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WORKING PAPER ON THE ILC DRAFT ARTICLES ON THE PROTECTION OF PERSONS IN THE EVENT OF DISASTERS



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

Introductory Comments

The International Law Commission (ILC) began work on the ‘Draft Articles on the Protection of Persons in the Event of Disasters’ (‘the Draft Articles’) in 2007. This initiative resulted from the significant increase in the number of disasters and related damages reported internationally, and to the related internationally concerted focus on improving the institutional and operational effectiveness and delivery of humanitarian assistance witnessed over the past 25 years. The Draft Articles thus sit within the emergence of a so-called ‘*acquis humanitaire*’¹ relating to the emergence of a defined body of international law, policy and practice relating to the protection of persons during humanitarian crisis.²

The Draft Articles are intended to codify existing rights and obligations and enhance the potential development of international law in the field. Importantly, they are to date the most significant attempt to develop an international legal framework in disaster settings which aims at guiding the actions of States, the international community and humanitarian actors in disaster response, while putting at their centre the protection of the population affected by such events. The first reading of the Draft Articles, comprised of 21 articles in total, was completed during the sixty-sixth session of the ILC in August 2014.³ As per the ILC Statute, the current text of the Draft Articles was therefore transmitted to Governments, competent UN and other international organisations (including the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies) for comments and observations no later than 1 January 2016.⁴

The protection of persons affected by disasters is given a central position within the Draft Articles, and it is confirmed that their main aim is to ‘facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their

¹ See: D. Cubie, ‘Clarifying the “Acquis Humanitaire”: A Transnational Legal Perspective on the Internalization of Humanitarian Norms’, in D. Caron, M. Kelly and A. Telesetsky (eds.), *The International Law Of Disaster Relief* (Cambridge University Press, 2014). See also: E. Valencia-Ospina, *Fourth Report on the Protection of Persons in the Event of Disasters* (11 May 2011) UN Doc A/CN.4/643, para. 97, where Valencia-Ospina acknowledged the existence of ‘the *acquis* of the international law of disaster response’.

² D. Cubie and M. Hesselman, ‘Accountability for the Human Rights Implications of Natural Disasters: A Proposal for Systemic International Oversight’ (2015) 33(1) *Netherlands Quarterly of Human Rights* 9. See also Summary of 25th UNGA Sixth Committee Meeting (2011) UN Doc A/C.6/66/SR.25, para. 67, where Eduardo Valencia-Ospina also recognised the emergence of such a body of law, stating that: ‘[t]o the extent that international disaster relief law might be said to exist as an autonomous branch of international law, it owed that character to the [International Law] Commission’s work’.

³ Official Records of the General Assembly, Sixty-eighth Session, *Supplement No.10 (A/69/10)*, Chapter V: Protection of Persons in the Event of Disasters (2014).

⁴ *Ibid*, para. 53.

rights’.⁵ In light of the on-going period of reflection and dialogue on the text of the Draft Articles, this Working Paper analyses some specific aspects of the current text of the Draft Articles and Commentaries, in particular from a human rights perspective.

Note on numbering: all article numbers used are those of the current version of the ILC Draft Articles, i.e. the text and titles as agreed at the conclusion of the first reading in May 2014.⁶ The complete text of the ILC Draft Articles as agreed at the first reading is reproduced in full as an Annex to this Working Paper.

a) Human rights-based approach

Human rights norms, whether embedded in global or regional human rights treaties or customary international law, are equally applicable to disaster settings.⁷ As evidenced by numerous binding as well as non-binding instruments relating to disasters, the protection of persons is a major concern in disaster response, and naturally includes the protection of the human rights of the populations affected by disasters. Through rights such as the right to life, health, food or shelter,⁸ it is clear that human rights issues are closely intertwined with disaster preparation and response.⁹ This was recognised by Human Rights Council Resolution 22/16 of March 2013, which called for research on ‘best practices and main challenges in the promotion and protection of human rights in post-disaster and post-conflict situations, with a focus on human rights mainstreaming in relief, recovery and reconstruction efforts’.¹⁰ The importance of international human rights law in disaster management has been subsequently acknowledged by the Human Rights Council in the resulting

⁵ ILC, *Texts and titles of the draft articles adopted by the Drafting Committee on first reading* (15 May 2014) UN Doc A/CN.4/L.831, draft Article 2.

⁶ *Ibid.*

⁷ Cubie and Hesselman (n.2) 11.

⁸ *Ibid.*, 12. Such relevance has notably been highlighted by various UN human rights bodies, see: UN Committee on Economic, Social and Cultural Rights (CESCR), ‘General Comment No 4, The right to adequate housing’ (13 December 1991) UN Doc E/1992/23, para. 8; ‘General Comment No 12: The right to adequate food’ (12 May 1999) UN Doc E/C.12/1999/5, paras. 5, 6, 13, 15, 38; ‘General Comment No 14: The right to the highest attainable standard of health’ (11 August 2000) UN Doc E/C.12/2000/4, paras. 16, 40, 65; General Comment No 15: The right to water’ (20 January 2003) UN Doc E/C.12/2002/11, paras. 16, 22, 34, 60; UNCRC, ‘General Comment No 3: HIV/AIDS and the rights of the child’ (17 March 2003) UN Doc CRC/GC/2003/3, para. 34.

⁹ See: E. Valencia-Ospina, *Preliminary Report on the Protection of Persons in the Event of Disasters* (5 May 2008) UN Doc A/CN.4/598, para. 26. See also: Cubie and Hesselman (n.2) 14.

¹⁰ HRC Res 22/16, *Promotion and protection of human rights in post-disaster and post-conflict situations* (18 March 2013) UN Doc A/HRC/22/L.23. See also: HRC, *Progress report on the research-based report of the Human Rights Council Advisory Committee on best practices and main challenges in the promotion and protection of human rights in post-disaster and post-conflict situations* (11 August 2014) UN Doc A/HRC/27/57.

report.¹¹ Such developments highlight the growing awareness of the importance of a human rights-based approach to the field of disaster law and acknowledges the central place of the populations affected by disasters within international disaster law.

Some of the key advantages of adopting a human rights-based approach are:

- It can play an important role in enhancing accountability in the considered field, as acknowledged by numerous human rights Treaty bodies,¹² the Office of the High Commissioner for Human Rights,¹³ and the Human Rights Council;¹⁴
- It involves the principles of transparency, non-discrimination, participation and consultation with the population affected as well as with beneficiaries;¹⁵
- It can help to identify rights and obligations so as to ensure the central place of the affected persons in the concerned legal framework;
- It can ensure the application of the international body of human rights norms, and thus a direct and intentional link with human rights standards.¹⁶ This includes the State's duty to respect, protect and fulfil human rights, the non-derogable obligations in emergency situations, the principles of universality, indivisibility, non-discrimination principle and the protection of vulnerable and marginalised groups;¹⁷
- It permits the recognition of both obligations of conduct and result, linked to effective protection and adaptation to new circumstances;
- Insists on identifiable rights-holders and duty-bearers.¹⁸

A human rights-based approach to disaster preparation and response is thus expected to be highly beneficial for the affected populations and their effective protection. Overall, the advantages are two-fold: it encourages domestic recognition of the applicability and importance of human rights in disaster settings, and opens disaster planning and response to international mechanisms of human

¹¹ HRC, *Final research-based report of the Human Rights Council Advisory Committee on best practices and main challenges in the promotion and protection of human rights in post-disaster and post-conflict situations* (10 February 2015) UN Doc A/HRC/28/76.

¹² Cubie and Hesselman (n.2) 21. See also: UNICEF, 'A Human Rights-based Approach to Programming in Humanitarian Crises: Is UNICEF up to the Challenge?' (2003).

¹³ See for example: *Towards Freedom from Fear and Want: Human Rights in the Post-2015 Agenda*, Thematic Think Piece, Office of the High Commissioner for Human Rights, May 2012, produced for the UN System Task Team on the Post-2015 UN Development Agenda) 6-7.

¹⁴ See, for example: HRC, *Final Report* (n.11) para. 40(e).

¹⁵ *Ibid*, para. 40(c), (d) & (f), 95.

¹⁶ *Ibid*, para. 37, 95.

¹⁷ *Ibid*, para. 40(d), 95. See also: Cubie and Hesselman (n.2) 21.

¹⁸ *Ibid* HRC, para. 39.

rights accountability and oversight.¹⁹ Moreover, as highlighted by Eduardo Valencia-Ospina in his Second Report as Special Rapporteur on the Draft Articles,²⁰ a rights-based approach would be compatible with the traditional needs-based approach to disaster response. Indeed, needs-based and rights-based approaches are not incompatible but complementary, and a holistic approach to the protection of persons in the event of disasters seems to require them to work together.²¹ Such complementarity is reflected in the current text of the Draft Articles, which provides that responses to disasters should meet ‘the essential needs of the person concerned, with full respect for their rights’.²²

b) Form of the final instrument

In keeping with this human rights-based approach, we support the proposals of the ILC Secretariat²³ and the Special Rapporteur²⁴ that a framework convention is the most pragmatic form for the Draft Articles. A framework convention can provide the overarching humanitarian and international law principles, such as the importance of human dignity and human rights in disasters, while allowing flexibility to adapt to future challenges through the inclusion of technical or thematic Additional Protocols.

Nevertheless, even as a non-binding legal framework for the conduct of international disaster relief activities, the Draft Articles could still promote the codification and harmonisation that has been called for in relation to legal standards, procedures, rights and duties pertaining to disaster response and assistance.²⁵ If the final form of the Draft Articles takes a non-binding form, it will still have the ability to directly influence the actions of States, and therefore achieve a strongly persuasive character.²⁶

¹⁹ Cubie and Hesselman (n.2) 22.

²⁰ Eduardo Valencia-Ospina, *Second Report on the Protection of Persons in the Event of Disasters* (7 May 2009) UN Doc A/CN.4/615, para 17.

²¹ Valencia-Ospina, *Preliminary Report* (n.9) para. 12.

²² ILC, *Texts and titles of the draft articles* (n.5) draft Article 2.

²³ ILC, *Protection of Persons in the Event of Disasters – Memorandum by the Secretariat* (11 December 2007) UN Doc A/CN.4/590.

²⁴ Valencia-Ospina, *Preliminary Report* (n.9) para. 59-60.

²⁵ M. Hoffman, ‘Towards an International Disaster Response Law’ in P. Walker and J. Walter (eds), *The IFRC World Disasters Report – Focus on Public Health* (IFRC 2000), available at: www.ifrc.org/Global/Publications/disasters/WDR/9000-WDR2000.pdf (accessed 4 February 2016).

²⁶ D. Cubie, ‘An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?’ (2011) 2 *Journal of International Humanitarian Legal Studies* 177.

A helpful paradigm can be found in the form of the UN Guiding Principles on Internal Displacement,²⁷ which is not an international treaty and therefore does not carry the binding force of international law. Like the Draft Articles, the UN Guiding Principles did not necessarily create new rights, but collated and standardised existing international law, with the result that many States adopted national laws or policies based on the Guiding Principles.²⁸

The UN Guiding Principles have provided a flexible approach, by establishing rights and responsibilities, while at the same time allowing states to incorporate them into their domestic laws in a manner that reflects their national context.²⁹ We recognise that this example presents a strong argument for the ILC Draft Articles on the Protection of Persons in the Event of Disasters to take a non-binding form, as a means of informing and guiding domestic and regional legislation, regulations, and policies, without binding states to additional international obligations.

- Notwithstanding the obvious advantages to the Draft Articles taking a non-binding form, we believe that the area of disaster response is in need of international harmonisation in the form of a binding international agreement, and therefore submit that a framework convention is the most favourable way to do this as it retains the ability to provide flexibility to States within their national law.

As the primary aim of this Working Paper is to focus on the role of human rights within the Draft Articles, we have focused our analysis and recommendations on four groups of articles, namely: draft Articles 5, 6 and 7 which elaborate the role of human dignity, human rights and humanitarian principles; draft Articles 8 and 9 on the duty to cooperate; draft Articles 10 and 11 on disaster risk reduction; and draft Articles 16 and 17 on external assistance. Rather than commenting on every Article, we have chosen these specific Articles on the basis of their plea to our normative human rights approach.

²⁷ UN Office of the High Commissioner for Human Rights, *Guiding Principles on Internal Displacement* (1998) UN Doc E/CN.4/1998/53/Add.2.

²⁸ R. Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10 *Governance* 459; D. Cubie, 'An Enchanted Tool? Humanitarian Assistance and the ILC Draft Articles on the Protection of Persons in the Event of Disasters' (2010) IV-V *Irish Yearbook of International Law* 119, 139-141.

²⁹ *Ibid* Cubie.

Summary of Recommendations

Form of the Final Instrument

- i. Notwithstanding the obvious advantages to the Draft Articles taking a non-binding form, we believe that the area of disaster response is in need of international harmonisation in the form of a binding international agreement, and therefore submit that a framework convention is the most favourable way to do this as it retains the ability to provide flexibility to States within their national law.

Draft Article 5: Human Dignity

- i. It is advisable for the legal effect of the notion of human dignity to be clarified. A paragraph highlighting that the term ‘human dignity’ is to be interpreted in a broader sense and should be given legal effect could be included in the Commentaries.
- ii. We advise the creation of an additional paragraph in the Commentary of draft Article 5 on the importance of the presence of an autonomous Article on human dignity and on the links between draft Articles 5 and 6. In particular, the correlation between draft Article 6 and human dignity as an underlying principle and motivation behind the international human rights framework as well as behind humanitarian crisis response could be highlighted.

Draft Article 6: Human Rights

- i. Include the word ‘protection’ into draft Article 6 so that it reads:

‘Persons affected by disasters are entitled to respect for and protection of their human rights’.
- ii. Add into the Commentary a clarification that ‘affected persons’ also includes those who have not yet been affected, but are at risk of being affected by disasters.
- iii. Introduce ‘cautionary elements’ into the Commentary to ensure that States’ right to derogation is only accessed in times of absolute necessity.

Draft Article 7: Humanitarian Principles

- i. In order to reflect the equal importance of having regard to humanitarian principles in both the pre- and post-disaster phases, we submit that draft Article 7 should be edited to read:

Response to disasters, and disaster risk reduction measures, 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.

- ii. We submit that reference to mental illness should be explicitly included so as to avoid any confusion. We suggest that the following sentence should be added to the end of paragraph 7 of the Commentary to draft Article 7:

‘Any reference to particularly vulnerable groups or persons should also reflect obligations set out in the 2006 Convention on the Rights of Persons with Disabilities (CRPD) towards persons with long-term physical, mental, intellectual or sensory impairments, although it should be noted that any list formulated within the Commentary to this Article is non-exhaustive.’

Draft Article 8: Duty to Cooperate

- i. More clarification on the existence of a negative duty to cooperate is advisable given the importance of cooperation in times of disaster. Such clarification could be introduced in an additional paragraph of the Commentary of draft Article 8. More clarification on the existence of a duty of conduct or of a duty of result would be welcome. Clarification could be provided in paragraph 6 of the Commentary of the Article, which could read:

*‘(6) Article 8 recognises the central importance of international cooperation to international disaster relief and assistance activities. It establishes a legal obligation of conduct for the various parties concerned.
[...]*

- ii. The necessity to adopt or at least consider a human rights-based approach could be added in the Commentary to draft Article 8, notably as a justification for the possible intrusions into the sovereignty of the affected State.
- iii. Reference to Articles 55 and 56 of the UN Charter could be added in paragraph two of the Commentary to draft Article 8. The second paragraph of the Commentary could read:

‘(2) Cooperation takes on special significance with regard to international human rights law. Such a significance has been highlighted in Articles 55 and 56 of the UN Charter, stating the importance of cooperation in the respect and protection of human rights as a means to achieve “stability and well-being which are necessary for peaceful and friendly relations among nations.” The link between international cooperation and human rights protection has been further explicitly referred to in the International

Covenant on Economic, Social and Cultural Rights as a means of realising the rights contained therein. [...]

- iv. Reference to such a balance could be added to the Commentary to draft Articles 8 and 13, and could read:

'(4) [...] particularly those on the primary duty of the affected State. Article 8 should be understood as providing for a balance in the obligations of an affected State and the international community, while aiming at the maximum protection of persons and their rights in the event of disasters, which is the primary aim of these Articles.'

- v. A possible compromise for enhanced human rights protection, despite the lack of a specific legal obligation to provide assistance, would be to strongly link draft Article 8 with human rights protection and in particular with the Commentaries of draft Articles 5, 6 and 7. Draft Article 6 could explicitly include the obligation to cooperate to fulfil the relevant human rights, thus strengthening the provision and its link with the protection of human rights. It is advisable to include a reference to the coordinating role played by non-State organisations in draft Article 8.
- vi. We support the proposal to merge draft Articles 8 and 10 into a single draft Article 8 so as to bring further clarity to the duty to cooperate and to the Draft Articles as a whole.

Draft Article 9: Forms of Cooperation

- i. So as to avoid the risk of a restrictive interpretation of the duty to cooperate as envisaged in draft Article 8, paragraph 5 of the Commentaries of draft Article 9 could read:

'The Article is therefore not intended to be a list of activities in which an assisting State may engage, but rather areas in which cooperation on the part of both the affected State and assisting actors may be appropriate.'

- ii. A reference to human rights protection at the time of implementation of draft Article 9 could be added. We suggest to add such reference to the 3rd paragraph of the Commentary, stating that:

'in the context of the present topic, the ultimate goal of the duty to cooperate, and therefore of any of the forms of cooperation referred to in Article 9, is the protection of persons affected by disasters. In this respect, actors should fully take into account the protection of the dignity and rights of individuals as stated in Articles 5 and 6 when implementing Article 9.'

Draft Article 10: Cooperation for Disaster Risk Reduction

- i. Revise draft Article 4 to include:

‘(g) “Risk of disasters” means the probability of harmful consequences or losses with regard to human life or health, livelihood, property and economic activity, or damage to the environment, resulting from a disaster.’
- ii. Merge draft Articles 8 and 10 into a single draft Article 8 so as to bring further clarity to the duty to cooperate and to the Draft Articles as a whole.

Draft Article 11: Duty to Reduce the Risk of Disasters

- i. Make reference to the Sendai Framework and future international agreements on disaster risk reduction in the Commentary. Likewise, the Commentary should highlight that the ILC Draft Articles should be read in conjunction with relevant international agreements on disaster risk reduction.
- ii. Include into paragraph 3 of the Commentary the Sendai Framework’s approach to disaster risk reduction, namely:

‘the prevention of new risks, reduction of existing risks and the strengthening of resilience.’
- iii. We would suggest including the UNISDR definitions of ‘resilience’ and ‘vulnerability’ into the Commentary. These terms emphasize the impact of underdevelopment on disaster risk, and broaden the scope of disaster risk reduction to include development strategies.

Resilience: *‘The ability of a system, community or society exposed to hazards to resist, absorb, accommodate to and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions.’*

Vulnerability: *‘The conditions determined by physical, social, economic and environmental factors or processes, which increase the susceptibility of a community to the impact of hazards.’*

Draft Article 16: Offers of External Assistance

- i. On the distinction in nature and legal status of non-governmental organisations (NGOs), States, the United Nations (UN), and intergovernmental organisations – we acknowledge the need for emphasis in order to encourage offers from States, the UN and intergovernmental organisations. It must however be questioned whether this puts certain humanitarian actors

in a weaker position when offering their assistance in response to a disaster. Considering the significance of assistance regularly offered by NGOs and the International Red Cross Movement, we submit that such organisations should also be provided with the right to do so. Moreover, the IFRC have noted that they do not fall into any category listed within this Article: we submit that clarity in terms could be achieved through modifying the second sentence of draft Article 16 to read:

Relevant non-governmental organizations and assisting humanitarian organisations (such as the International Federation of Red Cross and Red Crescent Societies) also have the right to offer assistance to the affected State.

- ii. For consistency, it would be necessary to modify the definition of ‘other assisting actor’ given in draft Article 4(c) (Use of terms). This would then read:

(c) “other assisting actor” means a competent intergovernmental organization, assisting humanitarian organisation (such as the International Federation of Red Cross and Red Crescent Societies) or a relevant non-governmental organisation or any other entity or individual external to the affected State, providing humanitarian relief, recovery or development assistance to that State at its request or with its consent;

- iii. We submit that the substance of draft Article 16 prepares the ground for the draft articles concerning the notion of consent and the arbitrary withholding of consent and would therefore be better placed after draft Article 13 (Duty of the affected State to seek external assistance), and before draft Article 14 (Consent of the affected State to external assistance).

Draft Article 17: Facilitation of External Assistance

- i. We advise that the following non-exhaustive recommendation is added as a new paragraph in the Commentary:

‘The delivery of necessary relief personnel, equipment, and goods is often dependent on relief flights. Therefore the relevant national aviation authorities should assist with the facilitation of such flights through the waiver of landing fees, installations, protection, security, and any other relevant measures.’

- ii. The assistance of transit States in the facilitation of disaster relief could be expressly included in paragraph 4 of the Commentary to draft Article 17: recognition of their impact could be achieved by editing the last sentence to read:

‘Unnecessary restriction of movement of relief personnel, both within the affected State and in transit States, inhibits workers’ ability to provide flexible assistance.’

- iii. Differentiating military and civilian relief personnel. We submit that the reference to military relief should be removed from the substance of draft Article 17, and that reference should instead be made in the Commentaries where it is recommended as a standalone paragraph specifying their particular role in disasters and highlighting their independence from civilian relief personnel. This paragraph can then also reference the comprehensive Oslo Guidelines and the broader concept of civil-military cooperation.

Part I: Human Rights

1. Human Dignity, Human Rights and Humanitarian Principles

a) General comments

First of all, we welcome the initiative of adding dedicated Articles on human dignity, human rights and humanitarian principles, as well as their placement in the Draft Articles.³⁰ Such Articles provide a focus on human dignity and human rights, thus reaffirming the devastating impact of disasters on the rights of the affected population and – importantly – expressly linking the Draft Articles to existing international human rights law.³¹ Moreover, we believe that such provisions are central and indivisible from the aims stated in draft Article 2, and should be put at the centre of any action in the aftermath as well as in the preparation for and prevention of disasters. Indeed, an international instrument meant to facilitate an effective response to disasters is *per se* largely targeted to the protection of the affected population, and would thus be deprived of sense without such protection. The inclusion of draft Articles 5, 6 and 7, and their prominent placement amongst the very first provisions thus strengthens the requirements of Article 2, as well as the legitimacy of the Draft Articles as a whole and reinforces the human rights-based approach required in the field of disaster preparation, prevention and response.

2. Draft Article 5: Human Dignity

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

a) General comments

We would like to salute the introduction of a draft article on human dignity within the Draft Articles. The inclusion of the principle of human dignity in the substantive body of the Draft

³⁰ For discussion of these articles by the Special Rapporteur, see: E. Valencia-Ospina, *Fifth Report on the Protection of Persons in the Event of Disasters* (9 April 2012) UN Doc A/CN.4/652.

³¹ Cubie and Hesselman (n.2) 20.

Articles, not only in a Preamble, is to be welcomed and we would argue is fundamental to achieving the stated objectives of the Draft Articles.³²

Such an addition not only provides for a further focus on individuals, but is also of particular relevance in the disaster context.³³ Such relevance has been stressed by the UN General Assembly which affirmed in Resolutions 43/131³⁴ and 45/100 that ‘the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity’.³⁵ Moreover, and as acknowledged by the Commentary,³⁶ the principle of human dignity is intrinsically linked with human rights and the protection of persons and is thus naturally the foundation to human rights law and international humanitarian law. As a consequence, it is widely recognised and protected within a wide range of international human rights and humanitarian law instruments,³⁷ and has seen practical application and inspiration in the opinions of members of the International Court of Justice and the European Court of Human Rights.³⁸

In addition, the fact that draft Article 5 is directed not only to the State parties but also clearly directed to relevant intergovernmental organisations and non-governmental organisations can only be applauded. Indeed, in light of the importance of the concept of human dignity and of the importance of such actors in disaster response, setting an all-inclusive scope *ratione personae* is of utmost importance. Moreover, we believe that the establishment not only of a negative duty to respect but also a positive duty to protect human dignity is essential to the overall effectiveness of the draft Article, and provides for a broad *ratione materiae* to draft Article 5. Indeed, it provides for more effectivity to draft Article 5 as it obliges the targeted actors not only to refrain from acting detrimentally to the dignity of human person, but also to act in order to maintain that dignity, and thus ultimately to prevent violations carried out by all private actors. These two aspects of the

³² As supported by Poland (UN Doc A/C.6/65/SR.23, para. 100).

³³ As also acknowledged by Czech Republic (UN Doc A/C.6/65/SR.23, para. 24); Poland (UN Doc A/C.6/65/SR.23, para. 100); and Sri Lanka (UN Doc A/C.6/65/SR.26, para. 43).

³⁴ UNGA, Resolution 43/131, *Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations* (8 December 1988) UN Doc A/RES/43/131, eighth preambular paragraph.

³⁵ UNGA, Resolution 45/100, *Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations* (14 December 1990) UN Doc A/RES/45/100, sixth preambular paragraph.

³⁶ Official Records of the General Assembly, Sixty-third Session, *Supplement No.10 (A/66/10)*, Chapter IX: Protection of Persons in the Event of Disasters (2011), pp.258-260.

³⁷ See: E. Valencia-Ospina, *Third Report on the Protection of Persons in the Event of Disasters* (31 March 2010) UN Doc A/CN.4/629, paras.20-22.

³⁸ See, for example: European Court of Human Rights, *Tyrrer v United Kingdom* (1978) 2 EHRR 1, in which the Court found a particular form of corporal punishment as contrary to human dignity. See also: International Court of Justice, *Ethiopia v South Africa* and *Liberia v South Africa* (‘South West Africa Cases’) (1966) ICJ Reports 1966.

provision create an all-inclusiveness which can only be applauded, and correctly reinforce the importance of the notion of human dignity in relation to disasters.

b) The legal effect of ‘human dignity’

However, there remain concerns regarding the exact legal effect of the notion of ‘human dignity’. As highlighted during a meeting of experts organised by Roma Tre University in June 2015,³⁹ despite being presented as an overarching principle, both draft Article 5 and the Commentary leave unsettled the legal meaning to be attached to the expression ‘human dignity’ within the current text. Such lack of clarity raises questions as to whether or not Article 5 has specific legal effects or is only stating a generic reference to a general principle.

- In light of the importance of draft Article 5 for the protection of populations affected by disasters, and keeping in mind the fact that the legal meaning of the expression ‘human dignity’ is not fixed in international human rights law and depends on the concerned context, it would be advisable to provide for more clarity on this matter. The Commentaries could include a paragraph highlighting that the term ‘human dignity’ is to be interpreted in a broader sense and should be given legal effect.

c) Linking human dignity, human rights and draft Article 2

As highlighted by the Rome expert meeting, the fact that draft Articles 5 and 6 relate to the overarching ‘general inspiration of the Draft Articles’ does not relieve the task of identifying the reciprocal relationship of these Articles as well as their relationship with draft Article 2.⁴⁰ We likewise believe that more clarity could be given on these matters. Clear links would improve the harmony of the Draft Articles, the comprehensibility of the notions within the current text and would ultimately reinforce and highlight further the final aim of the document as providing protection for persons in time of disaster.

- We would like to advise the creation of an additional paragraph in the Commentary explaining the links with draft Articles 2 and 6. In particular, the correlation between draft

³⁹ G. Bartolini, T. Natoli and A. Riccardi, ‘Report of the Expert Meeting on the ILC’s Draft Articles on the Protection of Persons in the Event of Disasters’, Roma Tre University Department of Law, *International Law and Disasters Working Papers Series 03* (2015), 29-30. Hereinafter ‘the Rome Report’.

⁴⁰ Ibid, 29.

Article 6 and human dignity as an underlying principle and motivation behind the international human rights framework, as well as humanitarian crisis responses, could be highlighted.⁴¹

3. Draft Article 6: Human Rights

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

a) General comments

We welcome the inclusion of a draft Article devoted solely to the respect of human rights in disasters, and the separation of draft Articles 5 and 6, as we believe there is enough of a distinction between the two to merit individual focus. Undeniably, the idea of rights and needs of persons affected by disasters has been a focal point in the creation of the Draft Articles. In the sixty-fifth session of the ILC, Mr. Caflich remarked that ‘the Special Rapporteur had rightly included the international protection of human rights, in particular the right to life, among the pillars of international law supporting the project, the very title of which contained the phrase “protection of persons”, giving it a human rights dimension.’⁴² Draft Article 6 and its commentary links the Draft Articles to the wide range of international human rights law, garnering even more legal support in the arena of human rights in disasters.

b) The broad nature of draft Article 6

We recognise that draft Article 6 is intended to be broad, in order to encompass ‘human rights obligations expressed in relevant international agreements and reflected in customary international law, as well as assertions of best practices for the protection of human rights included in non-binding texts on the international level.’⁴³ It appears to be purposefully ambiguous to leave space for the unique interpretations of States, while still meeting the needs of persons affected by

⁴¹ Cubie and Hesselman (n.2), 19.

⁴² ILC, ‘Provisional Summary Record of the 3178th Meeting, sixty-fifth session (second part)’ (11 July-9 August 2013) UN Doc A/CN.4/SR.3178.

⁴³ Official Records of the General Assembly, Sixty-third Session, *Supplement No.10 (A/66/10)*, Chapter IX: Protection of Persons in the Event of Disasters (2011), pp.260-261.

disasters. Although we accept this approach, we would also propose the certain adjustments to the text of draft Article 6 and Commentary, in order to bring more focus to the idea of human rights.

c) The absence of references to ‘protection’

While we acknowledge that the Commentary states that draft Article 6 includes an implicit obligation for relevant actors to protect human rights, we feel that the idea of ‘protection’ could be explicitly included in the wording of the draft Article. Just as draft Article 5 includes the obligation to ‘respect and protect the inherent dignity of the human person,’ draft Article 6 should also include the entitlement of persons for both respect and protection of their rights. The Rome Report notes that the word ‘respect’ appears to allude to civil and political rights, but interpretation may not extend to the obligations that relate to economic, social, and cultural rights.⁴⁴ The report suggests that in addition to respect, there are also the States’ affirmative ‘obligations to protect, facilitate, fulfil and provide.’⁴⁵ The concept of protection is especially significant, as it is the focal point of the Draft Articles as a whole.

- Include the word ‘protection’ into draft Article 6 so that it reads:

‘Persons affected by disasters are entitled to respect for and protection of their human rights’.

d) States’ positive obligations

From our point of view, the phrase ‘persons affected by disasters’ in draft Article 6 seems ambiguous in scope, and can be interpreted as applying only to post-disaster situations. We are of the opinion that draft Article 6 should not be limited to the response of disasters, but also the pre-disaster phase. In the Commentary for draft Article 11, paragraph 4, it is stated that ‘protection not only relates to actual violations of human rights, but also entails an affirmative obligation on States to take the necessary and appropriate measures’ to prevent the occurrence of such violations.’⁴⁶ We would reaffirm the idea that human rights should be respected and protected both before and

⁴⁴ Bartolini et al, *The Rome Report* (n.39), 33.

⁴⁵ Ibid.

⁴⁶ Official Records of the General Assembly, Sixty-fifth Session, *Supplement No.10 (A/68/10)*, Chapter VI: Protection of Persons in the Event of Disasters (2013), p.87. See also: *Kolyadenko and others v Russia* [2012] ECHR 17423/05 (28 February 2012); *Budayeva and others v Russia* [2008] ECHR 15339/02 (20 March 2008); and *Öneryildiz v Turkey* [2002] ECHR 48939/99 (8 June 2002) regarding a State’s positive obligation to protect right to life under Article 2 of the European Convention on Human Rights and Fundamental Freedoms.

after a disaster, and that the scope of draft Article 6 should be extended to include the protection of human rights through the prevention and disaster risk reduction.

A similar issue is addressed in paragraph 5 of the Commentary for draft Article 2, which stipulates that the phrase ‘response to disasters’ needs to be ‘viewed, where relevant, to include the pre-disaster risk-reduction, prevention and mitigation phase’.⁴⁷ In keeping with this clarification, we would suggest including a section in the Commentary for draft Article 6 that expands the idea of affected persons to include a similar stipulation. This would reinforce the acknowledgement of States’ positive obligations to respect, protect, and fulfil human rights through disaster risk reduction and prevention measures, as well as in the response phase.

- Include in the Commentary a clarification that ‘affected persons’ also includes those who have not yet been affected, but are at risk of being affected by disasters.⁴⁸

e) The right of derogation

While we acknowledge the instances in which a State may need to access their right to derogation, we are concerned with the lack of parameters surrounding such derogations within the context of disaster management.

- We would agree with the Rome Report in suggesting the introduction of ‘cautionary elements’ into the Commentary to ensure that States’ right to derogation is only accessed in times of absolute necessity.⁴⁹

⁴⁷ Official Records of the General Assembly, Sixty-second Session, *Supplement No.10 (A/65/10)*, Chapter VII: Protection of Persons in the Event of Disasters (2010), p.324.

⁴⁸ Alternatively, we would suggest including the clarification of the phrase into draft Article 1 paragraph 1 and/or the use of terms in draft Article 4, so that subsequent references to ‘affected persons’ throughout the Commentary could be read with the understanding that the term includes people at risk of being impacted by disasters.

⁴⁹ Bartolini et al, *The Rome Report* (n.39), 34. See also: E. Sommaro, ‘Derogation from Human Rights Treaties in Situations of Natural or Man-Made Disasters’ in A. de Guttry, M. Gestri and G. Venturini (eds), *International Disaster Response Law* (T.M.C. Asser Press, 2012); A. Müller, ‘Limitations to and Derogations from Economic, Social and Cultural Rights’ (2009) 9(4) *Human Rights Law Review* 557.

4. Draft Article 7: Humanitarian Principles

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

a) General comments

According to the ILC Secretariat, the principles of humanity, neutrality, impartiality, non-discrimination and cooperation, lie at the heart of all humanitarian assistance.⁵⁰ Additionally, the UN General Assembly has stressed that '(h)umanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality'.⁵¹

We applaud the placement of this Article as a standalone concept of fundamental importance within the Draft Articles, as it emphasises the key rationale behind the ILC project. We submit that the emphasis on humanitarian principles and the apolitical nature of aid as a key concept within the Draft Articles, should be useful in pacifying concerns related to sovereignty and interference in internal affairs.

b) Application of humanitarian principles to disaster risk reduction

Given that the nature and purpose of the Draft Articles has not been limited to the post-disaster phase, we submit that there should be no reason for the omission of preventative measures within Article 7. We appreciate that attention to the pre-disaster responsibilities of States is a relatively recent development, given that Articles 10 and 11 dealing with disaster risk reduction were late additions to the Draft Articles, after being adopted by the ILC at the sixty-fifth session in 2013.⁵²

- In order to reflect the equal importance of having regard to humanitarian principles in both the pre- and post-disaster phases, we submit that Article 7 should be edited to read:

⁵⁰ ILC, *Secretariat Memorandum* (n.23), para. 10.

⁵¹ UNGA, Resolution 46/182, *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations* (19 December 1991) UN Doc A/RES/46/182, Guiding Principle 2.

⁵² E. Valencia-Ospina, *Sixth Report on the Protection of Persons in the Event of Disasters* (3 May 2013) UN Doc A/CN.4/662.

Response to disasters, and disaster risk reduction measures, 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.

c) Definition of ‘particularly vulnerable’

We submit that a particularly vulnerable group that should be explicitly included within the Commentary is people living with mental illnesses. In addition, it should be made clear that the list in subsection 7 of the Commentary, within the reference to the IFRC Guidelines, is non-exhaustive.

The 2006 Convention on the Rights of Persons with Disabilities (CRPD)⁵³ specifically includes those who have long-term physical, mental, intellectual or sensory impairments⁵⁴ as persons with disabilities. Moreover, Article 11 CRPD declares that States Parties, in accordance with international law, must take all necessary measures to ensure the protection and safety of persons with disabilities in the event of humanitarian emergencies and disasters.⁵⁵

Notwithstanding the inclusion of mental illness within the definition of disability in the CRPD, the same might not be true for the legislation of all State Parties to the Draft Articles, and therefore in some countries, mental illness may not currently fall under the scope of ‘persons living with disabilities’. We submit that this term should be explicitly included so as to avoid any confusion.

- We therefore suggest that the following sentence should be added to the end of paragraph 7 of the Commentary to draft Article 7:

‘Any reference to particularly vulnerable groups or persons should also reflect obligations set out in the 2006 Convention on the Rights of Persons with Disabilities (CRPD) towards persons with long-term physical, mental, intellectual or sensory impairments, although it should be noted that any list formulated within the Commentary to this Article is non-exhaustive.’

⁵³ UN Convention on the Rights of Persons with Disabilities (CRPD), 13 December 2006, 2515 UNTS 3.

⁵⁴ Ibid, CRPD, Article 1 (Purpose).

⁵⁵ Ibid, CRPD, Article 11 (Situations of risk and humanitarian emergencies).

Part II: International Cooperation

5. Draft Article 8: Duty to Cooperate

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

a) General comments

We would first like to welcome the initiative to introduce into the Draft Articles an article on the duty to cooperate in the event of disasters, building on the existing general duty to cooperate in the UN Charter. We believe that comprehensive international cooperation is a key element for effective relief operations in disasters, in particular so as to ensure the highest possible protection of human rights of the populations affected. Indeed, if international action by itself permits a better answer to disasters and to the human rights implications it entails by the multiplication of means and intelligences applied to the issue, *cooperation* and *coordination* of international intervention are necessary so as to ensure its maximum – not just mere – effectiveness.

We also welcome the initiative to explicitly state a duty to cooperate with intergovernmental and non-governmental organisations, as civil society actors have proven over the years to be a cornerstone in disaster relief and related human rights protection of the populations affected.

b) Lack of clarity concerning States duties

As already highlighted by Cuba and Malaysia and noted in the Special Rapporteur's Fifth Report,⁵⁶ the duty to cooperate as set in draft Article 8 and in the Commentary suffers a lack of clarity as to the extent of the State's obligations. If, as highlighted by paragraphs 6 and 7 of the Commentary, some margin of appreciation is necessary so as to permit effective answer to the particularities of

⁵⁶ See: Cuba (UN Doc A/C.6/66/SR.24, para. 26); Malaysia (UN Doc A/C.6/66/SR.24, para. 120); Valencia-Ospina, *Fifth Report* (n.30).

each disaster situation, we are of the opinion that further clarification of what the duty to cooperate entails is needed on a number of points. We thus agree with certain participants to the Rome expert meeting⁵⁷ on the necessity not only to state the basis and history of the duty to cooperate in international law, but on its general meaning, notably concerning its relation with the common understanding of the notion in international humanitarian law. Such clarification is all the more important considering the fundamental role that international cooperation can play in disaster settings. Moreover, draft Article 8 is a key provision binding together the Draft Articles, as it addresses the issue of State sovereignty (both those affected and those providing assistance), including the duty of the affected State to seek assistance and not to arbitrarily withhold consent to assistance. There are three key aspects of draft Article 8 which we believe need to be examined.

First, we would like to call for further clarification on the existence of a negative duty to cooperate. The current text confirms a positive obligation on States to facilitate assistance, overlooking the possible second face of the duty to cooperate: a negative obligation not to interfere with the provision of assistance. Given the importance of cooperation in the protection of persons affected by disasters and their human rights, clarification on the eventual existence of such a negative obligation would be of utmost importance. In particular, the recognition of such a negative duty could further improve the effectiveness of the Draft Articles as a whole, not least by clarifying the role of transit States.⁵⁸ Such clarification could be provided in the Commentary of draft Article 8.

- More clarification on the existence of a negative duty to cooperate is advisable given the importance of cooperation in times of disaster.

Second, we agree with comments made at the Rome expert meeting⁵⁹ that it could be advisable to clarify in the Commentary to draft Article 8 whether the cooperation duty is a duty of conduct – as seems to be understood by the Special Rapporteur⁶⁰ – or a duty of result, as some forms of cooperation presently referred to in draft Article 9 seem to imply.⁶¹

- More clarification on the existence of a duty of conduct or of a duty of result, as well as on the eventual *erga omnes* nature of the obligations, would be welcomed. Clarification could

⁵⁷ Bartolini et al, *The Rome Report* (n.39), 41.

⁵⁸ Ibid, 42.

⁵⁹ Ibid, 41.

⁶⁰ See Valencia-Ospina, *Fifth Report* (n.30), 22-24.

⁶¹ See for example in draft Article 9 the duty to ‘mak[e] available relief personnel, equipment and goods, and scientific, medical and technical resources’.

be provided in paragraph 6 of the Commentary of the draft Article, which could read: '(6) Draft article 8 recognizes the central importance of international cooperation to international disaster relief and assistance activities. It establishes a legal obligation of *conduct* for the various parties concerned. [...]'

Finally, we are of the view that the application of the duty of cooperation should entail a human rights-based approach, putting at its heart the protection of the rights of the concerned populations.

- The necessity to adopt or at least consider a human rights-based approach could be added in the Commentary to draft Article 8, notably as a justification for the possible intrusions into the sovereignty of the affected State. This would be in line with the proposal for clarification offered by the Rome expert meeting to bring into light the eventuality of intrusions in the sovereignty of the affected State in the Commentary to draft Article 8.⁶²

c) Linking obligation to cooperate with draft Articles 5, 6, 7 and 13 and stressing the protection of human rights

As pointed out by the second paragraph of the Commentary to draft Article 8, cooperation is of great significance with regard to international human rights law. Indeed, effective cooperation is a key for efficient disaster risk reduction and response operations and thus for the protection of the human rights of the affected population. Moreover, cooperation in the protection of human rights is highlighted by Articles 55 and 56 of the UN Charter, with Article 55 stating the importance of respect and protection of human rights as a means to achieve 'stability and well-being which are necessary for peaceful and friendly relations among nations', and Article 56 imposing a duty to cooperate so as to reach such an aim.

- According to their relevance for the protection of human rights through cooperation in disaster settings, reference to Articles 55 and 56 of the UN Charter could be added in paragraph two of the Commentary to draft Article 8. Such a reference would further highlight the relationship between cooperation and human rights in disaster preparation and response. The second paragraph of the Commentary would thus read:

⁶² Bartolini et al, *The Rome Report* (n.39), 39.

‘(2) Cooperation takes on special significance with regard to international human rights law. Such a significance has been highlighted in Articles 55 and 56 of the UN Charter, stating the importance of cooperation in the respect and protection of human rights as a means to achieve “stability and well-being which are necessary for peaceful and friendly relations among nations.” The link between international cooperation and human rights protection has been further explicitly referred to in the international covenant on Economic, Social and Cultural Rights as a means of realizing the rights contained therein. [...]’

We also follow the opinion of several participants of the Rome expert meeting that the present text of draft Article 8 on a duty of cooperation is to be acknowledged as a necessary balance and counterpart to the duty to seek assistance for the affected State.⁶³ Considering the importance of the relationship between the two Articles, the choice between a duty of conduct and a duty of result highlighted previously should take into account the nature of the duty envisaged in draft Article 13. Indeed, as pointed out by a participant to the Rome expert meeting, coherence between the different obligations of an affected State and the international community, as expressed in draft Articles 8 and 13, would bring cohesion within the project.⁶⁴

Draft Article 12 clearly sets out that the affected State has the duty to ensure the protection of persons and the provision of disaster relief and assistance on its territory. Moreover, the affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance. Therefore, we recommend that the relationship between draft Articles 8 and 13 takes into account the different situation of the affected State as primary duty-bearer and the international community as secondary and external duty-bearer. Considering the overall objectives of the Draft Articles, such cohesion should be primarily aimed at improving the protection of persons affected by disasters. In particular, the link between the draft Articles 8 and 13 should promote effective linkages between affected and donor States to provide for the maximum human rights protection as possible.

- Reference to such a balance could be added to the Commentary to draft Articles 8 and 13, and could read:

⁶³ Ibid, 42.

⁶⁴ Ibid, 41.

'(4) [...] particularly those on the primary duty of the affected State. Article 8 should be understood as providing for a balance in the obligations of an affected State and the international community, while aiming at the maximum protection of persons and their rights in the event of disasters, which is the primary aim of these Articles.'

One further question is to know whether the duty of cooperation under draft Article 8 entails an obligation to provide assistance when requested by an affected State under draft Article 13. Although a positive answer to this question would ideally bring a balance between draft Article 8 and 13, and should be advocated for so as to ensure the effective protection of affected persons, it has been answered negatively by many in the UN General Assembly due to its lack of basis in international law.⁶⁵

- A possible compromise for enhanced human rights protection, despite the inexistence of a duty to provide assistance, would be to strongly link draft Article 8 with human rights protection and in particular with the Commentaries of draft Articles 5, 6 and 7.⁶⁶ Draft Article 6 could explicitly include the obligation to cooperate to fulfil the relevant human rights. Such wording would change the focus of the duty to cooperate from a State obligation towards other States to an individual right to cooperation for individuals, thus strengthening the provision and its link with the protection of human rights.

d) Cooperation with non-State actors

As highlighted during the Rome expert meeting, draft Article 8 does not simply refer to cooperation between States, but should also take into account the overall cooperation and coordination between all the assisting actors concerned.⁶⁷ The significant role in cooperation activities played by other assisting actors, especially international organisations and NGOs, should therefore be further addressed in the Commentary to draft Article 8. Draft Article 8 reiterates the duty on States to cooperate amongst themselves, and with non-State actors such as the UN, competent intergovernmental organisations, or relevant non-governmental organisations. However, although such a duty is acknowledged in paragraph 5 of the Commentary, the duty in regard to non-State

⁶⁵ See: ILC, 'Report of the International Law Commission, Sixty-Fourth Session' (2012) UN Doc A/67/10, p.86; Valencia-Ospina, *Fifth Report* (n.30), para. 52.

⁶⁶ See: Cubie and Hesselman (n.2).

⁶⁷ Bartolini et al, *The Rome Report* (n.39), 42.

actors in disaster prevention and response remains vague and further clarification would be welcomed so as to insure better effectiveness of the provision.

- We support the proposition of the Rome expert meeting to include more comprehensive references to the coordinating and operational role played by non-State organisations in the Commentaries to draft Article 8.⁶⁸

e) Separation of cooperation duties operating in disaster risk reduction and relief assistance

Draft Article 10 extends the cooperation duty to measures taken to reduce disaster risk. The Rome expert meeting suggested the fusion of the similar cooperation duties in draft Article 8 and draft Article 10 in the disaster risk reduction phase so as to obtain a 'general, comprehensive cooperation clause'.⁶⁹

- We support the proposal to merge draft Articles 8 and 10 into a single draft Article 8, as per the Special Rapporteur's original proposal,⁷⁰ so as to bring further clarity to the duty to cooperate and to the Draft Articles as a whole. We would recommend that the new draft Article 8 contained two paragraphs, utilising the existing language, to ensure the distinct phases of disaster prevention and response are retained. The wording of newly merged draft Articles 8 and 10 would therefore be:

Article 8 – Duty to cooperate

- 1. In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organisations, the International Federation of the Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organisations.*
- 2. Cooperation shall extend to the taking of measures intended to reduce the risk of disasters.*

⁶⁸ Ibid, 40.

⁶⁹ Ibid. For further discussion of this point, see Section 8(a) below.

⁷⁰ Valencia-Ospina, *Sixth Report* (n.52), 59.

6. Draft Article 9: Forms of Cooperation

For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.

a) General comments

Given the general character of the duty to cooperate as stated in draft Article 8, together with the previously highlighted importance of the provision for effective disaster relief and protection of the rights of the affected population, we welcome the introduction in draft Article 9 of further clarification of which kinds of cooperation draft Article 8 entails.

We also welcome the non-exhaustive and illustrative character of the list, as clarified in paragraph 4 of the Commentary. Indeed, flexibility is of great importance in the field of disasters by permitting adaptation to the particular circumstances of the wide range of disaster scenarios covered by the Draft Articles,⁷¹ as well as the differential needs of the affected persons and affected State, and the unequal capacities of the different actors. By offering guidance, while permitting adaptation to the specific conditions, an open-ended list of possible forms of cooperation would appear the best solution to promote the ultimate goal of the duty to cooperate.⁷²

b) Lack of clarity of the Article

However, intrinsically linked with the lack of clarity of the duty to cooperate as stated in draft Article 8, draft Article 9 suffers similar shortcomings. In particular, paragraph 5 of the Commentary reads: ‘as with the principle of cooperation itself, the forms of cooperation in draft Article 9 are meant to be reciprocal in nature, as cooperation is not a unilateral act, but rather one that involves the collaborative behaviour of multiple parties. The draft Article is therefore not intended to be a list of activities in which an assisting State may engage, but rather areas in which harmonisation of

⁷¹ See in particular: ILC, *Texts and titles of the draft articles* (n.5) draft Article 3 on the definition of ‘disaster’ and related Commentaries, *Official Records of the General Assembly* (2010) (n.47) p.326.

⁷² See: *Official Records of the General Assembly* (2013) (n.46) p.77.

efforts through consultation on the part of both the affected State and assisting actors may be appropriate.'

Such a paragraph casts shadow on the meaning of the duty to cooperate within the draft Articles, and seems to further define it as 'harmonisation of efforts through consultation'. Combined with the lack of clarity on States' duty to cooperate to be found in the Commentary to draft Article 8, the risk is for draft Article 9 to influence States towards a restrictive approach to the duty to cooperate. A minimal approach to international cooperation may ultimately limit the ability of the Draft Articles to protect persons in the event of disasters.

- So as to avoid the risk of restrictive interpretation of the duty to cooperate as envisaged in draft Article 8, paragraph 5 of the Commentaries to draft Article 9 could read:

'The Article is therefore not intended to be a list of activities in which an assisting State may engage, but rather areas in which cooperation on the part of both the affected State and assisting actors may be appropriate.'

c) A more human-rights centred Commentary

We note that the current Commentary to draft Article 9, despite highlighting the relationship between draft Articles 2 and 9, does not reaffirm the relationship with draft Articles 5 and 6. If the relationship with these draft Articles is not conflictual, it could be useful to draw the attention on human rights protection during the implementation of draft Article 9.

- Such a reference could notably be added to the 3rd paragraph of the Commentary, stating that:

'in the context of the present topic, the ultimate goal of the duty to cooperate, and therefore of any of the forms of cooperation referred to in Article 9, is the protection of persons affected by disasters. In this respect, actors should fully take into account the protection of the dignity and rights of individuals as stated in Articles 5 and 6 when implementing Article 9.'

Part III: Disaster Risk Reduction

7. Disaster Risk Reduction

a) General comments

We welcome the addition of draft Articles 10 and 11, which were adopted after the Special Rapporteur's Sixth Report.⁷³ Up to this point, the focus of the Draft Articles had been on the post-disaster phase, but draft Articles 10 and 11 highlight the pre-disaster responsibilities of the State, including risk prevention, mitigation, and preparedness. The concept of Disaster Risk Reduction (DRR) emerged in the 1970's and has gained momentum in recent years; some 64 States or areas have reported establishing policies of DRR, and several have also included DRR into their domestic legislation.⁷⁴ The adoption of draft articles 10 and 11 reflects the global awareness of the importance of implementing proactive measures to reduce risk of disasters.

b) Use of terms

As it is important to include definitions of relevant key terms within draft Article 4, we are in agreement with the Rome Report that recommends the inclusion of a definition of 'risk of disasters' into draft Article 4. Considering that the Special Rapporteur's Seventh Report suggests such a definition,⁷⁵ we believe that inclusion of this definition into draft Article 4 would bring clarification to the concept of DRR.

- The revised draft Article 4 would therefore read:

Article 4 – Use of terms

For the purposes of the present articles:

...

(g) "Risk of disasters" means the probability of harmful consequences or losses with regard to human life or health, livelihood, property and

⁷³ Valencia-Ospina, *Sixth Report* (n.52).

⁷⁴ *Official Records of the General Assembly* (2013) (n.46) pp.87-88.

⁷⁵ E. Valencia-Ospina, *Seventh Report Addendum* (11 March 2014) UN Doc A/CN.4/668/Add.1, para. 4(h).

economic activity, or damage to the environment, resulting from a disaster.⁷⁶

8. Draft Article 10: Cooperation for Disaster Risk Reduction

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

a) Positioning of draft Article 10

The Commentary for draft Article 10 establishes that the *ratione temporis* of the duty to cooperate established in draft Article 8 also extends to the pre-disaster phase.⁷⁷ Although, like draft Article 11, draft Article 10 addresses disaster risk reduction, we are of the opinion that the former could be combined with draft Article 8, regarding the duty to cooperate. Draft Articles 9 and 11 would then follow sequentially as both seek to outline practical measures that could be taken to fulfil their respective duties.

- Merge draft Articles 8 and 10 into a single draft Article 8.⁷⁸

9. Draft Article 11: Duty to Reduce the Risk of Disasters

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

⁷⁶ Ibid.

⁷⁷ *Official Records of the General Assembly* (2013) (n.46) pp.78.

⁷⁸ For further discussion of this point and recommended text, see Section 5(e) above.

a) The relationship to the Sendai Framework

We support the decision to reference both the ‘Yokohama Strategy for a Safer World’⁷⁹ and the ‘Hyogo Framework for Action 2005-2015’⁸⁰ in the Commentary to draft Article 11 as they both serve to strengthen international approaches and mechanisms to disaster risk reduction, thereby promoting coherence between the work of the ILC and the UN International Strategy for Disaster Reduction (UNISDR). However, considering that the UN Office for Disaster Risk Reduction finalised the Sendai Framework for Disaster Risk Reduction 2015-2030⁸¹ in March 2015, it is important that the Commentary to draft Article 11 recognises the evolving nature of international agreements on disaster risk reduction.

The Rome Report makes a strong case for the complementary nature of draft Article 11 and the Sendai Framework.⁸² Their recommendation is for the two documents to be seen as ‘a coherent whole.’ This is a logical approach to take, both in the Commentaries and by States and other humanitarian actors. That being said, it should be noted that presumably by 2030, the UNISDR will develop a new framework to succeed the Sendai Framework. If the Draft Articles were to become binding, we are concerned that emphasizing the importance of the Sendai Framework in the Commentary could cause the Commentary to be out of date in the future.

- It is recommended that there is reference made to the Sendai Framework and future international agreements on disaster risk reduction in the Commentary. Likewise, the Commentaries should highlight that the ILC Draft Articles should be read in conjunction with relevant international agreements on disaster risk reduction.

b) Legal obligations for DRR

Again, we salute the inclusion of DRR into the Draft Articles, as it is an important part to the protection of persons in the event of disasters. Draft Article 11 addresses DRR in broad terms, and

⁷⁹ IDNDR, *Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation and Plan of Action*, UN Doc A/CONF.172/9.

⁸⁰ UN Office for Disaster Risk Reduction (UNISDR), *Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters*, as adopted at the World Conference on Disaster Reduction, 18-22 January 2005, Kobe, Hyogo, Japan, UN Doc A/CONF.206/6. Hereinafter ‘the Hyogo Framework.’

⁸¹ UNISDR, *Sendai Framework for Disaster Risk Reduction 2015-2030, as adopted at the World Conference on Disaster Risk Reduction*, 14-18 March 2015, Sendai, Miyagi, Japan (A/CONF.224/CRP.1). Hereinafter ‘the Sendai Framework.’

⁸² Bartolini et al, *The Rome Report* (n.39), 42.

could be used in conjunction with the Sendai Framework, as the former stipulates the legal duty of States to reduce the risk of disasters and the latter provides a framework of measures to fulfil the duty. Though the Rome Report notes that the Sendai Framework has been ‘shy’ in terms of legal obligations, it does serve to inform and strengthen the Draft Articles involving disaster risk reduction, and could be referenced in the Commentary as a guide to relevant actions required.⁸³

- We would suggest revising the Commentaries to draft Article 11 to align them with the Sendai Framework, as a means of mutual reinforcement of the obligations set out in the two instruments.

c) ‘Prevention’ and the creation of new risks

The Sendai Framework, according to the Rome Report, adopts an ‘innovative interpretation of the concept of prevention’.⁸⁴ It focuses on the ‘prevention of new risks, reduction of existing risks and the strengthening of resilience,’ giving more specific direction to the ideas of prevention, mitigation, and preparedness.⁸⁵ In particular, the Sendai Framework addresses the creation of new risks,⁸⁶ in addition to reducing existing risks. The Commentary for draft Article 11 does not currently capture this aspect of risk. Incorporating the idea of preventing the creation of new risks into the Commentary, either directly or indirectly through referencing the Sendai Framework could strengthen the purposes of this draft Article.

- Include into paragraph 3 of the Commentary the Sendai Framework’s approach to disaster risk reduction:

‘the prevention of new risks, reduction of existing risks and the strengthening of resilience.’

d) ‘Vulnerability’ and ‘resilience’

The Commentary of draft Article 11 references the ideas of ‘vulnerability’ and ‘resilience’, but does not establish their relationship to DRR. The Hyogo Framework defines vulnerability as: ‘The

⁸³ Bartolini et al, *The Rome Report* (n.39), 42.

⁸⁴ Ibid, 43.

⁸⁵ Ibid.

⁸⁶ For example, in the *Öneryıldız v Turkey* case (n.46) the State had a positive obligation to predict and prevent the potential loss of life should a methane explosion occur in a municipal rubbish tip where people were living.

conditions determined by physical, social, economic and environmental factors or processes, which increase the susceptibility of a community to the impact of hazards.’⁸⁷ Resilience is defined as: ‘The ability of a system, community or society exposed to hazards to resist, absorb, accommodate to and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions.’⁸⁸ Within the arena of the UNISDR and the Sendai Framework, increasing attention has been directed toward these two concepts. Not only does the Sendai Framework emphasize identification of vulnerabilities, it also discusses in depth the concept of resilience, dedicating one of four key priorities as investing in DRR for resilience.⁸⁹ The idea is that developing resilience reduces the risks and impact of disasters on people and communities.

- We would suggest including the UNISDR definitions of ‘resilience’ and ‘vulnerability’ into the Commentary. These terms emphasize the impact of underdevelopment on disaster risk, and broaden the scope of disaster risk reduction to include development strategies.

Resilience: *‘The ability of a system, community or society exposed to hazards to resist, absorb, accommodate to and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions.’*

Vulnerability: *‘The conditions determined by physical, social, economic and environmental factors or processes, which increase the susceptibility of a community to the impact of hazards.’*

⁸⁷ Hyogo Framework (n.80), 1.

⁸⁸ UNISDR, ‘2009 UNISDR Terminology on Disaster Risk Reduction’, Geneva, May 2009, available at: www.unisdr.org/we/inform/terminology (accessed 4 February 2016).

⁸⁹ Sendai Framework (n.81), 8-20. In the Sendai Framework, the eradication of poverty is highlighted as a way to develop resilience, as well as implementing inclusive policies and social safety-net mechanisms. There is also an emphasis on training health workers, educators and businesses in order to develop their capacities in the event of a disaster. The Framework additionally looks at rural development planning, sustainable use and management of ecosystems, and the ‘protection of livelihoods and productive assets, including livestock, working animals, tools and seeds.’

Part IV: External Assistance

10. Draft Article 16: Offers of External Assistance

In responding to disasters, States, the United Nations, and other competent intergovernmental organisations have the right to offer assistance to the affected State. Relevant non-governmental organisations may also offer assistance to the affected State.

a) General comments

The rationale of draft Article 16 is to set out the ‘role of external actors in the provision of humanitarian assistance in disaster settings.’ We agree that this constitutes a balance between State sovereignty, non-interference and the rights of those affected,⁹⁰ and acknowledge the importance of stating in the Commentary to draft Article 16 that there is no corresponding duty to accept offers of assistance.

b) Position of the IFRC

The IFRC have noted that they do not fall into any category listed within this Article,⁹¹ and considering their well-recognised position as a crucial actor in disaster relief efforts their role should be appropriately recognised in the Draft Articles and Commentaries.

The IFRC has stated that the ambiguity arising from Article 16 creates cause for concern as to their perceived rights to act in the event of a disaster.⁹² The IFRC has suggested that clarity could be achieved through the Commentary to draft Article 16, and we agree that the Commentaries are an appropriate way of achieving clarity. Indeed, the International Committee of the Red Cross is already referenced in paragraph 5 of the Commentary to draft Article 16.⁹³ However, we would like

⁹⁰ Bartolini et al, *The Rome Report* (n.39), 64.

⁹¹ K. Cooper, ‘Comments on the International Law Commission’s Draft Articles on protecting persons in the event of disasters – Draft Articles 10-12’ (*International Federation of Red Cross and Red Crescent Societies*, 31 October 2011), available at: www.ifrc.org/fr/news-and-media/opinions-and-positions/speeches/2011/comments-on-the-international-law-commissions-draft-articles-on-protecting-persons-in-the-event-of-disasters---draft-articles-10-12/ (accessed 4 February 2016).

⁹² Ibid.

⁹³ *Official Records of the General Assembly* (2013) (n.46) pp.80.

to suggest an alternative means whereby this issue could be clarified in the text of the Draft Articles themselves to promote consistency of terminology.

The IFRC's own *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* define "assisting humanitarian organisations" as: 'A foreign, regional, intergovernmental or international non-profit entity whose mandate and activities are primarily focused on humanitarian relief, recovery or development.'⁹⁴ This source should then be referenced in the Commentaries to draft Articles 16 and 4.

- Therefore, one possibility is that the second sentence of draft Article 16 be changed to read:

Relevant non-governmental organisations and assisting humanitarian organisations (such as the International Federation of Red Cross and Red Crescent Societies) also have the right to offer assistance to the affected State.

- For consistency, it would be necessary to modify the definition of 'other assisting actor' given in draft Article 4(c) (Use of terms). This would then read:

(c) "other assisting actor" means a competent intergovernmental organization, assisting humanitarian organisation (such as the International Federation of Red Cross and Red Crescent Societies) or a relevant non-governmental organisation or any other entity or individual external to the affected State, providing humanitarian relief, recovery or development assistance to that State at its request or with its consent;

c) Rights and correlating obligations, and distinction in nature and legal status

Draft Article 16 provides States, the UN, and other competent intergovernmental organisations a *right* to offer but not necessarily a duty or *obligation* to provide assistance. Similarly, it creates a right to offer, not a right to provide assistance and consent must be obtained in accordance with draft Article 14. We are satisfied that this has been clearly addressed in the Commentary to draft Article 16.

⁹⁴ *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, International Federation of Red Cross and Red Crescent Societies (Geneva, 2007), Article 2(12), p.11.

The very nature of rights provides that a correlating obligation is created. If a right should have a corresponding obligation, it must be questioned whether for the purposes of draft Article 16 that is to be limited to ‘an obligation to *consider* offers of assistance’. In any event, we suggest that this should be clarified in the Commentary.

Notwithstanding this caveat, one issue that has arisen with this draft Article is the importance of retaining principles of sovereignty and non-interference. While these principles must be balanced with the rights of those affected by disasters, it is important to consider the possible development and implementation of the Draft Articles as a treaty that States will commit to ratifying. If the obligations imposed on States are too onerous, then the process of adoption by States will run into difficulties. Given the significance of the Draft Articles as filling a yawning gap⁹⁵ regarding the regulation of international disaster responses in international law, this is something that we have kept in mind throughout this Working Paper.

Providing rights to external actors, in whatever setting, presents the notion of limiting State sovereignty, which can intensify anxieties of interference within affected States. Cyclone Nargis and the response of the governing regime in Myanmar regarding external assistance, highlights anxieties regarding sovereign discretion. Craig Allan and Thérèse O’Donnell have stated that the much-condemned conduct of the regime was based on ‘fears of foreign intervention aiming at regime change’.⁹⁶ It is important to consider such anxieties in the drafting of these Articles to avoid any interpretation that may prompt similar behaviour.

Despite these concerns, we are satisfied that the right to offer assistance is unequivocally *an offer* that is clearly dependent on the request, or the consent, of the affected State.

On the distinct nature and legal status of non-governmental organisations (NGOs), States, the United Nations, and intergovernmental organisations – we acknowledge the need for emphasis in order to encourage offers from States, the UN and intergovernmental organisations. It must however be questioned whether this puts certain humanitarian organisations in a weaker position when offering assistance in the response to a disaster. While there is no doubt that States, the UN,

⁹⁵ E. Valencia-Ospina, ‘The ILC Work on the Protection of Persons in the Event of Disasters’ (*SHARES*, 4 December 2013), available at: www.sharesproject.nl/the-ilc-work-on-the-protection-of-persons-in-the-event-of-disasters/ (accessed 4 February 2016).

⁹⁶ C. Allan and T. O’Donnell, ‘An Offer You Cannot Refuse? Natural Disasters, the Politics of Aid Refusal and Potential Legal Implications’ (2013) 5(1) *Amsterdam Law Forum* 36, 37.

and intergovernmental organisations have a different nature and legal status than that of NGOs, this does not necessarily affect the ability of NGOs to offer assistance to an affected State.

- Considering the significance of assistance regularly offered by NGOs and the International Red Cross Movement, we submit that such organisations should also be provided with the right to do so. The distinct nature and legal status could be retained by keeping the two sentence structure, therefore editing the second sentence of Article 16 to read:

‘Relevant non-governmental organisations and assisting humanitarian organisations (such as the International Federation of Red Cross and Red Crescent Societies) also have the right to offer assistance to the affected State.’

d) Positioning of Article 16

In the ordinary course of events in situations with which the Draft Articles are dealing, offers would normally be expected before acceptance, therefore we must consider the relationship between draft Article 16 and draft Article 14. We submit that the substance of Article 16 prepares the ground for the draft articles concerning the notion of consent and the arbitrary withholding of consent and would therefore be better placed after draft Article 13 (Duty of the affected State to seek external assistance), and before draft Article 14 (Consent of the affected State to external assistance).

e) Sources in the Commentaries

We submit that the wording of Article 5 of the 1989 resolution of the Institut de Droit International,⁹⁷ which is quoted in the Commentary to draft Article 16,⁹⁸ may prove to be inadvertently restrictive. The quote used specifically refers to a right to offer food and medical supplies, and does not mention other material or services that should be required for the protection of persons.

⁹⁷ International Law Institute, ‘The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States’ (1989) 63 *Institut de Droit International Annuaire* 338.

⁹⁸ *Official Records of the General Assembly* (2013) (n.46) pp.79.

- Since the purpose of the reference is to bolster the idea that offers of assistance are not to be considered an interference in the affected State’s internal affairs, we submit that the use of the UN’s Guiding Principles on Internal Displacement would achieve this aim without resulting in unwarranted restrictions.⁹⁹ Specifically, reference in the Commentaries could be made to Principle 25(2), which reads:

‘International humanitarian organisations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State’s internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.’

11. Draft Article 17: 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 regarding, in particular:

- i. civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and*
- ii. equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof.*

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

a) General comments

The principal aim of draft Article 17 is to remove practical obstacles that can hinder the relief process in emergency situations. This facilitation could be realised through the implementation of

⁹⁹ OHCHR, *Guiding Principles* (n.27).

legal and policy frameworks that remove regulatory barriers. It was recommended in the Rome expert meeting¹⁰⁰ that the ILC should provide more detail in order to establish basic operational rules for facilitation.

There has been notable commentary on when, and as to whom, required flexibilities should apply.¹⁰¹ While we salute the calls for clarity, we would be concerned that changes to draft Article 17 could result in narrowing the timeframe within which humanitarian agencies and their personnel are recognised to have a right to assist an affected state.

We agree that the importance of legislative and regulatory preparedness should be reflected in the Draft Articles, and acknowledge that the purpose of draft Article 17 is to streamline the delivery of external assistance in affected States, and facilitate the operation of humanitarian agencies within affected areas in the aftermath of a disaster. We therefore submit that the broad nature of the Article, as it is currently drafted, is the most effective way of achieving this.

b) Reference to relief flights in the Commentary

The IFRC have drawn attention to the lack of any special provisions for facilitating and regulating relief flights in the case of disasters and recommended the development of special rules to facilitate rapid operation, over-flight and landing of such flights.¹⁰² We have noted that there is no mention of flights throughout the Commentary, and given the strict aviation rules in the normal course of events, we propose that flexibility in regulations for the purposes of facilitating assistance might prove to be invaluable. We therefore submit that reference in the Commentary should be made to national aviation authorities facilitating external assistance, with specific reference to the waiver of landing fees, installations, protection and security for relief flights.

- We advise that the following non-exhaustive recommendation is added as a new paragraph in the Commentary:

¹⁰⁰ Bartolini et al, *The Rome Report* (n.39), 69.

¹⁰¹ Ibid, 69; IFRC, *The Right Aid at the Right Time: Progress Report on the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (November 2009), available at: www.ifrc.org/PageFiles/41203/IDRL-Progress-Report_en.pdf (accessed 4 February 2016). Similarly, Allan and O'Donnell have noted that 'the gap between emergency relief and development has become seamless in recent years.' See: 'An Offer You Cannot Refuse' (n.96), 57.

¹⁰² IFRC, 'Ecuador adopts new procedures for humanitarian relief flights' (20 July 2015), available at: www.ifrc.org/en/what-we-do/disaster-law/news/americas/ecuador-adopts-new-procedures-for-humanitarian-relief-flights--69078/ (accessed 4 February 2016).

'The delivery of necessary relief personnel, equipment, and goods is often dependent on relief flights. Therefore the relevant national aviation authorities should assist with the facilitation of such flights through the waiver of landing fees, installations, protection, security, and any other relevant measures.'

c) Important role of transit States

Although transit States are specifically mentioned in draft Article 1 (Purpose), it is noticeable that their important role in assisting States is not currently reflected within the Commentary to draft Article 17.

- Therefore, the assistance of transit States in the facilitation of disaster relief could be expressly included in paragraph (4) of the Commentary to draft Article 17: recognition of their impact could be achieved by editing the last sentence to read:

'Unnecessary restriction of movement of relief personnel, both within the affected state and in transit States, inhibits workers' ability to provide flexible assistance.'

As previously mentioned, relief flights play an important role in the aftermath of a disaster. We therefore submit that any inclusion of a paragraph on flexibilities provided by aviation authorities should also refer to transit states for the purposes of over-flight facilitation.

d) Differentiation between civilian and military relief

The Oslo Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief provide for the use of military relief only as a last resort when civilian humanitarian alternatives are not adequate.¹⁰³ Likewise, the IFRC has emphasised the importance of differentiating between military and civilian relief for the purposes of preserving the apolitical nature of humanitarian aid.¹⁰⁴ While we recognise and appreciate the importance of military assistance in the provision of

¹⁰³ UN OCHA, *Guidelines on The Use of Foreign Military and Civil Defence Assets In Disaster Relief* (the 'Oslo Guidelines') Revision 1.1, November 2007, para. 5. This is reiterated in 'Key Concepts for Use of Military and Civil Defence Assets (MCDA) by UN Agencies', paras 32-36 and throughout.

¹⁰⁴ IFRC, *Statement to the International Law Commission on the Protection of Persons in the Event of Disasters* (2 November 2012), available at: www.ifrc.org/en/news-and-media/opinions-and-positions/speeches/2012/report-

humanitarian aid, we salute the IFRC's submission that the 'indiscriminate mixing' of the two may pose a risk to the security of humanitarians, and even pose a risk to their acceptance by affected States in the first place.¹⁰⁵

- We submit that the reference to military relief should be removed from the substance of draft Article 17, and that reference should instead be made in the Commentaries where it is recommended as a standalone paragraph specifying their particular role in disasters and highlighting their independence from civilian relief personnel. This paragraph can then also reference the comprehensive Oslo Guidelines and broader concept of civil-military cooperation.

Conclusion

The codification of rights and obligations related to the protection of persons during disasters takes on particular importance when faced with the exponential growth in potential humanitarian responders, alongside the increasing vulnerability and resilience of communities to the massive impacts of natural and human-made disasters. The ILC's initiative to advance this topic to the forefront of international law should therefore be highly commended. We agree that a coherent international instrument clarifying the legal rights and obligations of different stakeholders should help promote an adequate and effective response to disasters, meeting the essential needs of those concerned within a framework that has full respect for their rights. We therefore hope that the suggestions contained within this Working Paper are useful for governments and interested parties in the process of reviewing the ILC draft articles. By keeping a clear focus on the need to respect the human dignity of those facing the greatest risks from natural and human-made disasters, the ILC draft articles will not only help to promote a coherent international mechanism, but reduce the human suffering inherent in such humanitarian crises.

[of-the-international-law-commission-on-the-work-of-its-sixty-fourth-session-protection-of-persons-in-the-event-of-disasters-/](#) (accessed 4 February 2016).

¹⁰⁵ The risk to the independence and credibility of humanitarian agencies when there is an indiscriminate mixing of civilian and military actors in the provision of aid can exemplified by the actions of the Nigerian Federal Government during the Biafran War (1967-70). The fear of military assistance to the Republic of Biafra being disguised as humanitarian aid led to the Nigerian government banning flights carrying aid from the IFRC. The consequence of politicisation in this case led to the exacerbation of a man-made famine that caused the death of an estimated two million Biafrans. See: D. Maxwell and P. Walker, *Shaping the Humanitarian World* (Routledge, 2008), pp.46-48.

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

*First reading as of May 2014*¹⁰⁶

Article 1 – Scope

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

Article 2 – Purpose

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

Article 3 – Definition of Disaster

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

Article 4 – Use of terms

For the purposes of the present articles:

- (a) “affected State” means the State in the territory or otherwise under the jurisdiction or control of which persons, property or the environment are affected by a disaster;
- (b) “assisting State” means a State providing assistance to an affected State at its request or with its acceptance;
- (c) “other assisting actor” means a competent intergovernmental organization, or a relevant non-governmental organization or any other entity or individual external to the affected State, providing assistance to that State at its request or with its consent;
- (d) “external assistance” means relief personnel, equipment and goods, and services provided to an affected State by assisting States or other assisting actors for disaster relief assistance or disaster risk reduction;
- (e) “relief personnel” means civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance or disaster risk reduction;
- (f) “equipment and goods” includes supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects necessary for the provision of disaster relief assistance or disaster risk reduction.

Article 5 – Human dignity

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

¹⁰⁶ Official Records of the General Assembly, Sixty-eighth Session, *Supplement No.10 (A/69/10)*, Chapter V: Protection of Persons in the Event of Disasters (2014).

Article 6 – Human rights

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

Article 7 – Humanitarian principles

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

Article 8 – Duty to cooperate

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

Article 9 – Forms of cooperation

For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.

Article 10 – Cooperation for disaster risk reduction

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

Article 11 – Duty to reduce the risk of disasters

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

Article 12 – Role of the affected State

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

Article 13 – Duty of the affected State to seek external assistance

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

Article 14 – 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 assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known.

Article 15 – Conditions on the provision of external assistance

The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

Article 16 – Offers of external assistance

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

Article 17 – 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 regarding, in particular:
 - (a) civilian and military 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 disposal thereof.
2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

Article 18 – Protection of relief personnel, equipment and goods

The affected State shall take all necessary measures to ensure the protection of relief personnel, equipment and goods present in its territory for the purpose of providing external assistance.

Article 19 – Termination of external assistance

The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actors wishing to terminate shall provide appropriate notification.

Article 20 – Relationship with special or other rules of international law

The present draft articles are without prejudice to special or other rules of international law applicable in the event of disasters.

Article 21 – Relationship with International Humanitarian Law

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