

# Comments on the International Law Commission's draft articles on protecting persons in the event of disasters

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*Statement by Ms Elyse Mosquini of the IFRC Delegation to the United Nations, at the Sixth Committee of the United Nations General Assembly, in New York*

Madam Chair,

It is my pleasure to take the floor on behalf of the International Federation of Red Cross and Red Crescent Societies (IFRC) to comment on chapter 7 of the International Law Commission's report, with respect to its project concerning the protection of persons in the event of disasters.

As in past years, we would like to extend our appreciation to Special Rapporteur Eduardo Valencia-Ospina and his colleagues for their thoughtful attention to this project and in particular for their focus on the critical issues of humanitarian principles and human rights in this report.

We note that the ILC has now provisionally adopted the five draft articles discussed last year along with their commentaries, and that the Drafting Committee has provisionally adopted several more draft articles. Because there is now more information behind the intentions of the text discussed last year, some of our comments will also apply to that text.

We begin with a general observation. While we see the attraction to building consensus on the draft articles step by step, we find that the deferred decision as to the final form of the instrument, and the remaining ambiguities as to its scope, present certain difficulties even at this early stage.

## **Final format**

On this first point, if this text will indeed result in a new set of non-binding guidelines, then it makes sense for the ILC to avoid re-inventing existing instruments of a similar nature, like the Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance (also known as the IDRL Guidelines), which were adopted by the State Parties to the Geneva Conventions in 2007. However, if

it is intended as a basis for an eventual treaty, then it is important that key aspects of existing international instruments be reflected in this new text as well.

As an illustration, we note that the commentary to draft article 1 clarifies that the draft articles will address the role of civil society actors in disaster response only as a secondary matter. One of the key findings of IFRC's dedicated programme of research and global consultations with states and humanitarian actors over the last nine years is that the lack of clearly articulated rules for the facilitation and regulation of civil society actors has actually been a much bigger practical problem in international disaster operations – for all concerned – than any ambiguities with regard to state-to-state or international organization assistance. The Haiti earthquake operation, which has attracted hundreds of foreign NGOs, is a case in point.

The IDRL Guidelines address themselves to this issue, as well as to state-to-state and international organization assistance. If the ILC's draft articles will eventually become a framework treaty, the absence of adequate attention to civil society actors would be a critical gap. If not, they might simply refer to the IDRL Guidelines on these points and concentrate instead on different issues, such as the rights of disaster-affected persons.

### **Scope**

With respect to scope, we note that draft articles 1 and 2 draw no distinctions between domestic and international disaster response and the commentary seems to indicate that both kinds of response are meant to be addressed. If this is so, it has ramifications for several of the other draft articles.

For instance, article 5 – which is very positive in its affirmation of a duty to cooperate with international actors, including the IFRC – fails to reference National Red Cross and Red Crescent Societies. Yet states have committed to cooperate with them at the national level in light of their internationally recognized auxiliary role, as affirmed by Resolution 2 of the 30th International Conference of the Red Cross and Red Crescent. This issue could easily be resolved by replacing the existing references to the IFRC and ICRC with a broader reference to “the components of the International Red Cross and Red Crescent Movement”.

It also raises an issue with respect to draft article 6. As affirmed in General Assembly Resolution 46/182, the principles of humanity, impartiality and neutrality apply to all international humanitarian assistance. With regard to domestic response, the principles of humanity and impartiality may still be valid for all response actors. However, the principle of neutrality – which is generally understood as refraining from taking sides in political or ideological debates – can hardly be considered to apply to the affected state government itself.

### **Disasters and armed conflict**

We are pleased to see the evolution of draft article 4, which now appropriately avoids the potential for contradiction by excluding from the scope of the draft articles situations to which international humanitarian law applies. However, we are concerned by the final sentence of paragraph 3 of the commentary to that article as well as by paragraph 7 of the commentary to draft article 5, both of which seem to muddy this clear line, and could lead to misapprehensions about the scope of IHL.

### **Articulation of humanitarian principles**

Moreover, while we are glad to find the expression of humanitarian principles in article 6, we are concerned about the potential for confusion. First, humanity, impartiality and neutrality are core humanitarian principles, as affirmed by numerous UN resolutions and various collective statements of humanitarian practice. They are also included among the seven Fundamental Principles of the International Red Cross and Red Crescent Movement.

Impartiality is generally understood by the humanitarian community as non-discrimination – the absence of distinction on the basis of nationality, race, gender, religious belief, class or political opinion. Yet non-discrimination is presented in the text provisionally adopted by the Drafting Committee as if it were a separate principle. Likewise, ensuring a particular focus on persons with the greatest need is the essence of the principle of humanity, yet it too is presented as if it were separate. If there is a desire to place additional emphasis on particular elements of the existing principles, we have no objection, so long as the meaning of the principles is not muddied. We suggest that the potential for confusion could be avoided by adding the phrase “and in particular” after the word “impartiality”.

### **Human rights**

We find the emphasis on human dignity and human rights in draft articles 7 and 8 to be positive. We hope that subsequent articles will provide more specific guidance as to what these notions mean in practice in terms of the treatment of affected persons. This would seem critical for an instrument devoted to protection.

### **Role of the affected state**

We find the text of draft article 9 generally to be excellent. We do note, however, the reference in draft article 9.2 to the “control” of assistance. This term is used in some treaties related to state-to-state assistance, but it was not employed in UN General Assembly Resolution 46/182 or the IDRL Guidelines, both of which also refer to humanitarian organizations as well as states. While it is undoubted that affected states are entitled to coordinate and regulate disaster assistance by humanitarian organizations, it is also accepted that this is subject to respecting those organizations’ capacity to abide by humanitarian principles. With respect to the Red Cross Red Crescent, for example, this is acknowledged both as a mandatory element of all national Red Cross or Red Crescent acts and through resolutions adopted by the State Parties to

the Geneva Conventions at the International Conference of the Red Cross and Red Crescent. Perhaps these considerations could be addressed in the commentary.

In conclusion, Madam Chair, and in line with the suggestion by Italy yesterday and as noted by Ghana earlier today, I would like to reiterate the IFRC's willingness to work more closely with the ILC members to ensure that they have the benefit of our research, operational experience and ongoing country-level work in the area of IDRL. In particular, the IFRC would be very pleased to collaborate with the United Nations and other agencies to provide pre-session briefings to ILC members, if this would be helpful.

Thank you.