

Joint comments by the Nordic countries on the Report of the International Law Commission on the work of its sixty-sixth session (Chapter V: Protection of persons in the event of disasters)

The Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) would like to express their appreciation to the International Law Commission and the Special Rapporteur, Mr. Eduardo Valencia-Ospina, for the preparation of the draft articles concerning the protection of persons in the event of disasters. The draft articles, as adopted by the International Law Commission on first reading at its sixty-sixth session, present a coherent set of codified norms in an increasingly relevant area of public international law. The Nordic countries are strong supporters of further strengthening the international disaster relief and humanitarian assistance system and the present draft articles are a valued contribution to that purpose.

The preparation of the draft articles has involved finding a balance between different interests, most notably on one hand the aspects of State sovereignty and the needs of international cooperation in protecting persons and providing humanitarian assistance in the event of disasters on the other. As reaffirmed several times during the drafting process in the 6th Committee, it is the primary responsibility of the affected State to ensure the protection of persons affected by a disaster, as well as the provision of disaster relief.

The draft articles set a clear duty for the State affected by a disaster to initiate, organize, coordinate and implement external assistance within its territory when necessary and, in the absence of sufficient national response capacity or will, to seek external assistance to ensure that the humanitarian needs of the affected persons are met in a timely manner. The Nordic countries salute the particular attention given to the needs of the individuals affected by disasters, with full respect for their rights. In this regard, it must be highlighted that some people may be particularly vulnerable to abuse and adverse discrimination due to their status (age, gender, race, etc.) and may require special measures of protection and assistance.

The Nordic countries would also like to highlight the diverse roles of other actors, such as intergovernmental, regional and relevant non-governmental organizations or other entities like the Red Cross and the Red Crescent, as referred to in the draft articles. As the number of different actors has increased and continues to do so, their coordination and interoperability becomes critically important when providing external assistance.

The Nordic countries would also like to make the following article-specific or thematic remarks and suggestions.

Humanitarian principles

One area of concern for the Nordic countries is the issue of neutrality of humanitarian assistance. While draft article 7 [6] refers to neutrality as a humanitarian principle to be taken into account, it appears that this principle is not consistently respected in some of the other draft articles. More precisely, in draft article 4 (e) on the definition of "relief personnel" and in draft article 17 [14] (1) (a) on the facilitation of external assistance, civilian and military relief personnel are referred to in the one and same context. Maintaining neutrality, impartiality and independence is the best way to protect humanitarian space and ensure access to aid for beneficiaries and the safety and security of humanitarian personnel. Therefore, it is pivotal that the relevant draft articles more clearly distinguish between military personnel and humanitarian response and emphasize the fundamentally civilian character of humanitarian assistance. It is key to reaffirm in the draft articles that where military capability and assets are used as a last resort to support the implementation of humanitarian assistance, the evaluation of the need to use them is to be undertaken with the consent of the affected State and in conformity with international law, including international humanitarian law, as well as humanitarian principles. In this regard, the Nordic countries refer particularly to the guidance given by the *OCHA Oslo Guidelines on Humanitarian Civil-Military Coordination and the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies*.

The protection of vulnerable groups in disasters is another area to be highlighted. The Nordic countries are pleased that the Commission has made explicit reference to the needs of the particularly vulnerable as an important humanitarian principle. Vulnerable individuals and groups are commonly those whose humanitarian situation may become most affected in the event of disasters and who in those circumstances deserve special attention. For this reason, some elaboration could add practical value to the draft article, which in its current form is not very specific or explicit. The draft article could draw from the definitions used in, for example, the UN General Assembly resolution A/RES/69/135, which refers to the need to take into account in all humanitarian response *the specific humanitarian needs and vulnerabilities of all components of the affected population, in particular girls, boys, women, older persons and persons with disabilities*.

Another key aspect of humanitarian assistance that the Nordic countries would like to emphasize is the importance of the *do-no-harm* principle. In the context of humanitarian response, assisting actors should avoid exposing people to further harm as a result of their action, ensure access to impartial assistance, protect persons from physical and psychological harm arising from violence and coercion, and assist persons to claim their rights and access to necessary remedies. Any explicit reference to this essential principle appears to be missing from the current draft articles, and therefore the Nordic countries would suggest including the *do-no-harm* principle under draft article 7 [6].

Human rights

Draft article 6 [8] makes reference to the human rights of persons affected by disasters, which is a highly essential principle in any humanitarian response. People are at their most vulnerable in times of disasters so preventing human rights violations and abuses and actively fulfilling human rights are of utmost importance. From the Nordic countries' perspective, however, this reference could be strengthened. While it is neither necessary nor advisable to employ very specific and restrictive language in such a document, some further elaboration of this obligation would nevertheless be recommendable. It would be beneficial to revise the language in the draft article in order to more clearly reflect the duty of States to ensure compliance with all relevant human rights obligations. The draft article could read as follows: "*States must ensure that the rights of affected persons under international human rights law are respected, protected and fulfilled without discrimination.*"

Disaster risk reduction and due diligence

The Nordic countries would like to emphasize the importance of a well-established principle of international law, *due diligence*, as partly reflected in the duty of States to take preventive measures to reduce the risk of disasters, which is set forth in draft article 11 [16]. The key in disaster risk prevention is that domestic laws, regulations and public policies define roles and responsibilities and guide the public and private sectors to address disaster risk in publicly owned, managed or regulated services and infrastructures. They should also enhance transparency and public awareness of legal and administrative measures for disaster risk reduction to be undertaken by all relevant institutions from national to local and community level. Disaster risk reduction should be a priority at the community level. While the commentary to draft article 11 [16] rightly describes the nature of preventive obligations, it would be beneficial to elaborate the aforesaid element of risk prevention further.

Moreover, the Nordic countries note that it is necessary to set a duty for States not only to take relevant domestic measures, but also to engage in international cooperation, as it is mentioned in draft article 10 [5 *ter*]. In this respect, further reference could possibly be made in the commentary to the principles introduced in the *Sendai Framework for Disaster Risk Reduction 2015-2030*, including its paragraphs 8, 14, and 44, on the various types and modalities of cooperation.

Consent to and conditions on external assistance

Draft article 14 [11] underlines the importance of consent of the affected State to external assistance. The Nordic countries note with satisfaction that draft article 14 [11] (2) underlines that consent to external assistance shall not be withheld arbitrarily. As it appears, the term *arbitrarily* should be clearly defined in the commentary. It is indeed of utmost importance that the needs-based approach to humanitarian assistance of the affected population is respected and that the affected State does not withhold its consent to external assistance without legitimate grounds.

Draft article 15 [13] complements draft article 14 [11]. The key in draft article 15 [13] is the right to place conditions on assistance. As pointed out in the commentary, it is the recognition of a right of the affected State to deny unwanted or unneeded assistance and determine the appropriateness of assistance. The Nordic countries would suggest elaborating this essential aspect of humanitarian assistance further in the commentary. What should be explicitly mentioned therein is that unsolicited or inappropriate assistance has been a problem in many affected countries when hampering the delivery of assistance that is actually needed and causing delays.

Some rewording would also add more practical value to draft article 15 [13]. Particular attention should be paid to the importance of the needs of individuals affected by disasters, which does not appear to be sufficient in the language used in the draft article. Therefore, it would be recommendable to replace the expression *take into account* in the third sentence of the draft article with, for example, a less vague expression *verifiably reflect* to highlight this aspect.

Protection of relief personnel, equipment and goods

With regard to draft article 18 concerning the protection of humanitarian personnel, equipment and goods, the language used is appropriate, but some fine-tuning could be considered in the relevant commentary. As commented in their statements during the drafting process, the Nordic countries agree with the expression *appropriate measures* and regard it as an actual obligation of conduct for the affected State rather than that of result owing to the fact that several factors remain beyond the State's control in a disaster situation. It would add value to the draft article to highlight the duty of the affected State to take the best possible and reasonable measures available in the particular circumstances to protect the humanitarian personnel, equipment and goods, while following the principle of due diligence.

Termination of external assistance

The Nordic countries would like to suggest considering some further revision and elaboration of draft article 19 [15]. The term *termination* used in this draft article does not seem to properly represent or reflect what today is understood as quality and accountability in humanitarian response. Therefore, it would be advisable to reconsider the wording and content of this draft article in the light of these two principles. While the draft article deals with the legal implications of the termination of external assistance, it should not overlook the importance of early recovery measures and the linkages and transition between humanitarian and development assistance. The draft article should, at least in the commentary, take somehow into account the role of the assisting State and other actors in contributing to a responsible transition and handover when ceasing their assistance operations.

Draft article 19 [15] also ignores the issue of repatriation of goods and personnel. For this reason, the Nordic countries would recommend to include a clause allowing the

assisting State, and as appropriate other assisting actors, to repatriate their goods and personnel upon the end of their humanitarian assistance mission in possible transition to development assistance. Alternatively, if deemed more appropriate, such language could be included in draft article 17 [14] as an actual obligation for the affected State to facilitate the repatriation.

As a conclusion, the Nordic countries would, once again, like to commend the International Law Commission and the Special Rapporteur for the work done so far and, without prejudice to the final form of the draft articles, express the hope that the above comments will be taken into account as the drafting process continues.