

## **Annex – Proposals for amendments to the Draft Articles of the International Law Commission concerning the 'Protection of Persons in the Event of Disasters' on behalf of the European Union**

### **General comments**

The European Union would like to convey its gratitude for the chance to provide written feedback on the Draft Articles concerning the Protection of Persons in the Event of Disasters.

The European Union welcomes the present draft set of articles as an important contribution to international disaster law. The topic of the Protection of Persons in the Event of Disasters is of special interest to the European Union, especially in view of its activities in the field of humanitarian action and civil protection. The Union has contributed actively since 2011 with its views to the International Law Commission during its work on the Draft Articles

The Union's actions in its external relations are guided by the principles which have inspired its own creation and which it seeks to advance in the wider world, inter alia, respect for democracy, the rule of law, human rights and the principles of the United Nations Charter and international law<sup>1</sup>. The Union is active in the field of humanitarian aid, in accordance with Article 214 of the Treaty on the Functioning of the European Union (TFEU), to assist people in need in countries and regions confronting natural or man-made disasters. The Union's action in the field of humanitarian aid is more specifically based on Council Regulation (EC) No 1257/96<sup>2</sup>.

With respect to civil protection, pursuant to Article 196 TFEU, the Union supports Member States' action in prevention, preparedness and disaster response within the Union, and can also promote consistency in international civil protection work. It has exercised this competence with the adoption of Decision 1313/2013/EU on a Union Civil Protection Mechanism<sup>3</sup>. Any country in the world may activate the Union Civil Protection Mechanism to request assistance needed to cope with the effects of a disaster. The European Union also recognises the key role of intergovernmental organisations through strengthening policy dialogue, exchange of knowledge and best practices, as disasters and crises are increasing in scale and scope globally and the risks and threats thereof are shared.

### **Proposed amendments and comments on specific Draft Articles**

#### **Draft Article 1 – Scope**

*Proposed amendment:*

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<sup>1</sup> See article 21 (2) of the Treaty on the European Union (TEU)

<sup>2</sup> Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid, O.J. L 163, 02.07.1996 p. 01 - 06

<sup>3</sup> Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, O.J. L 347, 20.12.2013, p. 924

‘The present Draft Articles apply to the protection of persons in the event of disasters **or when there is a risk of a disaster**’ (addition in bold).

*Rationale:*

Draft Article 1 lays down the scope *ratione materiae, ratione personae, ratione temporis* and *ratione loci*. Concerning more specifically the scope *ratione temporis*, the terms ‘in the event of disasters’ seem to relate primarily to the immediate post-disaster response and recovery phase, including the post-disaster reconstruction phase. However, the draft article as it stands could entail a possible conflict with draft Article 9 on disaster risk reduction.

The European Union wishes to highlight the importance of addressing all phases of the disaster management cycle, namely prevention, preparedness and response. The European Union promotes the importance of disaster prevention and the integration of preventive measures, with a view to reducing risks, strengthening the resilience of population, infrastructure and essential services and thereby minimising the impact of disasters.

Although draft Article 2 clarifies that the purpose of the articles extends to the ‘reduction of the risk of disasters’, the European Union encourages the Sixth Committee to consider whether the linkage to the pre-disaster phase could be made more explicit in draft Article 1.

## **Draft Article 2 – Purpose**

*No changes proposed to the wording of draft Article 2.*

For the reasons mentioned above (see comment on draft Article 1), the European Union welcomes the fact that the purpose of the Draft Articles as set out in Article 2 covers the reduction of the risk of disasters, thus extending the scope of the duty to cooperate laid down in Article 7 to disaster risk reduction.

The draft Article 2 adequately reflects that the new instrument seeks to meet in an effective manner the essential needs of the persons affected by disasters, accompanied by a rights-based approach, which is also reflected both in draft Article 4 (human dignity) and draft Article 5 (human rights).

The European Union further welcomes the balance struck between victims’ needs (needs-based approach) and the full respect for their rights (rights-based approach). The two approaches are complementary.

## **Draft Article 3 – Use of terms**

*Proposed amendment to draft Article 3 (a):*

‘(a) “disaster” means ~~a calamitous~~ **an** event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, **including damage to cultural property**, thereby seriously disrupting the functioning of society. **A situation of armed conflict cannot be qualified as a disaster for the purposes of the present draft articles**’ (addition in bold).

*Rationale:*

With regard to draft Article 3 (a), which seeks to define the notion 'disaster' for the purpose of the set of articles, the European Union wishes to point out the following issues.

Firstly, in the light of the terminology that the draft Article establishes - such as 'calamitous event' -, it appears difficult to determine the threshold which would trigger the application of the set of articles. This qualifying adjective poses the question of how to determine whether the event was sufficiently serious to trigger the application of the new instrument, and it is therefore proposed to delete this word.

Secondly, the European Union notes that there is a number of definitions in legal acts that refer to 'disasters' in a broad sense. For instance, Article 3 of the Decision on the arrangements for the implementation by the Union of the solidarity clause<sup>4</sup>, which was adopted by the Council of the European Union in 2014, and Article 4 of Decision 1313/2013/EU on a Union Civil Protection Mechanism define 'disaster' as 'any situation which has or may have a severe impact on people, the environment or property, including cultural heritage'. The advantage is that this definition focuses immediately on the situation and its effects, notwithstanding the cause of it. In addition, with the reference to 'may have a severe impact', it allows to also include the potential immediate threats of a disaster (e.g. spread of Ebola, a storm approaching the land), in order to make such instruments applicable before the triggering event actually occurs and thus potentially minimising its impact.

Similarly, the definition of 'disaster' by the United Nations Office for Disaster Risk Reduction should be considered: 'A serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts'<sup>5</sup>.

Furthermore, the European Union notes that cultural property is also protected under the Additional Protocol I to the Geneva Conventions and under the United Nations Hague Convention of 1954. Therefore, it suggests adding 'including damage to cultural property' after 'environmental damage' in the Draft Article.

The European Union further welcomes the commentary on draft Article 3(a) which explains that a 'situation of armed conflict cannot be qualified per se as a disaster for the purposes of the [Draft Articles]'. There is no risk of conflict with the application of International Humanitarian Law in light of draft Article 18(2) which states that the Draft Articles 'do not apply to the extent that the response to a disaster is governed by the rules of international humanitarian law.'

*Proposed amendment to draft Article 3(c):*

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<sup>4</sup> Council Decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause (2014/415/EU) OJ L 192 1.7.2014, p. 53

<sup>5</sup> See the UNDRR Terminology. Source: <https://www.undrr.org/terminology/disaster>

‘(c) “assisting State” means a State providing assistance to an affected State with its consent; **military assets and capabilities should be used only where there is no comparable civilian alternative and only if the use of military assets can meet a critical humanitarian need.**’ (additions in bold).

*Rationale:*

The European Union notes that national civil authorities bear in principle primary responsibility in most crisis situations. However, in an increasing number of cases, such as health emergencies, extreme weather events, and hybrid or cyber-attacks, civilian authorities may require military support. The use, by an assisting State, of military means under civilian lead as a last resort may constitute an important contribution to disaster response and may be the only relevant assistance in certain cases.

Against this backdrop, the European Union is in favour of referring to the principles of the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (hereinafter ‘Oslo guidelines’)<sup>6</sup> and the Guidelines on the use of Military and Civil Defence Assets to Support UN Humanitarian Activities in Complex Emergencies<sup>7</sup> (hereinafter ‘MCDA guidelines’), which specify that international military assets should be used as a last resort, when civilian alternatives are exhausted.

In the same vein, another soft law instrument at the European Union level, the ‘European Consensus on Humanitarian Aid’, which was adopted by the European Commission, the European Parliament, the Council of the European Union and its Member States<sup>8</sup>, links the use of foreign military assets to the fulfilment of the ‘last resort’ principle as enshrined in the aforementioned guidelines and commits to promote a common understanding of these guidelines<sup>9</sup>. It furthermore reaffirms that a humanitarian operation making use of military assets can do so only where there is no comparable civilian alternative and only the use of military assets that are unique in capability and availability can meet a critical humanitarian need. Overall, a humanitarian operation making use of military assets must retain its civilian nature and character<sup>10</sup>.

*Proposed amendment to draft Article 3 (d):*

‘(d) “other assisting actor” means a competent intergovernmental organization, or a relevant non-governmental organization or entity **or a regional integration organization** providing assistance to an affected State ~~with its consent~~, **or on the territory of or on the territory under the jurisdiction or control of an affected State with its consent**’ (additions in bold).

*Rationale:*

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<sup>6</sup> Source: <http://www.refworld.org/pdfid/47da87822.pdf>

<sup>7</sup> Source: <https://www.unocha.org/publications/report/world/guidelines-use-military-and-civil-defence-assets-support-united-nations-humanitarian>

<sup>8</sup> Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission ‘The European Consensus on Humanitarian Aid’, O.J. C25, 30.1.2008, p. 1

<sup>9</sup> See paragraph 57 of the European Consensus on Humanitarian Aid

<sup>10</sup> See paragraphs 61 to 63 of the European Consensus on Humanitarian Aid

In view of the role of the European Union in the field of civil protection and humanitarian aid, it is welcomed that Draft Articles 3 (d), as well as 7 and 12 do not only relate to States in relation to the provision of external assistance but encompass a broader notion of 'assisting actors'. It is also recognised in draft Article 7 that a key feature of activity in the field of disaster relief assistance is international cooperation not only among States, but also with competent intergovernmental and non-governmental organisations.

Against this background, in draft Article 3 (d), the European Union considers that the inclusion of a reference to 'regional integration organisations' in the definition of 'other assisting actors' would better reflect the specificities of the European Union and other regional integration organisations such as the African Union. The term 'regional integration organisation' is accepted at UN level and has been included in important international legal instruments, including for example the 2006 UN Convention on the Rights of Persons with Disabilities<sup>11</sup>.

Furthermore, the European Union suggests specifying that, in addition to civil protection assistance to an affected State, principled humanitarian assistance may be provided by any assisting actor to the affected populations on the territory of or on the territory under the jurisdiction or control of an affected State with its consent.

*Proposed amendment to draft Article 3 (e):*

‘(e) “external assistance” means relief personnel, equipment and goods, ~~and~~ **services and expertise** provided to an affected State by an assisting State or other assisting actor for disaster **risk reduction and** relief assistance’ (addition in bold).

*Rationale:*

With regard to the definition of ‘external assistance’ in draft Article 3 (e), the European Union is in favour of mentioning specifically expertise as a type of external assistance to be provided and clarifying that assistance may also be provided for prevention and preparedness, in line with the scope set out in Draft Articles 1 and 2.

*Proposed amendment to draft Article 3 (f):*

‘(f) “relief personnel” means ~~civilian and military~~ personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance **or disaster risk reduction**’ (addition in bold).

*Rationale:*

The European Union suggests deleting “*civilian and military*” from article 3(f). Under international humanitarian law, humanitarian relief personnel must be respected and protected<sup>12</sup>. This protection does not cover armed forces. We would not wish to risk diluting

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<sup>11</sup> See Article 44 (1) of the UN Convention on the Rights of Persons with Disabilities

<sup>12</sup> See Rule 31. of the International Humanitarian Law Databases (<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule31>)

the protection of humanitarian organisations in practice by referring to military personnel in 3(f).

Additionally, and in line with the proposed amendments to Draft Article 3(e), the European Union is in favour of clarifying that relief personnel may also play an important role in the prevention and preparedness phases. The European Union understands the role of relief personnel as covering also assistance to prevent risks of further damage during an ongoing disaster.

### **Draft Article 5 – Human Rights**

*Proposed amendment:*

‘Persons affected by disasters are entitled to the respect for, protection **and fulfilment of** their human rights in accordance with international law’.

*Rationale:*

The European Union suggests adding that affected persons are entitled to the fulfilment of their human rights.

### **Draft Article 6 – Humanitarian principles**

*Proposed amendment:*

‘Response to disasters shall take place in accordance with the principles of humanity, neutrality, ~~and~~ impartiality **and independence**, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable’ (addition in bold).

*Rationale:*

The enumerated principles – humanity, neutrality, impartiality and non-discrimination – are rightly identified as the key humanitarian principles relevant to disaster response. This is also reflected in Article 214 (2) TFEU which reads: ‘Humanitarian aid operations shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination.’

In addition, the European Consensus on Humanitarian Aid makes also reference to the principle of independence as meaning ‘the autonomy of humanitarian objectives from political, economic, military or other objectives, and serves to ensure that the sole purpose of humanitarian aid remains to relieve and prevent the suffering of victims of humanitarian crises.’

Against this background, the Sixth Committee could consider whether it would be appropriate to insert a reference to the ‘independence principle’, in line with the Resolution adopted by the General Assembly on 17 December 2003 - Strengthening of the coordination of emergency humanitarian assistance of the United Nations<sup>13</sup>.

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<sup>13</sup> See Resolution A/RES/58/114

## **Draft Article 7 – Duty to cooperate**

*No changes proposed to the wording of draft Article 7.*

Draft Article 7 acknowledges the importance of international cooperation in disaster relief and assistance activities. The European Union would like to point out that the draft Article establishes an obligation for the involved actors to cooperate insofar as disaster relief assistance is concerned, including inter alia needs assessments, situation overview and delivery of assistance.

Duty to cooperate is also reflected in the European Consensus on Humanitarian Aid where it is underlined that the European Union supports the central and overall coordinating role of the United Nations, particularly the Office for the Coordination of Humanitarian Affairs (OCHA)<sup>14</sup> and that European Union humanitarian donors will work together through strengthened EU coordination with a view to promoting the European Union common vision in a way that reinforces international efforts<sup>15</sup>.

The European Union also wishes to comment on the scope of the duty to cooperate, underlining that at Union level, the principle of solidarity is strongly enshrined in its founding treaties. Article 2 TEU enumerates the foundational values of the Union, which notably include the principle of solidarity. Moreover, Article 222 TFEU on the solidarity clause establishes a positive duty for the Union to assist an affected European Union Member State, subject to a request from its authorities. It reads as follows: ‘1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural and man-made disaster. The Union shall mobilise all the instruments at its disposal, (...) to: (...) (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.’

The key European Union instrument for cooperation in disaster prevention, preparedness and response is the Union Civil Protection Mechanism, which is based on the principle of solidarity and through which all European Union Member States as well as 10 Participating States cooperate. The system is managed by the European Commission through its 24/7 Emergency Response Coordination Centre. Any European Union Member State, State that participates in the Union Civil Protection Mechanism, any third country<sup>16</sup>, as well as the United Nations and relevant international organisations can request assistance through the Union Civil Protection Mechanism.

## **Draft Article 8 – Forms of cooperation in the response to disasters**

*No changes proposed to the wording of Draft Article 8.*

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<sup>14</sup> Paragraph 25 of the European Consensus on Humanitarian Aid

<sup>15</sup> Paragraph 26 of the European Consensus on Humanitarian Aid

<sup>16</sup> Art. 16 (1) of the UCPM Decision

The European Union understands the forms of cooperation in the response to disasters outlined in Draft Article 8 as including risk reduction and resilience building activities in the aftermath of a disaster. As stated in the commentary to Draft Article 8, the forms of cooperation referred to are those relevant in the response phase following the onset of a disaster or in the post-disaster recovery phase. The commentary also specifies that the list of cooperation activities is not exhaustive.

### **Draft article 10 – Role of the affected State**

*Proposed amendment:*

‘1. The affected State has the duty to ensure the **timely and effective** protection of persons and the provision of disaster relief assistance, **as well as to facilitate access to such assistance**, in its territory, or in territory under its jurisdiction or control’ (additions in bold).

‘2. The affected State has the primary role in the direction, control, coordination and **supervision facilitation** of such relief assistance’ (additions in bold).

*Rationale:*

Draft Articles 10 to 13 concern the duties of the affected States and are central to the whole set of provisions on the Protection of Persons in the Event of Disasters. Overall, the European Union welcomes the balance between the need to safeguard the national sovereignty of the affected States on the one hand, and the duty to cooperate on the other.

The European Union appreciates in particular the clarification regarding the role of the affected State in draft Article 10, as effective disaster response necessitates coordinated efforts among multiple State actors. Additionally, it recommends highlighting the crucial elements of timeliness and effectiveness, given that safeguarding people often demands swift mobilisation and coordination amongst relevant actors. It is also proposed to add that the affected State facilitates access for relief personnel, equipment and goods, which is essential for the assistance to be timely and effective. In the context of the Union Civil Protection Mechanism, the duty of affected States to facilitate access is further elaborated on in the Host Nation Support Guidelines.

Furthermore, the European Union proposes deleting the word “supervision” from article 10(2) and replacing it by “facilitation”, thereby recognising the role of the affected States while preserving the principles of international humanitarian law.

### **Draft Article 12 – Offers of external assistance**

*Proposed Amendment:*

‘2. When external assistance is sought by an affected State by means of a request addressed to another State, the United Nations, or other potential assisting actor, the addressee shall expeditiously give due consideration to the request and inform the affected State ~~of its reply.~~ **of any assistance offered in response to the request**’ (additions in bold).

*Rationale:*

Subjecting states, the United Nations or other potential assisting actors to a legal obligation to inform the affected state of their reply – even when they cannot offer any assistance – is not deemed necessary nor expedient. In the event of a disaster, affected States may send requests for assistance to all UN Member States and receiving a reply from all States, even those not offering assistance, may add an administrative burden in times of crisis.

### **Draft Article 13 – Consent of the affected State to external assistance**

*No changes proposed to the wording of draft Article 13.*

As a general remark in relation to Draft Articles 11 and 13 (2), the European Union notes that these articles comprise notions – 'to the extent that a disaster manifestly exceeds its national response capacity' and 'consent to external assistance shall not be withheld arbitrarily' - which, in the first place, accord a certain discretionary flexibility to the affected State without referring to objective criteria, which would determine when the respective requirement is fulfilled.

More specifically on the notion of 'arbitrarily withholding of consent', it seems that a case-by-case approach has to be accepted, although it could be elaborated further in any commentary or equivalent guidance accompanying the future instrument on what is meant by this term and what kind of motivation should be deemed acceptable, if an affected State refuses assistance.

### **Draft Article 14 – Conditions on the provision of external assistance**

*Proposed amendment:*

‘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 complementing and supplementing provisions of** and the national law of the affected State. Conditions shall take into account the **rights and the** identified needs of the persons affected by disasters **in a non-discriminatory manner, including the needs of vulnerable or disadvantaged groups**, and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought’ (additions in bold).

*Rationale:*

The European Union would like to highlight that this draft Article is central to the future binding instrument.

Draft Article 14 pertains to the establishment of conditions by the affected State for allowing external assistance within its territory. This right to impose conditions is not unlimited and must be exercised in accordance with the Draft Articles, as well as applicable international law, which may be complemented by the applicable national legal frameworks. The draft Article provides that these conditions should be determined based on the identified needs of those affected by disasters and the quality of assistance provided. It further requires the affected State to specify the scope and type of assistance being sought when formulating these conditions. The subject-matter and contemplated content of the draft instrument should in any event not seek to displace the national law of the affected State.

In that sense, draft Article 14 in its current wording - 'may place conditions' - not only furthers the principles laid down in draft Article 10, which acknowledges the primary role of the affected State – by virtue of its sovereignty - in the control, coordination and supervision of disaster relief on its territory. It also recognises the right of the affected State to deny unwanted or unneeded assistance, and to determine what and when assistance is necessary.

This latter element - to deny unwanted assistance and to determine when assistance is necessary - is connected to draft Article 13 and more precisely to the obligation of the affected State not to arbitrarily withhold assistance. In fact, the formulation of conditions can contain the justification for refusing assistance or for withholding consent. In this respect, it appears to deliver an important element in order to further define when consent is arbitrarily withheld. The establishment of conditions seems to fall within the discretion of the affected State. Draft Article 14 (third sentence) mandates that the affected State, when setting these conditions, must 'take into account' the identified needs of disaster-affected individuals and the quality of the assistance. Although these two factors - identified needs and quality of assistance - are mentioned, the precise type and nature of the conditions which may be placed by the affected State on the provision of external assistance remains somewhat ambiguous.

The European Union proposes to clarify that the conditions must reflect the needs and rights of the affected persons, in a non-discriminatory manner, taking full account of the specific needs of certain groups of population.

With regard to the European level, and as already mentioned above, the European Commission has been entrusted with the implementation of the Union's Civil Protection Mechanism. The European Commission will often seek to ensure consistency through preliminary contacts in order to facilitate the definition of needs and response capacities needed, already before a formal request from an European Union Member State or a third State<sup>17</sup>. In addition, a clear set of criteria is established to guide the provision of assistance.

### **Draft Article 18 (2) – Relationship to International Humanitarian Law**

*No changes proposed to the wording of draft Article 18 (2).*

Draft Article 18(2) addresses the relationship between the present set of articles and the rules of International Humanitarian Law. The text of the draft article has been chosen so as to exclude the applicability of the Draft Articles to the extent that the response to a disaster is governed by the rules of International Humanitarian Law.

In cases of armed conflict governed by International Humanitarian Law, the latter takes precedence as *lex specialis*. In other words, nothing in the Draft Articles can be read or interpreted as affecting International Humanitarian Law. At the same time, the application of the Draft Articles is not excluded a priori, taking into account cases of complex emergencies where a disaster occurs in an area where there is an armed conflict.

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<sup>17</sup> Inside the Union: Article 14 (2) of the Union's Civil Protection Mechanism; the Member State shall notify the Commission that a possible request for assistance can be expected. Outside the Union: Article 33 (2) of the Commission Implementing Decision (EU) 2015/704: the Commission may inform the third country of the possibilities to request assistance under the Union's Civil Protection Mechanism

The European Union welcomes the wording of Draft Article 18(2) and agrees that the text – ‘to the extent’ - will contribute to filling potential legal gaps, while in relation to specific situations where both the Draft Articles and International Humanitarian Law would be applicable, the latter shall indisputably prevail.