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IOM International Organization for Migration  
OIM Organisation Internationale pour les Migrations  
OIM Organización Internacional para las Migraciones

## IOM comments and observations on the International Law Commission Draft articles on the protection of persons in the event of disasters with commentaries

### **I. Introduction**

At its sixty-sixth session, in 2014, the Commission adopted on first reading a set of 21 draft articles, together with commentaries thereto, on the protection of persons in the event of disasters. In accordance with articles 16 to 21 of its Statute, the Commission transmitted the draft articles, through the Secretary-General, to, *inter alia*, competent international organizations for comments and observations. The present document is submitted pursuant to this request.

### **II. IOM mandate and activities in the area of disasters**

Established in 1951, IOM is the only inter-governmental organization, exclusively focused on migration. IOM works towards orderly and humane migration by delivering people-centered services and advocating for the well-being of migrants and their families. IOM's mandate allows it to work with migrants, refugees, displaced persons and others in need of migration services or assistance,<sup>1</sup> including concerned communities. The prime responsibility for ensuring the respect of the human rights of migrants lies with States. However, IOM, along with other international actors, have a key supporting role to play in achieving the effective protection of migrants and displaced persons in various situations.

IOM's involvement in reducing the underlying causes of vulnerabilities that leads to disasters dates back to 1998 when the Organization was first called to support the Honduras government to deal with massive displacement as a result of hurricane Mitch. Besides disaster risk management, IOM supported reconstruction efforts with a view to reduce vulnerability and exposure to risks (including forced migration). A decade later while assessing the potential impact of climate change on human mobility, IOM took stock for the first time of its portfolio of activities in disaster response, risk reduction and climate change adaptation to discern a rich and nuanced involvement:

- At different levels (from community to national as well regional capacity building),

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<sup>1</sup> See the IOM Constitution.

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- In response to all types of disasters (from sudden onset geological disasters like earthquake to climate related slow-onset disasters such as sea-level rise and coastal erosion)
- At different moments of the migration crisis management cycle (before a crisis in terms of prevention and preparedness, during through coordinated emergency and disaster response and after through recovery, reconstruction and building resilience).

IOM also plays an increasingly important role in Disaster Risk Management (DRM) and Humanitarian Coordinated Response to displacement induced by natural disasters as global cluster lead for Camp Coordination and Camp Management in natural disasters. Globally, within the Inter-Agency Standing Committee (IASC), and at the country level, through the Humanitarian Country Team, IOM is regularly requested to assume stronger operational and strategic roles as a result of its in-country capacity, existing partnership and well-established credibility. Currently, the Organization plays an important role in Emergency Shelter, Logistics, Health, WASH, Protection, and Early Recovery clusters. IOM is also involved in climate change adaptation through the UN Framework Convention on Climate Change and other related policy fora.

Disaster prevention, preparedness, response and recovery activities are also fully integrated into IOM's Migration Crisis Operational Framework (MCOF),<sup>2</sup> and the recently approved IOM' Principles for Humanitarian Action, which are both used to systematize and improve support to Member States and partners, to better respond to the assistance and protection needs of crisis-affected populations.

IOM is strongly engaged in mass evacuation planning, both through the development of the MEND GUIDE, a comprehensive guide for planning mass evacuations in natural disasters, and through supporting interested governments worldwide in setting up inclusive evacuation plans and fostering knowledge exchange. These activities are carried out in close cooperation with the MEND Steering Committee, composed of civil protection specialists, humanitarian agencies and academia from all over the world.

IOM also serves as the Secretariat for the Migrants in Countries in Crisis (MICIC) Initiative. The MICIC Initiative is a government-led undertaking which seeks to improve the ability of States and other relevant stakeholders to increase the protection and decrease the vulnerability of migrants affected by crisis situations. Co-chaired by the Governments of the Philippines and the United States, the MICIC Initiative aims to distil principles, guidelines, and effective practices through a broad consultative process that engages with States and regional actors, civil society, including migrants and diasporas, the private sector, and international organizations. The ultimate outcome of the Initiative will be a set of non-binding, voluntary principles, guidelines, and practices that States, civil society, international organizations, the private sector and others can use to improve the protection and assistance of migrants before, during, and after a crisis.<sup>3</sup>

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<sup>2</sup> [http://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/IOM\\_MCOF\\_Infosheet\\_10March2013.pdf](http://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/IOM_MCOF_Infosheet_10March2013.pdf).

<sup>3</sup> <http://micicinitiative.iom.int/>.

### **III. Main focus of IOM comments**

On 8-9 June 2015, IOM took part in a meeting of experts organized by the University of Roma Tre, Italy, together with the Special Rapporteur, Mr. Eduardo Valencia-Ospina, and a number of other participants from international Organizations, NGOs and the academia, to discuss the draft articles with commentaries. IOM's main contribution to the discussion was to highlight that the issues of displacement and migration, which are closely connected to the impact of disasters, have been overlooked by the Commission.

The text of the draft articles and the commentaries, in its present drafting, does not reflect the importance of issues related to human mobility in the context of disasters. The only two mentions of this topic are a quote from the IFRC Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance, referring to displaced persons, among other vulnerable groups in paragraph 7 of the commentary to Article 7; and a mention of internally displaced children in paragraph 5 of the commentary to Article 13.

Therefore, the primary aim of the following comments and observations is to suggest how the issues of migration and displacement could be integrated in the text of the draft articles or in the commentaries thereto.

With regard to displacement, one way of integrating it into the draft articles would be to acknowledge the impact that disasters can have on displacement in the very definition of "disaster" in draft article 3. The definition adopted by the Commission acknowledges that large-scale material or environmental damages are normal consequences of disasters (para. 7 of the commentary); displacement should be treated in the same way.

The inclusion of a reference to displacement in the definition of disaster would serve two purposes. Firstly, it would provide more visibility to the issue of human mobility, reminding States that in designing their policies, including in the area of disaster risk reduction, they need to acknowledge the risk of displacement and address its negative impacts. Secondly, by defining what a disaster is, draft article 3 contributes to determining the scope of application of the draft articles. Therefore, a reference to displacement in draft article 3 would imply that, in complying with the other obligations set forth in the draft articles, States should also always take into account the displacement dimension.

The second issue of concern for IOM is the specific plight of migrants in disaster situations. This is an issue that has attracted increased attention from States, particularly following the 2013 UN High Level Dialogue on Migration and Development, which led to the launch by the Governments of the United States and Philippines of the MICIC Initiative.<sup>4</sup> In the commentary to draft article 1, it is specified that the draft articles apply to all persons present on the territory of the affected State, irrespective of nationality. However, the following draft articles do not fully reflect the importance of taking into account the specific vulnerability of

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<sup>4</sup> <http://micicinitiative.iom.int/>.

those who do not have the nationality of the affected State in disaster situations. Furthermore, no reference is made to the need to ensure access of foreign States to their nationals, including for the purpose of evacuation when protection and assistance *in situ* cannot be guaranteed.

These two issues are further elaborated in the comments below, along with a number of other suggestions for inclusions or changes in the text of the commentaries.

## Draft Article 1 [1] Scope

*The present draft articles apply to the protection of persons in the event of disasters.*

Paragraph 2 of the commentary: In regards to the scope of application of the draft articles *ratione materiae* it would be important to recall in the commentary that States have the obligation to protect all persons present on their territory, **irrespective** not only of nationality **but also of legal status**.

Furthermore, the choice of the commentary to expressly state that the focus of the draft article is primarily on the rights and obligations of States in relation to one another, and to a lesser extent on the rights of individuals is hardly justifiable in light of both the topic of the protection of persons in the event of disasters and the importance that is recognized today to human rights in disaster situations. This importance is clearly demonstrated by the increased attention paid to this issue by UN human rights bodies and regional courts. The draft articles represent an important opportunity to clarify how the human rights framework applies in the context of disasters. Moreover, an approach based on human rights can help in finding the right balance between the individual and the general interests that are at stake in disaster situations.

Paragraph 4 of the commentary: The draft article **focuses primarily on the immediate post-disaster response and recovery phase, including post-disaster reconstruction phase**. Then it reads “*nonetheless, the draft Article also, in draft articles 10.5ter and 11.16, where relevant, cover the pre-disaster phase as relating to disaster risk reduction and disaster prevention and mitigation phase*” [emphasis added]. In the present wording it seems that obligations regarding the pre-disaster phase are only those addressed in draft articles 10.5ter and 11.16. The reference to “where relevant” could be used to extend States obligations to the pre-disaster phase also with regard to other provisions such as draft article 6, where obligation in the area of prevention are particularly relevant. Perhaps this extension could be ensured by adding an “**AND**” between “where relevant” and “cover”, instead of the comma.

It is also suggested adding “**EARLY**” to recovery phase, and this adjective would apply also to the following reference to the reconstruction phase. The sentence would then read: “...on the immediate post disaster and early recovery phase, including post-disaster reconstruction phase”. This change would allow clarifying that it is only the reconstruction activities that start right after the disaster that

are included. It is important to ensure that the scope of application of the draft articles, notably *ratione temporis* is clearly determined, particularly because **the pre-disaster (disaster risk reduction of management) and the post-disaster recovery and reconstruction phase can involve the intervention of completely different actors**, not only humanitarian organizations, but also those dealing with development issues. The parameters of intervention of these various actors can be quite different; therefore, it is suggested excluding the more long-term recovery and reconstruction phase from the scope of application of the draft articles.

## Draft Article 2 [2]

### Purpose

*The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.*

#### Paragraph 8 Definition of persons concerned

- a) It is suggested adding a paragraph to expressly acknowledge that those displaced by a disaster are also considered as directly affected. This express reference to this group can be justified in light of **the scale of displacement in relation to disasters** and with a view to drawing States' and other stakeholders' attention to this issue. As it is demonstrated in the various international reports<sup>5</sup> and reiterated in the Sendai Framework for Disaster Risk Reduction, displacement is one of the main consequences of disasters, which in recent year has increased and is expected to increase further in the future.

The Sendai Framework recognizes that displacement is a major consequence of disasters, with 144 million people displaced between 2008 and 2012, compared to the much lower figures of people injured or made homeless. Paragraph 4 of the Framework reads as follows:

“Over the same 10-year time frame, however, disasters have continued to exact a heavy toll, and as a result the well-being and safety of persons, communities and countries as a whole have been affected. Over 700 thousand people have lost their lives, over **1.4 million have been injured** and approximately **23 million made homeless** as a result of disasters. Overall, more than 1.5 billion people have been affected by disasters in various ways, with women, children and people in vulnerable situations disproportionately affected. The total economic loss was more than \$1.3 trillion. In addition,

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<sup>5</sup> See, for example, Internal Displacement Monitoring Center (IDMC), Global Estimates 2015 – People Displaced by Disasters, IDMC, 2015, <http://www.internal-displacement.org/publications/2015/global-estimates-2015-people-displaced-by-disasters/>.

between **2008 and 2012, 144 million people were displaced by disasters**" (The Sendai Framework for Disaster Risk Reduction, 2015: 10)

Furthermore, the Intergovernmental Panel on Climate Change (IPCC) 2014 Synthesis report predicted that climate change, including climate change related disasters, is projected to increase displacement of people.<sup>6</sup> The decision adopted by the Conference of the Party to the UN Convention Framework Convention on Climate Change, during the 21<sup>st</sup> session held in Paris on 30 November – 11 December 2015, also acknowledged the need to "to avert, minimize and address displacement related to the adverse impacts of climate change."<sup>7</sup>

In light of the above-mentioned figures, it seems justified to expressly acknowledge that persons displaced by the disasters are considered as "**directly affected**" by the draft articles.

- b) The definition of "**persons concerned**" could also be influenced by the definition of "disaster". Understanding disaster as a consequence of a hazard would allow including a broader range of affected persons, and notably:

- those displaced not only by the actual hazard, but also in the aftermath of the hazard due to the general level of disruption in the functioning of the community;
- those for which the disaster cannot be singled out as the only cause of displacement, and
- the host communities affected by the inflow of displaced persons.

Any adopted measures, which do not take into account these situations, will always be partial and ineffective in providing protection to affected people.

- c) The definition of **affected persons** adopted in the draft articles does not take fully into account the importance of the prevention phase, specifically for the protection of persons who risk being affected, which is included in the scope of application of the draft articles (as specified in paragraph 4 of the commentary to draft article 1 and reiterated in paragraph 5 of the commentary to draft article 2). In addition to persons directly affected, it is suggested that the commentary also refers to **persons likely to be affected**. The problem is how to determine who is likely to be affected. In the context of DRR, the determination of who are the persons at risk is based on an evaluation of the persons' exposure and vulnerability. However, in light of the narrow definition of disaster of the draft articles and of the need to ensure legal certainty, the concept of exposure could be translated into a concept that is easier to define, by referring for example to a geographical element (all those who live in a certain area). Alternatively, the task to define who the persons at risk are could be left to the national legislator.

- d) With regard to **family members**, one needs to **take into account the specific situation of those who are not directly affected, but have lost a family member**. Their plight may be even direr than the one of families affected by the disaster who have survived and are together. It could even be argued that family members who have lost a relative may be more vulnerable, from both a psychological and a material point of view. Therefore, it is suggested

<sup>6</sup> IPCC 2014 Synthesis Report, 2014, p. 16, <http://www.ipcc.ch/report/ar5/syr/>.

<sup>7</sup> Adoption of the Paris Agreement. Proposal by the President., 12 December 2015, FCCC/CP/2015/L.9/Rev.1, § 50.

keeping the exclusion of family members as indirectly affected, **except when those members are somehow directly affected, for instance due to the loss of one of their relatives**, in which case their possibly heightened vulnerability should be acknowledged.

- e) With regard to the exclusion from the scope of application of the draft articles of *economic losses* of those who are elsewhere, attention is drawn to the justification of the distinction between those who are there when the disaster strikes and those who are elsewhere. Can it really be maintained that those who were not there when the disaster took place have always less protection needs than those who were there and were, for example, only barely affected? This distinction is even **more difficult to justify in light of the broad scope of application of the draft articles that includes also the recovery and reconstruction phase**. Furthermore, it is also hard to justify such a distinction in light of the importance of the impact on persons of economic losses mentioned in paragraph 7 of the commentary to draft article 3. The impact on persons and not necessarily the physical presence of the person in the affected area should be the guiding criterion.

#### Paragraph 9 Economic and social rights

The paragraph recognizes the central role of economic and social rights in the context of disasters and the special characteristics of these rights that imply an obligation of progressive realization. Even if the commentary clearly states that the definition of the specific States' or other actors' obligations to the relevant rules of international law, it would be worth recalling here that **some minimum core obligations** (essential foodstuffs, essential health care, basic shelter and housing, education for children) **persist even in the context of a disaster**, in addition the needs of the most vulnerable, including migrants, displaced persons, but also trapped populations and host communities, have to be specifically taken into account. Furthermore, it would be important to specify that **States' margin of appreciation refers to the choice of the measures to be adopted and not to the result to be achieved**.

#### Paragraph 10 Reference to rights

The Commission's choice not to include a list of rights to avoid any *a contrario* interpretation, which would risk excluding other rights that are not mentioned is well-noted. However, **for the work of international organizations and their advocacy role, it would be beneficial to have a non-exhaustive list of rights that are relevant in this context**. International organizations and other humanitarian actors are constantly confronted with the need to back up their advocacy for the respect of some rights with references to the correspondent obligations set forth in legal instruments. A mention of the applicability of relevant rights in the specific context of a disaster and correspondent State obligations would be of great support in this respect.

Ultimately, references to rights are already spread across different draft articles and commentaries but gathering them in one place would enhance their visibility and facilitate accessibility of the relevant information. Perhaps the commentary of **Article 6** could be the most sensible option to put a non-exhaustive list of relevant rights. This could also be done indirectly, as the Commission did with regard to other issues, such as the identification of vulnerable groups in paragraph 7 of the

commentary to Draft article 7, which refers to the IFRC guidelines. Relevant documents for this purpose could be, among others, **the UN Guiding Principles on internal displacement**, as well as **the Inter-Agency Standing Committee (IASC) Operational Guidelines on the Protection of Persons in situations of Natural Disasters**.

## Draft Article 3

### Definition of disaster

*“Disaster” means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.*

In the draft article, disaster is defined as the event and not as its consequences. However, as specified in paragraph 3 of the commentary “**calamitous**” is used to establish a threshold, which is further defined by the consequences of that such an event, namely “widespread loss of life, great human suffering and distress, or large-scale material or environmental damage”, together with a serious disruption in the functioning of the society. This choice creates many superposed levels of analysis that risk generating confusions in the application of a definition, which is key in interpreting the whole text of the draft articles. Is **the threshold of calamitous defined *per se* or by these outcomes?** In other words, must the event be both calamitous and causing disastrous consequences or is it only when it causes such consequences that it is considered as calamitous? The distinction is important because an event of a smaller scale could also cause such disastrous consequences and one must wonder whether less extreme situations will be included in the scope of application of the draft articles. If the correct answer is that an event needs to be both calamitous *per se* and cause the named consequences, which seems what it is suggested in paragraph 3 of the commentary, then a definition of calamitous is required in the commentary, and it would be important that such a definition includes also smaller events.

Furthermore, while the commentaries clarify that the definition is not meant to cover conflicts, it does not seem to be limited to environmental causes (not even in the commentaries). Calamitous events or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage could very well include all the following events:

- natural hazards
- slow onset processes of environmental degradation and change
- technological accidents
- epidemics.

This may be a deliberate choice by the Commission. However, its clear implications on the scope of the whole text should be carefully considered. Notably, draft article 10 (Cooperation for disaster risk reduction) which, while seemingly referring to disaster risk reduction as articulated in the Hyogo Framework for Action and Sendai Framework, might be expanded if the definition of “disaster” was broader.

In paragraph 6 of the commentary, it is recognized that **severe dislocation** can cause “great human suffering and distress” even if there is no loss of life. It is unclear what it is meant with the term

dislocation. Does it include displacement of people? It is suggested adding a new paragraph referring to displacement as a major consequence of disasters after paragraph 6 in order to give to the issue the visibility that is required by the scale of displacement as a consequence of disaster situations.<sup>8</sup>

In paragraph 7 of the commentary, the Commission justifies that damage to property and the environment has been included as recognition of the fact that these are standard outcomes of a disaster, so in the same line of thought displacement ought to be equally treated. Therefore, it is suggested **including displacement in the definition of disaster together with the reference to human suffering and distress**. The draft articles would then read as follows: “Disaster” means a calamitous event or series of events resulting in widespread loss of life, great human suffering, distress **and displacement**, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.’

This inclusion would be justified in light of the scale of displacement increasingly caused by disasters (see the reference to some figures and acknowledgements in the comments to paragraph 8(a) of the commentary to draft article 2 above) and it would allow giving to the issue the needed visibility. The purpose being that governments will realize that they need to take the risk of displacement of entire communities into account to comply with the various other obligations that are defined in the draft articles, notably in the context of disaster risk reduction and management, but also in addressing the consequence of disasters and ensuring an effective protection of affected persons. Displacement puts people in a dire situation through loss of access to livelihoods, services and social capital. The draft articles, the purpose of which is to deal with the protection of persons in the event of disasters, should duly take into account the issue of displacement and clarify the obligations of States to prevent displacement, prepare, respond and mitigate displacement when it cannot be avoided, as well as address its long-term consequences.

## Draft Article 6 [8]

### Human Rights

*Persons affected by disasters are entitled to respect for their human rights.*

In paragraph 2 of the commentary to draft article 6, it is pointed out that the reference to **Human Rights encompasses also rights that are contained in non-binding instruments**. As mentioned before in the comments to paragraph 10 of the commentary to draft article 2, an express mention of the most important of these instruments, such as **UN Guiding Principles on internal displacement**, as well as **the Inter-Agency Standing Committee (IASC) Operational Guidelines on the Protection of Persons in situations of Natural Disasters**, would help in identifying the relevant standards. At the same time, it should also be acknowledged that most if not all of the rights that are stipulated in these instruments are already recognized in international conventions or customary law. The **added**

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<sup>8</sup> See Internal Displacement Monitoring Center (IDMC), Global Estimates 2015 – People Displaced by Disasters, *ibid*. See also the figures provided in the comments to draft article 2 above.

**value of these instruments is to explain how human rights apply in the specific context of disasters.** Mentioning these standards in the draft articles would represent an important opportunity to fill the obligations deriving from human rights instruments with more specific content with regard to their application in disaster situations.

### **The obligation to protect rights**

The term “respect” to qualify States and other actors’ obligations to implement rights appears too restrictive to capture the full array of obligations that States and other actors have. In light of the importance that positive obligations have in this field, it is recommended, at least, to add a reference to “protection” of rights as well (see, for example and among many others, the European Court of Human Rights’ case *Budayeva v. Russia*, 2008).

### **Examples of rights**

Although the Commission decided not to dress up a list of rights, there is in fact a reference to a number of rights spread out across the text of the draft articles and commentaries. For example, paragraph 4 of the commentary to draft article 13 on duty to seek external assistance mentions a number of rights that are relevant in the context of disasters including right to life, food, health and medical services, right to supply water, to adequate housing, clothing and sanitation and the right to be free from discrimination. It is also reiterated that States have an obligation to protect the right to life. In addition, paragraph 3 of the commentary to draft article 11 on the duty to reduce the risk of disasters mentions the right to access risk information.

**To streamline the relevant information and increase its accessibility, it is suggested putting all these references** under the draft article on human rights or at least adding in the commentary a cross-reference to the relevant parts of the commentaries of other draft articles.

Furthermore, **in line with the UN Guiding Principles on internal displacement**, one could consider adding a **reference to the impact of human rights violations, committed through state acts or omissions in the pre and post disaster phases, on displacement**. In this regard, Principle 5 of the UN Guiding Principles stipulates that: “All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.”

## **Draft Article 7[6]**

### **Humanitarian principles**

*Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.*

Although draft article 7[6] refers to the response to disaster, in light of the broad scope of application of the draft articles specified in paragraph 4 of the commentary to draft article 1 (“event of disaster” as including the post disaster response and recovery, including reconstruction) and in light of paragraph 5 of the commentary to draft article 2, the phrase **“response to disasters”** needs to include pre-disaster risk-reduction, where relevant. This should be recalled in the text of the commentary. The **principle of non-discrimination** is particularly relevant, for example, also in the context of the prevention of disasters. In addition, a specific attention to vulnerable groups, in terms of ensuring accessibility of information, participation in the decision making process and preparedness to respond to their specific needs when the disaster strikes should be key considerations in the prevention of disasters or their consequences.

The reference to nationality among the grounds for non-discrimination in paragraph 6 is particularly welcome in light of the risk of stigmatization and exclusion of non-nationals in disaster response situations. In this respect, it is suggested adding in the footnote a reference to the International Convention on the Rights of All Migrant Workers and of the Members of Their Families (Article 7), because the two Covenants only refer to the broader and less well-defined concept of “national origin” and not to “nationality” as a ground for discrimination. The Commission could also consider adding a reference to **legal or social status** as grounds for discrimination, in line with the list of grounds provided in the UN Guiding Principles on Internal Displacement, Principle 4.1.

Paragraph 7 of the commentary specifies that the phrasing “particularly vulnerable” is drawn from the IFRC Guidelines, which refer to the special needs of “women and particularly vulnerable groups, which may include children, **displaced persons** [emphasis added], the elderly, persons with disabilities, and persons living with HIV and other debilitating illnesses”. (IFRC Guidelines, 2011: 15). The express quote of the list of the IFRC Guidelines is welcome because it facilitates the identification of the categories of persons that should be considered vulnerable in the context of disasters. However, it would be important to single out also the plight of non-nationals in the disaster situations. **Migrants** are often among the worst affected by disasters due to factors including their lack of nationality of the country where they find themselves, limited language proficiency, limited knowledge of local environmental conditions, including natural hazards, legal frameworks and institutions, limited social networks, lack of trust in authorities, restrictions on mobility, and discrimination.<sup>9</sup> They often face difficulties in accessing information, resources, and opportunities, which reduce their ability to prevent, mitigate, prepare for, cope with, and recover from natural disasters. There is an increasing recognition of the specific vulnerability of non-nationals in disaster situations.<sup>10</sup>

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<sup>9</sup> Lorenzo Guadagno, Reducing Migrants’ Vulnerability to Natural Disasters through Disaster Risk Reduction Measures, IOM, MICIC Initiative, Issue in Brief, October 2015, [http://micicinitiative.iom.int/sites/default/files/brief/MICIC\\_Issue%20Briefs\\_1\\_DRR\\_0.pdf](http://micicinitiative.iom.int/sites/default/files/brief/MICIC_Issue%20Briefs_1_DRR_0.pdf).

<sup>10</sup> See, *inter alia*, IOM, Moving to Safety : Migration Consequences of Complex Crises, International Dialogue on Migration No. 20, 2012, [http://micicinitiative.iom.int/sites/default/files/document/RB20\\_ENG\\_web.pdf](http://micicinitiative.iom.int/sites/default/files/document/RB20_ENG_web.pdf); IOM, Protection of Migrants During Times of Crisis : Immediate Response and Sustainable Strategies, International Dialogue on Migration No. 21, 2012, [http://micicinitiative.iom.int/sites/default/files/document/RB21\\_ENG\\_web.pdf](http://micicinitiative.iom.int/sites/default/files/document/RB21_ENG_web.pdf); MICIC General Background Paper, 2-3- February 2015, [http://micicinitiative.iom.int/sites/default/files/General\\_Background%20Paper.pdf](http://micicinitiative.iom.int/sites/default/files/General_Background%20Paper.pdf).

### Examples of the impact of disasters on migrants

#### **Hurricane Katrina**

By the time Katrina hit, New Orleans was home to about 140,000 to 150,000 Hondurans – the largest Honduran community in the country. New Orleans has significant groups of ethnically diverse people including Vietnamese, Peruvians, Brazilians and Jamaicans amongst others.

Despite this strong presence, there was very little attention to the needs of non-citizens throughout the emergency – mirroring a generalized lack of attention to the needs of marginalized communities. No official early warning and very little emergency information was provided in Spanish, Vietnamese or Portuguese, with only a private Spanish-language radio broadcasting information accessible to Latino communities. Even the radio broadcasting information only became available after Katrina made landfall. This only heightened the existing trust issues these communities had vis-a-vis public authorities, and contributed to their reduced access to assistance.

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#### **Hurricane Sandy**

On October 27, 2012, Hurricane Sandy, the largest Atlantic hurricane on record, struck the densely-populated East Coast of the United States, hitting in particular New York City, New Jersey, and Southern Connecticut. The storm left more than 130 victims and forced no less than 450,000 people evacuated and homeless. Overall, it caused losses for USD 65 billion, the second most expensive after Katrina in US history.

Some of the hardest-hit areas contained large immigrant population. The foreign-born population of New York City is the largest of any city in the United States, at just over three million people. Of the foreign-born residents of New York City, 51.5% come from Latin America and the Caribbean; 27.5% from Asia; and 15.9% from Europe. An analysis of data from 2000 to 2006 conducted estimated there were 535,000 unauthorized immigrants and 374,000 unauthorized workers in New York City, comprising 10% of the resident workforce.

Twenty per cent of the total population of Staten Island and Long Island, among the New York areas most heavily affected by Hurricane Sandy in 2012, were foreign-born at the time of the disaster. Migrants accounted for well over 50% of the residents of specific neighborhoods. Hurricane Sandy had significant impacts on the individuals. Forty per cent of the migrants living in affected areas reported economic losses and one in three suffered from damage to home or property. In Staten Island, 60% of the migrants reported damage and 40% were displaced. However, only 22% of those affected applied for relief, due to a lack of understanding of the system in the United States, and only 25% of those who applied actually received assistance.

Language barriers, administrative requirements and lack of organization hindered migrant access to support by the Federal Emergency Management Agency and local charities. Many migrants avoided applying fearing the possibility of xenophobic incidents. “Non-qualified aliens”, including some groups of documented migrants (such as those with a “Temporary Protected Status” in light of the situation of their country of origin), could not access cash assistance or unemployment benefits. Other migrants were eligible for benefits because their children were citizens of the United States, but did not apply for fear of arrest and deportation, despite statements from national and local authorities that no immigration enforcement initiatives would be conducted. This, in turn, resulted in a number of unassisted children.

Migrant communities were disproportionately affected by loss of income and livelihoods related to the physical destruction of homes and displacement: many migrants employed as domestic workers, for instance, no longer had a workplace. Reduced access to safety nets for migrant workers resulted in widespread unemployment (11 per cent of the migrant community) and economic hardship.

#### Reference

Unmet Needs: Superstorm Sandy and Immigrant Communities in the Metro New York Area, Make the Road New York, December 2012, [http://www.maketheroadny.org/pix\\_reports/MRNY\\_Unmet\\_Needs\\_Superstorm\\_Sandy\\_and\\_Immigrant\\_Communities\\_121812\\_fin.pdf](http://www.maketheroadny.org/pix_reports/MRNY_Unmet_Needs_Superstorm_Sandy_and_Immigrant_Communities_121812_fin.pdf).

#### **Thailand floods**

From August to December 2011, Thailand experienced its worst flooding in 50 years. Floods devastated the local economy, affecting 13 million people, displacing 1.5 million and killing over 800. It created damages worth \$45.7 billion, critically impacting productive activities in 66 out of Thailand’s 77 provinces, and prompting the government to execute countrywide disaster management and relief measures. The central region, which generates a large portion of the country’s economic output, experienced the longest period of flooding. Thailand has historically hosted large populations of noncitizens, specifically from neighboring countries, which seek greater opportunity within its growing economy or refuge from conflict and violence. At the end of 2009, an estimated 3.5 million noncitizens resided in Thailand, comprised of documented and undocumented migrant workers, refugees and asylum seekers, and ethnic minorities without Thai citizenship. Low-skilled migrant workers from Myanmar, Cambodia, and Laos represent the largest population of noncitizens in Thailand. They are primarily employed in sectors such as agriculture, construction and fishing. Migrants from Burma alone are estimated to represent between 5 and 10 % of the country’s workforce. At the end of 2010, there were an estimated 2.4 million noncitizens originating from these countries, with 1.4 million (almost 60 percent) classified as unregistered migrant workers or family members.

Out of the 3.5 million noncitizens estimated to be living in Thailand, one million migrant workers were living in areas affected by the floods. Aid workers estimated the number of migrant workers stranded due to the disaster at 600,000.

Relief assistance to disaster-affected areas was provided by the Government, together with the International system and a number of non-governmental partners. However, some migrants reported being deliberately excluded from assistance.

As it was recalled above, in 2014 the Governments of the Philippines and the United States launched the Migrants in Countries in Crisis (MICIC) the aim of which is to hold a broad consultative process that engages with States and regional actors, civil society, including migrants and diasporas, the private sector, and international organizations. The ultimate outcome of the initiative will be a set of non-binding, voluntary Principles, Guidelines, and Effective Practices that identify the roles and responsibilities of different stakeholders vis-à-vis migrants in countries in crisis, including in the event of disasters.

## Draft Article 9[5]

### Forms of cooperation

*For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.*

Paragraph 4 of the commentary to draft article 9 explains that, although the draft article highlights specific forms of cooperation, the list is not exhaustive and welcomes other forms of cooperation. It is suggested adding a reference, in the draft article or in the commentary, to the cooperation with the countries of origin of non-nationals that are present on the territory, in the form of bilateral coordination aimed to ensure access to nationals during crisis, evacuation procedures, documentation facilitation, etc. This would be in line with the general purpose of the draft articles recalled in paragraph 3 of the commentary to the draft article, namely to “facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights”. The paragraph also recalls that the ultimate goal of the duty to cooperate, and therefore of any of the forms of cooperation referred to in the draft article is the protection of persons affected by disasters. Cooperation with the countries of origin of the nationals who are present in the area hit by the disaster is also essential to ensure that States of origin can alleviate the burden of the affected States in taking care of their nationals.

The guidelines issued as a result of the first consultation held under the MICIC initiative, in Geneva on 2-3- February 2015, acknowledge the importance of establishing a coordination mechanism between countries of origin and of destination hit by a disaster regarding, in particular, access to nationals during crisis, evacuation procedures, documentation facilitation, etc.<sup>11</sup>

The role of the private sector in this respect has also been acknowledged during MICIC Initiative consultations. Migrants’ employers can play a key role in locating migrants who are present in the country but who may not be registered with the local authorities. In this respect, cooperation of the

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<sup>11</sup> Guidelines and effective practices, Inter-governmental Consultations on Migration, Asylum and Refugees (IGC) as well as the Governments of Bangladesh, Japan, Philippines and South Korea (IGC-Plus) Consultation on the Migrants in Countries in Crisis Initiative, p. 11, [http://micicinitiative.iom.int/sites/default/files/consultations/document/IGC%20Plus%20Consultation Guidelines%20and%20Effective%20Practices.pdf](http://micicinitiative.iom.int/sites/default/files/consultations/document/IGC%20Plus%20Consultation%20Guidelines%20and%20Effective%20Practices.pdf).

affected State with private employers is important to ensure that migrants can be located and assisted on an equal footing with nationals.

#### Migrants in disasters' situations

##### **Case study: Tohoku Triple Disaster**

On March 11, 2011, a 9.0 magnitude earthquake struck the Japanese coastline which triggered a 10-meter tsunami and decimated communities primarily in the northeastern prefectures of Iwate, Miyagi, and Fukushima. The earthquake and in particular the tsunami killed almost 20,000 and affected 370,000 people. In addition, the water brought inland by the tsunami triggered a failure at the Fukushima Daiichi Nuclear Power Station, which prompted one of the worst nuclear disasters since Chernobyl. As a consequence, approximately 465,000 people were evacuated. The economic cost of the disaster is estimated at \$360 billion – possibly the costliest disaster on record. 250,000 buildings were damaged or destroyed, and 4.4 million households lacked electricity and 2.3 million had no access to water in the immediate aftermath.

At the time of the triple disaster, Japan was home to roughly 2,078,480 noncitizens. Chinese citizens constituted the largest group with South Koreans, Brazilians, and Filipinos comprising other sizeable populations. The noncitizen population included roughly 141,774 foreign students, the majority hailing from neighbouring Asian countries, most significantly China and South Korea, and to a lesser extent Taiwan, Vietnam and Malaysia.

An estimated 700,000 noncitizens were residing in areas that were in some way affected by the crisis with approximately 33,000 in the three main affected prefectures, 200,000 in the surrounding prefectures and 423,000 visiting the area. The earthquake and tsunami killed 23 and injured 173 noncitizens. An estimated 470,000 foreigners are reported to have left Japan during the time of the disaster. Many embassies and employers urged their citizens and employees in Japan to leave the country or to at least leave the areas near the earthquake/tsunami zone – or even to leave Tokyo, over the fears of radiation exposure from the stricken Fukushima nuclear facilities. The phenomenon was worsened by the lack of direct access to quality information for non-Japanese speaking people in the aftermath of the disaster.

This resulted in a huge loss of workers and students, which had a sizable impact both on the local economy and on intra-communal relations, with Japanese native aggravated by the flight of so many foreigners.

Many refugees and asylum seekers also chose to leave. However, this posed a difficult trade-off to many asylum seekers, as their demand was often tied to their permanence in a specific area.

Government efforts to track the missing indicated that Japan worked with foreign embassies to compile a list of at least 600 missing noncitizens and that this information was furnished to the local police and rescue administration.

Alternatively the issue of emergency consular assistance could be dealt with under Article 15 on conditions on the provision of external assistance.

## Draft Article 11[16]

### Duty to reduce the risk of disasters

1. *Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.*
2. *Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.*

It would be important to add an express reference to the Sendai Framework for disaster risk reduction (DRR) as the new standard on DRR efforts as well as specifically to the key priorities that are identified in the Framework.

The examples of measures of DRR mentioned in paragraph 2 may be too narrow. It should be noted that neither the Hyogo Framework for Action (HFA) nor the Sendai Framework for Disaster Risk Reduction (SFDRR) in fact link DRR with humanitarian interventions *per se*. Reducing risk is a process mainly dependent on non-humanitarian actors – in particular when one looks at its core elements that are rooted in sustainable development and long-term local level empowerment practices. This is the case both at national and international levels: of the whole spectrum of DRR activities emergency responders and humanitarian actors tend to only engage with the reduction of the risk of hazard as opposed to the consequences of the hazard. It would be important that this draft article acknowledges more strongly that key elements of DRR are the interventions aimed at reducing vulnerability and building resilience.

## Draft Article 15

### Conditions on the provision of external assistance

*The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.*

Conditions on the provision of external assistance shall take into account the needs of persons affected by a disaster, in line with draft article 2. According to paragraph 8 of the commentary, this entails that the **special needs of vulnerable persons** should also be considered. In the list of relevant vulnerable groups, it would be important to add a reference to **displaced persons**, because of their specific vulnerability in this context, but also to **migrants** (in the sense of non-nationals) who are particularly reliant on the assistance that can be provided by their country of origin (external

assistance) or by international organizations. Migrants may be less well protected than the nationals of the country in the context of humanitarian emergencies and have troubles in accessing humanitarian assistance, particularly if they are in an irregular situation.

This has become evident in recent crisis, not only humanitarian crisis, such as the one in Libya or CAR, but also in the context of disasters, for example in the US with Hurricane Sandy or after the 2012 earthquake and tsunami in Japan, where migrants have been among those seriously affected. A number of calls have been formulated to develop better ways of addressing the effects of these kinds of crises on migrants. The Migrants in Countries in Crisis Initiative (MICIC), referred to in previous comments, is aimed to respond to these calls.

It would be important for the commentary to the draft article to expressly recognize that conditions imposed on the provision of external assistance should not disproportionately limit the right of foreign States to provide assistance to their nationals caught in the crisis situation. This right of States can be anchored to Article 5 of the Vienna Convention on Consular Relations (1963) which recognizes that one of the principal consular functions is “helping and assisting nationals, both individuals and bodies corporate, of the sending State”.

Often the most effective solution in a situation in which protection and assistance *in situ* cannot be guaranteed is return or evacuation of migrants to their countries of origin. Consular authorities can play a key role in assisting their nationals caught in a disaster situation, notably by replacement of lost travel documents or provision of *laisser-passer* for migrants to be evacuated to their home countries. Evacuation of migrants can also have the positive effect of decreasing the pressure on the affected States by limiting the number of the persons in need of assistance.

### **Conclusion**

IOM is grateful for the opportunity to comment on the draft articles on the protection of persons in the event of disasters, prepared by the International Law Commission. IOM sees these draft articles as an important tool for the work of the Organization in the area of disaster preparedness and response and disaster risk management, as well as assistance and protection of disaster affected populations. It expresses the hope that migration and displacement are integrated in the text of the draft articles or commentaries and it looks forward to the adoption of the draft articles in the form that States will consider the most appropriate.