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WRITTEN SUBMISSION OF THE INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES TO THE INTERNATIONAL LAW COMMISSION ON THE “DRAFT ARTICLES ON THE PROTECTION OF PERSONS IN THE EVENT OF DISASTERS”

The International Federation of Red Cross and Red Crescent Societies (IFRC) would like to extend its compliments to the International Law Commission (ILC), and particularly to Special Rapporteur Dr. Eduardo Valencia-Ospina, for the thoughtful attention they have devoted to the project on the “Draft articles on the protection of persons in the event of disasters”. The IFRC is pleased to be among the agencies solicited for written comments on the integral text and commentary of the Draft Articles following the first reading. It is also happy to share that positive mention of the ILC’s effort was made in Resolution 6 of the 32nd International Conference of the Red Cross and Red Crescent in December 2015, as discussed further below.

After consulting with its members, the IFRC has the following comments and suggestions:

1. Overall assessment

The IFRC feels that the Draft Articles have a number of strong elements, including their emphasis on human dignity, human rights, cooperation and respect for sovereignty as well as on disaster risk reduction. If they were adopted in the form of a framework treaty, they could have a positive impact on accelerating the development of more detailed national laws and procedures about international disaster cooperation.

However, the text can also be strengthened in several respects. As currently drafted, the Draft Articles are not yet sufficiently operational to have a direct impact on the most common regulatory problem areas in international response. They are also overly cautious with regard to the issue of protection, notwithstanding their title. The IFRC would also like to underline its concern about how the issue of armed conflict is addressed by the commentary to the Draft Articles, as it feels that the current text could inadvertently undermine the protections of international humanitarian law.

2. Background on the IFRC

For ILC members that are not closely familiar with the IFRC, some background may place our comments in perspective. The International Red Cross and Red Crescent Movement is comprised of its founding member -- the International Committee of the Red Cross (ICRC) --, the world’s 190 National Red Cross and Red Crescent Societies (National Societies), and the IFRC. The IFRC, founded in 1921 under the original title “League of Red Cross Societies”, is the global network of the National Societies. The IFRC’s primary mission is to support its members in carrying out and strengthening their humanitarian work. It is serviced by its own secretariat with headquarters in Geneva and over 60

additional offices around the world. The IFRC is considered to have international legal personality, as confirmed by status agreements in over 80 countries.

Collectively, the IFRC and its members are the world's largest humanitarian network, working mainly through the efforts of 17 million community-based volunteers. In international disaster response operations, the IFRC generally takes a leading role, both in deploying its own capacity as well as in coordinating the efforts of the other components of the Movement, though always in support of, and in agreement with, the National Society of the affected state. In situations of armed conflict (including mixed situations of conflict and disaster), the ICRC takes the leading role in international response.

In 2001, the IFRC created a specific programme focused on legal issues in disaster risk management. Originally focused exclusively on the issue of how international disaster response is regulated, the programme now provides research, stakeholder consultations and technical assistance to states and National Societies on a variety of issues related to disaster law. Since 2007, it has supported technical assistance projects in over 50 countries. The role of the IFRC and its members in this respect has been mandated by the state parties to the Geneva Conventions in the context of resolutions of the International Conference of the Red Cross and Red Crescent in 2003, 2007, 2011 and 2015.

3. Appreciation of strong points in the existing text of the Draft Articles

Without dwelling at length on the points that are already strong in the existing text, the IFRC would like to express its particular support for several aspects:

3.1 Dignity and humanitarian principles

The emphasis the Draft Articles place on human dignity in draft article 5, and on humanitarian principles in draft article 6 is a very positive aspect. Establishing a hard-law basis for the humanitarian principles in disasters would be a very valuable addition to the current international normative framework.

3.2 Duty to reduce risks

Another important aspect of the Draft Articles is the assertion in draft article 11 that states have a duty to take necessary and appropriate steps to reduce disaster risks. While the recently adopted Sendai Framework on Disaster Risk Reduction has set a clear global agenda, affirming this duty in a binding instrument would provide a helpful tool for champions of disaster risk reduction within governments to make the case for greater attention to this critical activity.

3.3 Non-state actors and facilitation

It is also very positive that the Draft Articles refer to non-state humanitarian actors in several articles. This is very important given the role that important contributions they make in disaster response and the need to also bring them within a regulatory framework (even if not precisely the same as that of states).

3.4 Termination

Finally, the IFRC is pleased to see the attention devoted to promoting an orderly approach to the termination of aid by article 19, as its research and consultations have indicated that the lack of

communication (or an arbitrary approach to the issue) has often led to unnecessary negative consequences from communities recovering from a disaster.

4. Missed opportunities in the existing text

4.1 Lack of detail on the “rules of the road”

The IFRC feels that the text has missed some opportunities. Chief among these is the abbreviated approach taken to the “rules of the road” for international operations. Draft article 17 addresses the facilitation of international assistance in two short paragraphs simply stating that states should take “necessary measures” to facilitate prompt assistance “in fields such as” visas, customs requirements, taxation and transport. This provides little additional clarity as to what really is expected in the “fields” mentioned, leaving the existing uncertainty of approach from one state to another (and even from one operation to another in a single state) largely intact. Similarly, while the Draft Articles rightly assert humanitarian principles and human dignity as central, they leave it largely up to affected states to articulate any other “conditions” of assistance in draft article 15. This again provides little incentive for a harmonized approach as to the quality of relief and also fails to commit providers to minimum standards within the scope of this international instrument.

In this connection, the IFRC would like to draw to the ILC’s attention the results of a report it commissioned in 2015, reviewing the experience of regulatory issues in 15 international response operations since the IFRC published its desk study in 2007, as well as a survey it conducted in 2015 of governmental and non-governmental disaster managers.¹ Both found that regulatory issues such as those related to visas and customs remain important barriers to effective operations, and that the lack of clarity on technical regulatory issues is contributing to a sense of distrust and mutual frustration between affected state authorities and international responders.

The IFRC recommends that both of these articles should be enhanced with greater detail, potentially taking inspiration from the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (IDRL Guidelines), and binding instruments such as the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations or the ASEAN Agreement on Disaster Management and Emergency Response.

4.2 Failure to acknowledge National Societies

A second important gap relates to National Red Cross and Red Crescent Societies. Article 8 asserts an obligation of states to cooperate “among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.” While the IFRC is appreciative that it has been mentioned, it feels that there is an even stronger normative and practical basis to include National Societies in this approach.

According to the Statutes of the Movement, adopted by the State Parties to the Geneva Conventions in the context of International Conference of the Red Cross and Red Crescent, any recognized National Society must be legally recognized as auxiliary to the public authorities in the humanitarian field. Accordingly, both under international norms and domestic law in every country of incorporation, there is a particular expectation of mutual cooperation between domestic authorities and National Societies. This has been reaffirmed in a series of resolutions of the International Conference, including

¹ HERE Geneva, The Impact of Regulatory Problems and the Gains from Legal Preparedness in Recent Response Operations (2015), IFRC, Report on the survey on disaster relief and protection (2015), both available at www.ifrc.org/dl_ic.

Resolution 2 of the 30th International Conference of 2007, Resolution 4 of the 31st International Conference of 2011, and Resolution 7 of the 32nd International Conference of 2015. In addition, operative paragraph 6 of the latter resolution “endorsed” the “Principles and Rules of Red Cross Humanitarian Assistance,” which set out international cooperation by the IFRC and among National Societies in non-conflict disasters, and requested states to facilitate and support their implementation.

To address this issue without introducing additional complexity in the Draft Articles, the IFRC recommends replacing the reference to “the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross” with “the components of the International Red Cross and Red Crescent Movement.”

4.3 Lack of specificity on protection issues

A third gap is related to the issue of “protection”. Article 6 simply states that “persons affected by disasters are entitled to respect for their human rights.” This provision provides no guidance to states or other stakeholders as to how to protect persons in disasters and is therefore not likely to have any impact on their behaviour in operations.

The IFRC appreciates that it would be impossible to enunciate every right that could prove relevant in a disaster operation and is also conscious of the concern that specifically mentioning some examples might be misread to imply that rights not enunciated do not apply. However, there are certain rights issues that are of frequent concern in disaster settings and can usefully be underlined in the Draft Articles. Moreover, the latter concern could easily and completely be met by proceeding any list in the text with language such as “including but not limited to” and providing clarification in the commentary.

Drawing on its experience as well as the results of its recent survey, the IFRC recommends the following elements that might specifically mentioned:

- The right to receive humanitarian assistance
- The rights of particularly vulnerable groups (such as women, children, seniors, and disabled persons) to have their special protection and assistance needs taken into account
- The right of communities to have a voice in the planning and execution of risk reduction, response and recovery initiatives
- The right of all persons displaced by disasters to non-discriminatory assistance in obtaining durable solutions to their displacement.

4.4 Lack of acknowledgement of regional and bilateral arrangements

A fourth gap is the failure to explicitly acknowledge the role of regional and bilateral agreements and initiatives. Regional agreements in particular are playing a large and growing role around the world in promoting planning and preparedness to disasters within their member states and any global treaty in this field should more clearly acknowledge this. Draft article 20 should explicitly refer to regional and bilateral arrangements in its text, and not only mention them in the commentaries thereto.

5. Other concerns and suggestions related to the existing text

In addition to the missed opportunities, there are some areas where the IFRC feels the existing text should be reviewed or corrected. These include the following:

5.1 Applicability in armed conflict

Article 21 of the Draft Articles states that the articles will not apply in situations where international humanitarian law (IHL) applies. However, according to the commentaries to articles 4, 8 and 21 the ILC is of the view that there can be situations of armed conflict to which IHL does not apply and it is their intention that the Draft Articles should apply in situations of mixed conflict and disaster. In this vein, the commentary to Article 8 notes that the ICRC has been specifically named in the Draft Articles because they may apply in “complex emergencies involving armed conflict.”

The IFRC believes that the Draft Articles should not apply in situations of armed conflict. The particular dynamics of conflict have not been adequately considered in their design. These include, among others, the frequent impulse of the parties to limit humanitarian assistance out of concern that the opposing side will benefit from it, even indirectly. For this reason, the approach of the Fourth Geneva Convention (particularly articles 59 and 62) and of customary IHL, as articulated by the ICRC’s 2005 study (particularly rules 55 and 56) to humanitarian assistance is quite different to that found in instruments focused on non-conflict disasters, in particular by much more strongly circumscribing states’ authority to regulate aid efforts. No such distinction has been made here and no guidance is provided as to when IHL would or would not apply (as, indeed, none could be expected, as this is not the appropriate instrument to fundamentally define the scope of the Geneva Conventions). This invites confusion and contradiction without adding real value in operations.

Ideally, the Draft Articles would exclude armed conflict from their definition of “disaster” in order to avoid this problem. This was the approach strongly favoured by states when the IDRL Guidelines were negotiated in 2007. However, the solution proposed in article 21 would be acceptable if the contradictory comments in the commentaries were removed and no impression is given that there could be “mixed situations” of conflict and disaster where IHL does not apply.

5.2 Consent and the duty to seek help

The IFRC agrees with the ILC’s assertion in article 14 that while states’ consent is required prior to the provision on outside assistance, that consent should not be withheld arbitrarily. The IFRC considers that this rule would set out a reasonable approach, leaving significant discretion with the sovereign power, but also affirming that this discretion should not be abused in the face of humanitarian need.

However, given that this article has already proven controversial in the Sixth Committee and may not be welcomed by a significant number of States, the IFRC fears that their inclusion in the Draft Articles may jeopardize support to the project overall. Moreover, while there have been occasions in which states have refused all offers international aid when it was clearly needed, the problem is relatively rare in disaster settings (as opposed to situations of conflict).

5.3 Clarifications needed on offers and acceptance

While the IFRC agrees with the assertion that states sometimes have a duty to seek external assistance, it does not believe that states necessarily must accept it from anyone who chooses to offer it (in particular from those mentioned in draft article 13). In particular, it may often be appropriate for states to choose among providers with the capacity and competence to provide assistance of appropriate quality. Article 13 attempts to address this through the use of the term “as appropriate” but the Commentary could be more explicit in explaining that the duty is to seek help, not to seek it from any one external actor.

Furthermore, article 16 refers to the “right” of States, the United Nations, and other competent international organizations to offer assistance. The IFRC considers it unnecessary to refer to a “right to offer” as such, as it addresses a problem that in practical terms does not exist. Assistance-related operational problems constitute a more important issue that any international instrument on this matter should address. However, if the ILC is to keep the reference to a “right to offer assistance” by third actors, additional wording qualifying or characterising the assistance could be included, along the lines of Article 3(2) of 1977 Additional Protocol II to the 1949 Geneva Conventions, which states that “assistance shall not be used as a justification for intervening, directly or indirectly, in the internal or external affairs of the affected State”.

The second sentence of article 16 and the commentary thereto are also problematic. The former states that “relevant non-governmental organizations may also offer assistance to the affected State” and paragraph 5 of the commentary to this article explains that the second sentence intends to recognize “the important role played by those non-governmental organizations which, because of their nature, locations and expertise, are well placed to provide assistance in response to a particular disaster”. The commentary continues by making reference to the 1949 Geneva Conventions and the 1977 Second Additional Protocol articles about the role of the ICRC and National Red Cross and Red Crescent Societies. However, this second part of draft article 16 is misleading as neither the ICRC nor the National Societies are non-governmental organizations.

Moreover, as noted above, at the 32nd International Conference in December 2015, the state parties to the Geneva Conventions endorsed the “Principles and Rules of Red and Red Crescent Humanitarian Assistance” (the latest iteration of a document first adopted by the International Conference in 1969). This document sets out how the IFRC and National Societies cooperate with each other in international disaster operations. It makes clear that the IFRC and foreign National Societies make their offers of aid to the National Society of the affected state -- rather than to the government --, because their support is designed to assist the latter to fulfil its own mandate under international and national law. Of course, the National Society of the affected country is expected to coordinate closely with the relevant authorities to ensure its consent to any aid provided in this connection. A sentence in the commentary could ensure that there is no misapprehension of an intention to impinge on this state-approved specificity of the Red Cross and Red Crescent practice with regard to offers and acceptance

5.4 Confusion as to the meaning of impartiality

Article 7 refers to the principles of “impartiality” and “non-discrimination” as if they were separate concepts. This might lead to confusion as to the meaning of “impartiality”, which is fundamentally based on non-discrimination. As the humanitarian principles form part of the Movement’s own fundamental principles, we have a strong interest in guarding against this kind of confusion. Consequently, it has recommended that if the aim is to place additional emphasis on particular elements of the existing principles, that could be done without creating confusion or undermining the principle by adding the phrase “and in particular” after the word “impartiality”.

5.5 Failure to distinguish between civilian and military relief

Articles 4(A)(e) and 17(1)(a) treat civilian and military responses exactly the same in terms of facilitation. However, many states and the humanitarian community support the approach of the Oslo Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief, which call for military assets to be used only where civilian alternatives are inadequate and, when they are used, they should seek to avoid direct dissemination of aid, providing instead infrastructure, transport and other more indirect support. This is meant to emphasize the differences between humanitarian and military personnel, a key issue in the security of humanitarians around the world.

5.6 Improvements to the description of “cooperation”

Per articles 9 and 10, cooperation appears to extend to relief and risk reduction, but not clearly to recovery. The IFRC feels that recovery should also be included. Moreover, while non-exclusive, the enumeration of forms of cooperation contained in article 9 misses some important aspects, including financial support, training, information-sharing, and joint simulation exercises and planning. Likewise, consideration should be given to including “financial support” within the definition of “external assistance” in article 4(d).

5.7 Distinguishing humanitarian and risk reduction for purposes of extraordinary facilities

While both humanitarian response and risk reduction activities are very important, and often the same actors may be involved in both kinds of activity at different times, a distinction between humanitarian crises and the preparation phase is important. In humanitarian crises, states should provide special facilities and protections to relief personnel (e.g. expedited visas, special security, etc.) that are not needed in times of calm.

In the Draft Articles, article 4 includes in the definition of “relief personnel” not only those to respond to a disaster but also those sent to promote risk reduction. As a consequence, states would be required to provide them special facilities as set out in article 17 and even special security guarantees in article 18. These should be reserved to situations of crisis in order to avoid unnecessary burdens on states’ normal procedures and ensure their willingness to comply when needs are urgent.

5.8 Vulnerability and resilience should be included

While the IFRC applauds the assertion of a state due to reduce risks in draft article 11(1), it feels that the listing of “risk reduction measures” of article 11(2) should not be limited to assessing risk but also extend to assessing and reducing the vulnerability, and increasing the resilience of communities faced with natural hazards.

5.9 Duties of responding personnel with regard to their own security

Article 18 acknowledges the obligation of affected States to take appropriate measures to ensure the protection of relief personnel in its territory. However, this article does not recognize any corresponding rights and obligations of actors providing external assistance. In this vein, article 18 may benefit from additional text to confirm the duties of external actors to consult and cooperate with the affected State on matters of protection and security.

5.10 Telecommunication equipment and medicines

The IFRC feels that it would be worthwhile to include “telecommunications equipment” and “medicines” explicitly within the list of goods and equipment provided in article 4(f).

5.11 Definition of disaster

The IFRC suggests that the commentary to article 2 mention that the definition of disaster could equally apply to sudden-onset events (such as an earthquake or tsunami) and to slow-onset events (such as drought or gradual flooding). In addition, subparagraph 6 of this commentary could usefully point out that “great human suffering and distress” might also be occasioned by non-fatal injuries, disease or other health problems occasioned by a disaster (and not only by displacement).

6. Nature of the outcome document

As already expressed in IFRC previous statements before the Sixth Committee of the United Nations General Assembly, the IFRC feels that there is little point in issuing the Draft Articles as non-binding guidelines. This would risk significant confusion and overlap with existing “soft-law” documents such as the IDRL Guidelines, which have already been endorsed by states and provide a great deal more detail about how to handle operational issues. On the other hand, in principle, a global treaty could add value, first, by providing greater momentum for current efforts to develop rules at the domestic level, which remain very slow and arduous despite repeated emphasis at the International Conference in non-binding resolutions and, second, by establishing clearer reciprocity of commitments between receiving states and international responders. Alternatively, it is possible that the ILC’s effort may be taken up at the regional level, where there is a great deal of momentum in the development of new instruments.

However, some of the IFRC’s members have questioned whether states will have the appetite to take up such a project and have expressed concern about whether it might distract from developments at the national level. Even if there is a willingness for a treaty, concerns have been raised whether it would be more conservative in its vision of how assistance is managed than current practice.

Informal consultations that the IFRC has conducted over the last year with its members as well as with governmental officials and humanitarian partners have yielded mixed opinions on these questions.² In this connection, Resolution 6 of the 32nd International Conference “welcome[d] the International Federation’s initiative to foster dialogue on further options to accelerate progress in resolving regulatory problems in international disaster response operations, including country-level efforts as well as the potential for further strengthening global and/or regional legal frameworks, and invites it to continue to lead consultations with States and other stakeholders in this regard.”

Dr. Valencia-Ospina has had the opportunity to participate in some of the IFRC’s earlier consultations and the IFRC looks forward to continue to collaborate with him and any other interested members of the ILC in ongoing discussions in 2016.

7. Conclusion

The IFRC would like to avail itself one again of the opportunity to thank the ILC for its interest in its feedback on the Draft Articles. It remains at the disposal of the Special Rapporteur and any other members of the ILC for additional information or support in the ILC’s ongoing work on the Draft Articles.

² More information about these consultations is available at http://www.ifrc.org/dl_32ic.