

ICRC comments on The ILC Draft Articles on The Protection of Persons in the Events of Disasters

The ICRC thanks the International Law Commission for having transmitted, for comments and observations, the Drafts Articles on the protection of persons in the event of disasters and their commentaries.

The ICRC commends the International Law Commission for the work on these Draft Articles and their commentaries, understanding that the latter form an integral part of the former. Recent events have illustrated the importance of the subject and the necessity to consolidate the legal framework governing the protection of persons in the events of disasters. In this regard, the ICRC has no doubt that the Draft Articles will constitute an important contribution to contemporary international law in line with the leading role played by the International Law Commission in its codification and progressive development.

As per the International Law Commission's invitation, the ICRC has carefully studied the Draft Articles and their commentaries and would like to share with the Commission the following general observations. The ICRC's comments have been made mainly with the view to preserve: 1) the integrity of International Humanitarian Law (IHL hereafter); and 2) the ability of humanitarian organizations such as the ICRC to conduct, in times of armed conflict (be they international or non-international, even when occurring concomitantly with natural disasters), their humanitarian activities in accordance with a neutral, independent, impartial and humanitarian approach. The ICRC comments below are not meant to be exhaustive but focus on the main issues raised by the Draft Articles in the ICRC's view: the definition of the notion of disaster and the relationships between the Draft Articles and IHL.

Definition of disaster

Concerning the Draft Article 3 on the definition of disaster, the ICRC notes with concern that the definition of disaster for the purposes of the Draft Articles does not expressly exclude anymore situations of armed conflict as it was the case in the early stages of the drafting process of the Draft Articles. This new definition would result in overlaps and contradictions between IHL rules and the Draft Articles, creating confusion and potential conflicts of norms (should the Draft Articles be converted in an international binding instrument).

Relationship between the Draft Articles and IHL and their consequences on the latter

In light of the broad definition of disaster adopted by the Commission, Draft Article 21 dealing with the relationship with IHL becomes crucial in order to avoid overlaps and conflict of provisions between IHL and the Draft Articles.

In this regard, the ICRC would like to flag the important discrepancy existing between the rule contained in Draft Article 21 (“The present draft articles do not apply to situations to which the rules of IHL are applicable”) and its commentary.

In its current form, Draft Article 21 excludes entirely armed conflicts from the scope of the Draft Articles. However, the commentary of this Draft Article is much more nuanced when it affirms that the Draft Articles would apply in situation of “complex emergencies” - where a disaster occurs in an area where there is also an armed conflict. This contradiction between the Draft Article 21 and its commentary obscures the understanding of what the International Law Commission has envisaged for the relationship between the Draft Articles and IHL.

Therefore, the ICRC recommends to align the commentary with the text of the Draft Article 21 so that the Draft Articles do not apply in situations of armed conflict, including in “complex emergencies” as defined by the Commission’s commentaries.

The ICRC understands that the rationale for applying the Draft Articles in situation of “complex emergencies” is to maximize the protection of individuals and to avoid potential gaps in current international law. Indeed, the Commission upholds that excluding situation of armed conflict could be detrimental to the protection of persons, in particular when the onset of a disaster predates the armed conflict, because of potential gaps existing in IHL and of potential inapplicability of certain IHL rules (see para 4 of the commentary to Draft Article 20 and paras 2 & 3 of the commentary to Draft Article 21).

However, the Commission does not clarify, in the commentary, what would be those potential IHL gaps, what would be the exact adverse effects in terms of protection of applying only IHL, and how certain IHL rules would not apply in situation where armed conflict and disaster occurs concomitantly. In this regard, the ICRC is of the position that there is no such IHL gaps as perceived by the Commission and that IHL application in “complex emergencies” would have no adverse effect on the protection of individuals. On the contrary, the very object and purpose of IHL is to protect all those affected by armed conflict, including those affected by “complex emergencies”. In this perspective, IHL detailed rules upholding - inter alia - human treatment, human dignity and ensuring that the basic needs of the population affected by armed conflict are met (through the primary obligation to ensure the provision of supplies essential for the survival of the population incumbent upon the parties to the armed

conflict or though their obligation to allow relief schemes if they are unable or unwilling to fulfil their former primary obligation) will also benefit to all those impacted by “complex emergencies”.

IHL applies in situations of armed conflict, including in situations where armed conflict overlaps with a natural disaster and, in the ICRC’s view, contains a set of sufficient detailed provisions to deal with the protection and assistance issues arising from “complex emergencies”. Indeed, this body of law is tailored to armed conflicts and sets out an important and effective protective framework for those affected by such situations and regulates humanitarian access through detailed provisions aimed at ensuring that the basic needs of the population concerned are met. In this regard, IHL imposes certain constraints on governments’ discretion to refuse and control outside humanitarian assistance that do not otherwise apply outside of a context of armed conflict. Moreover, armed conflict situations raise concerns different in type and degree concerning humanitarian independence, security and access.

The following illustrates the differences, not to say the contradictions, existing between IHL treaty law and customary rules and the Draft Articles. In this regard, the co-application of IHL and the Draft Articles (in their current form) in situation of armed conflict may generate legal uncertainty and ultimately be detrimental to the protection of persons.

As they stand, the Draft Articles contain provisions appearing to be at odds with IHL. For instance Draft Article 12§2 stipulates that “the affected state has the primary role in the direction, control, coordination and supervision of such relief and assistance” (emphasis added) but its commentary omits to define what these terms means for the purposes of the Draft Articles. In its current form, this Draft Article is potentially very intrusive for impartial humanitarian organizations such as the ICRC; in addition, it could be read in conjunction with Draft Article 7 on humanitarian principles omitting to refer to the principle of independence. No such requirements of direction, coordination and supervision can be found in the relevant IHL rules. IHL only authorizes the concerned parties to the armed conflict and States to verify the humanitarian nature of the assistance through a so-called right of control. The Draft Articles do not seem to restrict the “affected state” to such limited right of control and are therefore much more sovereignty-oriented than the corresponding IHL provisions governing humanitarian access.

Also, under Draft Article 15, “when formulating conditions [on the provision of external assistance], the affected state shall indicate the scope and type of assistance sought”. This could result in conferring to the affected state an unfortunate pick and choose option in relation to the humanitarian activities to be carried out by humanitarian actors while IHL foresees in Article 81 of Additional Protocol I to the Geneva Conventions that “Parties to the conflict shall grant to the ICRC all facilities ... so as to enable it to carry out the humanitarian functions assigned to it by the

Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts...”.

Eventually, in order to illustrate the contradictions existing between the Draft Articles and IHL, Draft article 16 confers the “right to offer” assistance to States and inter-governmental organizations while non-governmental humanitarian agencies only “may offer” their services, which completely changes the perspective of - and in a way denies - the right of initiative to which impartial humanitarian organization such as the ICRC are entitled to under IHL and which places these organization in a privileged position.

In summary, from an ICRC perspective, it is crucial that the Draft Articles and their commentaries do not contradict IHL rules. Taking into account the current content of the Draft Articles, the only way to reach that objective **would be to ensure that the Draft Articles and their commentaries unambiguously exclude situations of armed conflict from the scope of application of the Draft Articles** as requested for a few years by a critical mass of States while discussing the reports of the International Law Commission on its work within the framework of the Sixth Committee of the UN General Assembly. This could be done either by including such exclusion in the Draft Article 3 defining the notion of disaster or by ensuring that the commentary of Draft Article 21 faithfully reflects the current black letter rule contained in the corresponding Draft Article.

In line with the position already shared with prof. E. Valencia-Ospina, special rapporteur of the Commission on the topic at hand, the ICRC favors therefore a clear exclusion of situations of armed conflict – international or non-international - from the scope of the Draft Articles because both the relevant international legal framework and the operational dynamics of humanitarian assistance operations are very different in “peacetime” disasters and armed conflict.

As they stand, the Draft Articles and their commentaries elevate the risk of conflict of norms with IHL, adversely impact the integrity of this body of law and may undermine the ability of impartial humanitarian organizations such as the ICRC to carry out their humanitarian activities in a principled manner and in accordance with the mandate assigned to them by States.

The ICRC stands ready to further discuss the issue with the International Law Commission, be it in Geneva, New York or elsewhere.

Eventually, the ICRC wants to inform the International Law Commission that it reserves itself the right to share proactively or reactively these comments in their current form or otherwise with other relevant stakeholders, in particular States and International Organizations if deemed necessary.