

ILC Draft Articles on the Protection of persons in the event of disasters

Comments by AUSTRIA

ad Article 2 (Purpose)

The formulation of Article 2 excludes the application of the articles to any activity relating to the avoidance or the reduction of the risk of disasters, what, for instance, is addressed in draft articles 10 and 11.

From a linguistic perspective it is pointed out that it is unknown to which noun the conjunction "that" relates; the text should be reformulated to make clear that the conjunction "that" relates to disasters.

ad Article 3 (Definition of disaster)

Despite the explanation in the commentary, the wording of Article 3 does not indicate whether the qualifier "resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage" only relates to the series of events or also to one "calamitous event". If it is deemed to relate also to the latter, the qualifier "calamitous" is redundant or even confusing since the effect of this event results from the second part. However, if the term "calamitous event" stands on its own without further qualifier it is questionable whether the expression "calamitous" is to be understood in the sense of the second part of this sentence. Likewise, if the qualifier "calamitous" is deemed to relate to both the event and the series of events, it is also redundant in view of the second part of this sentence. The restriction to the event seems also to exclude situations resulting for instance from the outbreak of an infectious disease, such as an epidemic or pandemic that cannot always be traced back to a given event.

Although this definition to a certain extent is based on the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, it may nevertheless be asked whether the element concerning the disruption of the functioning of society, is appropriate (see Statement of Austria in the Sixth Committee at the 64th Session of the General Assembly in 2009). It cannot be excluded that a society may furnish the best proof of its functioning in the situation of a disaster if appropriate relief measures are taken in accordance with well-prepared emergency plans. This would mean that such a situation is not covered by the definition, because there is no dysfunction of society. It is doubtful whether an earthquake, an avalanche, a flood or a tsunami taken as such necessarily meets the threshold of a "serious disruption of society". If the present definition was taken literally, situations as frequent as these - and expected to fall within the envisaged ambit - would not always be classified as disasters for the purposes of these draft articles.

It would therefore be worthwhile to review the definition of disasters so as to include all disasters, even if they do not seriously disrupt the society of an entire state.

ad Article 4 (Use of terms)

Austria doubts that the definitions of "assisting State" and "other assisting actor" (in subparagraphs a) and b)) need the qualifier "at its request or with its consent". This qualifier

seems to be unnecessary since these particular conditions are the result of the substantive provisions of the draft articles and need not be included in the definitions. Likewise the definitions contained in the Tampere Convention do not refer to this qualification.

Furthermore, the comment on subparagraph e) (para. 20 in the Report) on the definition of relief personnel has to be reconciled with state practice since military personnel remains under the full command of the assisting state irrespective of the operational control of the affected state. Accordingly, such relief operations remain attributable to the assisting state. Draft article 12 should also reflect this understanding.

ad Article 5 (Human dignity)

The broad wording imposes the relevant obligation on actors beyond those assisting in the case of a disaster.

ad Article 8 (Duty to cooperate)

Austria emphasizes that draft article 8 must not be interpreted as establishing a duty to cooperate with the affected state in disaster relief matters including a duty on states to provide assistance when requested by the affected state. Austria takes the view that such a duty does not exist and should not be established. It would contradict the basic principle in the field of international disaster relief, namely the principle of voluntariness. This position was underlined by Austria in the past in its statements made in the Sixth Committee at the 64th Session of the General Assembly in 2009, the 66th Session of the General Assembly in 2011 and the 67th Session of the General Assembly in 2012.

ad Article 9 (Forms of cooperation)

As to draft article 9, Austria is not convinced of the need to retain this draft article. As the commentary itself states, this article does not contain any normative substance, but only a demonstrative enumeration of possible forms of cooperation. Although we appreciate the presentation of the various measures taken by states, such an inventory would better remain in the commentary and need not be reflected in a normative provision. The forms of cooperation can hardly be defined in a general way, as they would depend on the particular type of disaster and the specific circumstances of the situation.

ad Article 10 (Cooperation for disaster risk reduction)

Draft article 10 refers to the duty to cooperate aiming at reducing the risk of disasters. Given the broad definition of disasters, this provision would oblige states to cooperate in reducing the risk of terrorist acts or civil strife below the level of a non-international armed conflict. Austria is of the opinion that the cooperation in these areas is, to a large extent, already covered by other regimes.

ad Article 11 (Duty to reduce the risk of disasters)

See comment on draft article 2 above.

ad Article 12 (Role of the affected State)

See comment on draft article 4 above.

ad Article 13 (Duty of the affected State to seek external assistance)

Austria recognizes that all states are obliged to provide for an appropriate disaster relief system in order to protect their citizens. Such a relief system should encompass prevention, preparedness, as well as response measures. Nevertheless, Austria is not convinced that the present formulation is striking the right balance between state sovereignty and the protection of the individuals. In cases in which the national response capacity is exceeded in the event of a disaster, the state concerned should seek assistance to meet its responsibility, but has no such duty. This approach would also correspond to guideline 3.2 of the Guidelines for the domestic facilitation and regulation of international disaster relief and international recovery assistance, elaborated by the International Federation of the Red Cross and Red Crescent Societies.

In Austria's view the term "as appropriate" would indicate that a state should seek assistance that is commensurate to the actual scope of the disaster. At the same time, this draft provision must not be understood as excluding the right of a state to seek assistance in the case of disaster even if its response capacity is not yet exceeded.

Several further difficulties are connected with the approach pursued in this draft article. States are sometimes reluctant to receive foreign assistance and to admit a lack of response capacity. If a state denies that a disaster exceeds its response capacity, what would be the consequence? In no case could such a situation entitle another State to act without the consent of the affected State.

This opinion was also expressed in the statement made by Austria in the Sixth Committee at the 66th Session of the General Assembly in 2011.

ad Article 14 (Consent of the affected State to external assistance)

Austria endorses the first principle in Article 14, which is reflected in many recent international documents dealing with this topic and also in the solidarity clause of Art. 222 of the Treaty on the Functioning of the European Union (TFEU). In Austria's view, such consent must be a valid consent in the sense of Art. 20 of the articles on State responsibility. Although this qualification seems to be self-evident, it would nevertheless be useful to include it in the commentary.

Austria could also concur with the second principle on the duty not to deny consent arbitrarily. The term "arbitrarily" gives rise to an obligation to accept assistance, if the response capacity is exceeded and no other serious reasons justify a denial of consent. Even if consent is denied arbitrarily, under existing international law, no other States would be entitled to substitute for the affected State and to act without its consent, irrespective of any international responsibility incurred by the affected State. Austria welcomes the duty of the affected State in paragraph 3 of draft article 14 to publish its decision on any offer of assistance. Such a duty would certainly facilitate the invocation of a responsibility of the affected State in this regard (see also statement made by Austria in Sixth Committee at the 66th Session of the General Assembly in 2011).

ad Article 15 (Conditions on the provision of external assistance)

As to draft article 15, Austria reiterates that the conditions under which assistance may be provided should not be the result of the unilateral decision of the affected state; they should rather be the result of consultations between the affected state and the assisting actors, taking into account the general principles governing assistance and the capacities of the assisting actors.

ad Article 16 (Offers of external assistance)

In Austria's view, a problem might arise from the fact that international organizations, non-governmental organizations and states are treated identically in draft article 16. Some organizations may not have the relevant competence to offer assistance and this draft provision must not be understood as providing the organization with such a right. It may also to be asked whether non-governmental organizations should be directly addressed by such an international instrument. Therefore, this draft provision would need some further clarification.

ad Article 17 (Facilitation of external assistance)

Draft Article 17 regarding the facilitation of external assistance requires the affected state to take the necessary legislative measures. However, practice shows that more issues have to be addressed by the legislation than only those mentioned in the draft article, such as confidentiality, liability issues, the reimbursement of costs, privileges and immunities, control and competent authorities. Articles 6 – 10 of the Convention of 1986 on Assistance in the Case of a Nuclear Accident or Radiological Emergency are very illustrative in this regard. Similarly, Point VII (2) of the Resolution of the Institut de Droit International of 2003 on Humanitarian Assistance refers to the obligation to prepare the required legislation regarding overflight and landing rights, telecommunication facilities and necessary immunities, exemption from any requisition, import, export and transit restrictions as well as customs duties for relief goods and services, the prompt granting of visas or other authorizations free of charge. In line with these provisions and in order to give a clear guidance, Austria suggests that draft Article 17 should be completed accordingly.

ad Article 21 [4] (Relationship to international humanitarian law)

Draft article 21 concerning the relationship of the draft articles to international humanitarian law deals with a major issue relating to the scope of application of these draft articles. According to draft article 1 defining the scope of the draft articles in connection with draft article 3 regarding the definition of disasters, the draft articles apply without distinction to all kinds of disasters, whether natural or man-made, which would include also armed conflicts. Draft article 21 limits the scope insofar as it determines that these articles do not apply to situations to which the rules of international humanitarian law are applicable. According to this wording these articles do not apply to disasters connected with international and non-international armed conflicts, whereas disasters connected with internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, would be covered.

However, the commentary (para. 3) presents a different understanding insofar as it states that the draft articles "can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do

not apply." According to the commentary, the draft articles would apply also to disasters connected with armed conflicts to the extent that the rules of international humanitarian law do not address this particular disaster situation. This difference between the draft articles and the commentary does not permit a clear understanding of what the Commission envisaged. In Austria's view, the draft articles should apply also to situations of armed conflict, but only insofar as they are not contradicting the particular rules of international humanitarian law (see also statement made by Austria in the Sixth Committee at the 69th Session of the General Assembly in 2014).