

ILC Draft Articles on the Protection of Persons in the Event of Disasters

COMMENTS FROM THE UN OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (OCHA)

1. OCHA is in broad agreement with the substance of the draft articles. OCHA would support the inclusion in the Commentary of a reference to the status of the Draft Articles (e.g. as binding or non-binding, serving as a reference tool, etc.). OCHA would support further discussion on whether the draft articles should form the basis for a binding international treaty.
2. OCHA is pleased that the focus of the draft articles is on persons in need, coupled with a rights-based approach, as set out in draft articles 1 and 2. This approach is broadly consistent with the “Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance” developed by OCHA, IFRC and IPU to assist States interested in incorporating the recommendations of the Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance (IDRL Guidelines) into their legal frameworks.
3. OCHA supports the definition of the term “affected State” in draft article 4(a) insofar as it emphasizes the primary role and responsibility of the State in whose territory the disaster occurs to protect persons, property and the environment from the effects of disaster. At the same time, the definition is broad enough to cover the situation where a State exercises *de facto* control over a territory other than its own, thus minimizing potential gaps in coverage in practice. In this regard, OCHA considers the explanation in the commentary to draft article 4(a) (p. 96) as to the relationship between this definition and draft article 12(1) to be particularly useful.
4. OCHA notes, however, that the definition of “affected State” in draft article 4(a) may be too broad insofar as it could be construed as including a State that has jurisdiction or control over individual *persons* affected by a disaster outside the State’s territory. Under public international law and particularly in human rights law, it is accepted that a State has jurisdiction over its nationals even when they are abroad. The definition in draft article 4(a) appears broad enough to cover States of nationality, since it includes “the State . . . under the jurisdiction . . . of which persons . . . are affected by a disaster”. Given that the consent of the affected State is required for external assistance, an overly broad definition of “affected State” would be undesirable. Therefore, it might be useful to clarify in the commentary that the term “affected State” is not intended to include a State that has jurisdiction under international law over individual *persons* affected by a disaster outside the State’s territory.
5. OCHA notes that the definition of “external assistance” in draft article 4(d) refers to “relief personnel, equipment and goods, and services . . .” Whereas “relief personnel” and “equipment and goods” are defined in draft articles 4(e) and 4(f) respectively, no definition of “services” is provided. It might be useful to include a definition of this term.
6. OCHA is concerned about the definition of “relief personnel” in draft article 4(e), which is understood to mean both civilian and military personnel but which makes no distinction between

those two categories. The Oslo Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (the “Oslo Guidelines”) specify that international military assets should be used as a last resort, “only where there is no comparable civilian alternative and only the use of military or civil defence assets can meet a critical humanitarian need.” OCHA would recommend that the definition of “relief personnel” in draft article 4(e) be brought into line with the existing consensus language contained in the Oslo Guidelines. At the very least, the commentary to article 4(e) should make it clear that international military assets should only be used as a last resort. Alternatively, or in addition, such a clarification could be placed in the commentary to Article 9 or 15, or in a separate, independent Article.

7. OCHA supports the inclusion of draft article 5, which underscores the need to respect and protect the inherent dignity of the human person. This provision refers to “States, competent intergovernmental organizations and relevant non-governmental organizations” responding to disasters. As the formulation in draft article 5 omits the term “any other entity of individual” (e.g. the ICRC or IFRC, as explained in the commentary, p. 97, but also private actors) found in draft article 4(c), it might be useful to refer instead to “States and other assisting actors” as defined in draft article 4(c), to ensure that draft article 5 encompasses all relevant actors providing “external assistance”. The Commentary (p. 101) notes that draft article 5 has been formulated to maintain consistency with draft article 8(5). However, it is not immediately clear why the scope of draft article 5 should be limited to that of draft article 8(5), since the latter is based on a duty to cooperate under international law.
8. OCHA welcomes draft article 7, which states that 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. Indeed, humanitarian principles underpin humanitarian action. In addition, OCHA would support the inclusion of a reference to the obligation for humanitarian organizations to respect the principle of independence, in accordance with UN General Assembly resolution 58/114 (2003): “Recognizing that independence, meaning the autonomy of humanitarian objectives from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented, is also an important guiding principle for the provision of humanitarian assistance.”
9. One essential element in considering the needs of the particularly vulnerable is community participation. This element is not explicit in the draft articles or commentaries. Affected communities, including vulnerable groups, should be consulted in the design, implementation, monitoring and evaluation and assistance provided in the event of a disaster. OCHA would support the inclusion in the Commentary of a reference to possible ways of including and ensuring community participation.
10. OCHA welcomes the emphasis in draft article 8 on cooperation between a range of different “assisting actors”. As mentioned above in relation to draft article 5, it would be useful to also refer to “any other entity of individual”, as we understand that private actors also have an important role to play. Indeed, this recognizes that effective disaster response requires cooperation not only amongst States, but also with intergovernmental and non-governmental

organizations as well as other individuals and entities.

11. Also in relation to draft article 8, OCHA has a special mandate to assist in the coordination of international assistance based on UN General Assembly Resolution 46/182, which strengthened the UN's international response to both complex emergencies and natural disasters, and created the high-level position of Emergency Relief Coordinator (ERC) as the single UN focal point for complex emergencies as well as for natural disasters. It provides that, if there is a need for externally coordinated emergency assistance, the government of the affected State may inform the ERC and the UN representative in the country. OCHA would support the inclusion in draft article 8 of an explicit reference to the responsibility of the ERC in accordance with UN General Assembly resolution 46/182 (1991). This could be phrased as follows: "States shall, as appropriate, cooperate among themselves, and with the United Nations, in particular the Emergency Relief Coordinator, and other competent intergovernmental organizations...". In addition, OCHA would support the inclusion in the Commentary to draft article 8 of a more detailed explanation of the ERC's role. (For example, the ERC processes requests from affected Member States for emergency assistance requiring a coordinated response, serves as a central focal point concerning UN emergency relief operations, and provides consolidated information, including early warning on emergencies. See para. 35 of resolution 46/182 (1991).)
12. Draft article 9 defines "cooperation" as including (*inter alia*) "making available relief personnel, equipment and goods, and scientific, medical and technical resources." While this list is not exhaustive, it might be useful to include "services" given that this term is included in the definition of "external assistance" in draft article 4(d).
13. In connection with draft article 8 and/or draft article 9, OCHA would suggest considering the insertion in the Commentary of a "duty to inform" or a "duty to notify", analogous to the duty described in the ILC's "Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries".¹ For instance, these state in draft article 17 that "The State of origin shall, without delay and by the most expeditious means at its disposal, **notify** the State **likely to be affected** of an emergency concerning an activity within the scope of the present articles and provide it with all relevant and available information" (emphasis added). Such a reference could capture a duty to inform / notify those actors that have a mandated role to gather information, provide early warning, and coordinate assistance from the international community.
14. OCHA supports the approach adopted in draft articles 12 to 15 towards the concept of sovereignty, in particular the notion that sovereignty entails the duty of the affected State to ensure within its territory the protection of persons and the provision of disaster relief.
15. OCHA would support the insertion in the Commentary to draft article 13 of a reference to the role of the ERC and Resident Coordinator, in accordance with UN General Assembly resolution 46/182 (1991), and an explanation of the key procedures that the affected State should follow when requesting external assistance. For instance, OCHA would welcome a reference to para. 35(a) of resolution 46/182, which refers to the role of the ERC, as supported by OCHA, in "processing requests from affected Member States for emergency assistance requiring a

¹ Available here: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf

coordinated response,” and to para. 39 on the role of the “resident coordinator” for country-level coordination of humanitarian assistance. In addition, today “humanitarian coordinators” are responsible for leading and coordinating humanitarian action of relevant organisations (including UN, non-governmental and civil society organizations) in country with a view to ensuring that it is principled, timely, effective and efficient, and contributes to longer-term recovery.

16. Regarding draft articles 14-17, it might be more logical to change the order of these provisions and first speak of offers of external assistance, then consent, facilitation and conditions (i.e. Art. 16, 14, 17, 15).
17. OCHA supports draft article 14(2), which provides that the consent of the affected State to external humanitarian assistance should not be arbitrarily withheld. OCHA notes that, in certain circumstances, an arbitrary withholding of consent may amount to a breach of international human rights law. For example, a State’s denial of access to materials that are essential for survival may amount to a violation of the right to life, or it may prevent the satisfaction of the minimum core of relevant economic, cultural and social rights, such as the right to food and water and to health and medical services. (Moreover, in the context of armed conflict, such denial may amount to a breach of international humanitarian law (IHL).)
18. OCHA would suggest that draft article 14(2) also include a reference to the withdrawal of consent, such that consent to external assistance shall not be withheld or withdrawn arbitrarily.
19. OCHA would further suggest that draft article 14(3) include a requirement as to timeliness, such that the affected State shall, whenever possible, make known its decision regarding the offer within a reasonable time frame. The notion of timeliness is discussed in the commentary (p. 125), which notes that the failure of an affected State to make known its decision within a reasonable time frame may be deemed arbitrary. OCHA is of the view that this element of timeliness should be included in the text of draft article 14(3) itself.
20. OCHA welcomes the inclusion of draft article 18 on the protection of relief personnel, their equipment and goods. Sufficient protection of relief personnel, equipment and goods is an essential condition for any relief operation to be carried out effectively.
21. OCHA is concerned that draft article 21, which sets out the relationship between these draft articles and ihl, appears to be inconsistent with the commentary. In particular:
 - a. Draft article 21 provides: “The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.” This appears to suggest that these draft articles do not apply *at all* to so-called “complex disasters” that occur on the same territory where an armed conflict is taking place – i.e. where IHL is applicable.
 - b. Yet the commentary to draft article 21 appears to contradict this when it states (pp. 137-138) that the draft articles “can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not apply.” Moreover, this formulation can be read as mistakenly suggesting that there may be situations of armed conflict to which IHL does not apply.

- c. Finally, the commentary to draft article 4(a) (p. 96) refers to “the recognition, in draft article 21 [4], that the draft articles would apply in the context of so-called ‘complex disasters’, which occur on the same territory where an armed conflict is taking place.”

OCHA is concerned that the wording in draft article 21 and the commentary does not offer a clear understanding of the relationship between the draft articles and IHL. OCHA considers that the draft articles should apply to so-called “complex disasters” that occur on the same territory on which an armed conflict is taking place: a) without prejudice to the parallel application of IHL, and b) where the rules of IHL do not address the specific disaster-related issue. This would appear to be the goal of both the draft article and the commentary, and, if this is correct, should be more clearly stated.