focused on assisting and supporting States rather than protection of individuals which as the discussions evince is confronting with legal difficulties including in terms of sovereignty of States.

Such an approach, while could ensure avoidance of politicization, is more practical as affected States are best placed to appreciate the needs and priorities of their people in the event of disasters. To that end the draft articles could have addressed ways and means to promote international cooperation especially within existing international legal instruments in support of affected States so that they could enhance protection of persons within their jurisdiction. This is the very essence of relevant resolutions including resolution 48/162 to which the Commission has made frequent references in the commentary. The said resolution states that "The United Nations has a central and unique role to play in providing leadership and coordinating the efforts of the international

community to support the affected countries". The International Framework of Action for the International Decade for Natural Disaster Reduction has enumerated among its purpose the improvement of "capacity of each country to mitigate the effects of natural disasters expeditiously and effectively paying special attention to assisting developing countries…". Establishing an arbitrary nexus between nationals of a State residing within the territory of that State with a foreign State providing assistance simply ignores the principle of national ownership and sovereignty and the fact that affected States are central to this discussion.

Mr. Chair.

Along with the same discussion on the preamble, we believe that more could have been inferred from the preamble on the object of the draft articles should it have been more elaborative on the very essential component in responding to disasters which is promotion of international cooperation and addressing challenges that affected states, in particular developing countries, face in responding to disasters thereby in protecting their people in the event of calamitous events. Eventually, either in the form of affected States or assisting states, developing States face various challenges owing to limited capacities and resources. International cooperation among States in this area should take into account these differing capacities and resources.

The Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States as an important relevant instrument certain content of which undergirds for recognizing customary international law in view of the International Court of Justice, reaffirms the duties to cooperate in various fields. It further reaffirms that "States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries". The importance of taking into account the status of developing countries does not need further explanation. The overall context of the discussions within the United Nations as reflected in the General Assembly relevant resolutions also clearly indicate that States are not on equal footing in terms of capabilities and capacities. By way of example, in the Guiding Principles appended to resolution 46/182 establishing DHA, the General Assembly has underlined that "International cooperation should be accelerated for the development of developing countries, thereby contributing to reducing the occurrence and impact of future disasters and emergencies".

The most recent General Assembly resolution continues to pay special attention to the status of developing counties, for instance resolution 78/119 recognizes "that developing countries, …, remain acutely vulnerable to human and economic loss resulting from natural hazards" and further recognizes "the need for strengthening international cooperation, as appropriate, to strengthen their resilience in this regard." The consistent attention of the international community through the General Assembly resolutions to developing countries is predicated on the economic hardship and lack of access to essential goods, commodities and required technologies that puts most developing countries in a

position of vulnerability in the face of disasters. This has been reflected in various manners in relevant instruments including the Addis Ababa Action Agenda of the Third International Conference on Financing for Development and other instruments which have all been considered by the Commission as frameworks from which in its view certain practices may be adduced. In the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, which is not a universal instrument yet referred to by the Commission in the commentary, regard has been made to developing countries both in its preamble and its provisions.

In the light of the foregoing, we believe that the draft articles should manifest a particular attention to the differences in capacities and resources of States. The Commission could take into account its previous work on Draft Articles on the Law of Transboundary Aquifers wherein the special needs of developing countries were addressed and to that end include appropriate provisions in the preamble as well as other relevant segments of the present draft articles. The concept of "common but differentiated responsibilities" known as CBDR seems to be congruent to this discussion, this concept has been appreciated by the Commission in its works and relates to international environmental law yet remains relevant as to the discussions on disasters which could entail environmental dimensions; not to mention that analogy may be also driven in this context. In this respect, we see merits in prioritizing the need to support developing countries in the purpose and scope of the draft articles as well as the addition of a standalone article on this matter, one which focuses on avenues for international cooperation to the benefit of States from developing countries both as assisting and affected States.

Mr. Chair.

As regards draft article 3 on the use of terms, it is understood that the types of assistance with respect to equipment and goods, where relevant, could also be realized through facilitating access to such equipment or removing barriers on access of affected States to such material. This could be further discussed and addressed in draft article 8. In addition, consideration might be given to a prudent approach in defining equipment and goods so as to ensure that this definition withstands volatile or intersecting situations. On the term "other assisting actors" while we concur with the Commission on the important role of competent intergovernmental organizations such as the United Nations as subjects of international law or entities such the International Committee of the Red Cross which has a unique status, we are not convinced if it is necessary for the draft articles to address non-governmental organizations or civil society in such a broad manner. We are doubtful if sufficient and uniform states' practice accepted as *opinio juris* ever exists on this matter.

Equally we are circumspect to assume this matter as part of the progressive development of international law. Domestic laws of affected States could regulate the activities of non-governmental organizations in accordance with the fundamental principles of the respective domestic legal system. Where a foreign non-governmental

organization provides its assistance, it could be regulated on the basis of appropriate arrangements on the part of the affected state with that organization including domestic laws. This view has been envisaged in the commentary, though in a tacit manner, which has considered the "activities of non-governmental organizations and other private actors, as being subject to the domestic laws". This matter or at least the broad approach taken in this respect needs to be reassessed especially in the light of article 7 which places obligations on affected States to cooperate with these organizations. We will address this topic in its relevant cluster.

I thank you.