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AN ENCHANTED TOOL?: HUMANITARIAN ASSISTANCE AND THE ILC DRAFT ARTICLES ON THE PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

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> International humanitarians all too often come to think of their tools – multilateral declarations, documents, institutional networks – as having a kind of inherent humanitarian potency. And the commitment to more global governance fuels enthusiasm to develop and test drive new techniques. This tendency to enchant our tools should make us wary – it often comes at a cost to analysis of the substantive results of their use.[1]
>
> David Kennedy, *The Dark Sides of Virtue*

A. INTRODUCTION

Speed of response is essential to protect lives and prevent unnecessary suffering following a natural or human-made disaster, and even developed countries may need the support of the international community to effectively respond to large-scale disasters. Despite being one of the richest countries in the world, Japan ultimately requested international assistance following the March 2011 earthquake and tsunami which not only destroyed towns and villages but also set off a chain reaction in the

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[1] D Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press: 2004), 119.

Fukushima nuclear power plant. Offers of assistance came from over 100 countries, including a donation of US$1million from the Mongolian government and US$50,000 from the city of Kandahar in Afghanistan.[2] Considerable effort has been made over the past 50 years in developing and refining international mechanisms for disaster prevention and response. Within the UN system, the first of many General Assembly Resolutions relating to universal responses to natural disasters was passed in 1965 and highlighted the need for greater international coordination of disaster relief.[3] Nevertheless, while the international humanitarian law of armed conflict is based on a series of binding multilateral conventions, there is no comparable international legal framework for humanitarian responses in non-conflict disasters. However, large-scale disasters such as the 2004 Indian Ocean Tsunami and 2005 Pakistan earthquake have led to an increased awareness of the need for regulation of international responses to natural and human-made disasters. This is understandable considering the huge amounts of funding provided each year in response to disasters, as well as the urgent need to ensure the smooth and efficient delivery of humanitarian assistance to survivors in the immediate aftermath of a disaster. The international Red Cross Red Crescent Movement[4] has been at the forefront of efforts to strengthen both domestic and international legal frameworks for disaster responses, with the International Federation of Red Cross and Red Crescent Societies (IFRC) promoting the concept of a distinct body of law entitled 'International Disaster Response Laws, Rules and Regulations' (IDRL).[5] The need for regulation of international responses is also clear

[2] 'Aid and rescue offers for Japan quake', Reuters, 15 March 2011, available at: www.trust.org/alertnet/news/factbox-aid-and-rescue-offers-for-japan-quake.

[3] Assistance in Cases of Natural Disaster, GA Res. 2034 (XX), 7 December 1965. For an overview of resolutions relating to humanitarian assistance since 1965, see: A Katoch, 'International Natural Disaster Response and the United Nations', in International Federation of Red Cross and Red Crescent Societies, *International Disaster Response Laws, Principles and Practice: reflections, prospects and challenges* (Geneva: 2003).

[4] The international Red Cross Red Crescent Movement is comprised of the International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (IFRC), and 186 national Red Cross and Red Crescent Societies globally.

[5] See: IFRC, *International Disaster Response Laws, Rules and Principles (IDRL) Programme Plan 2010-11*, available at: www.ifrc.org/en/what-we-do/idrl/about-idrl.

when one considers that the United Nations has recorded donations of nearly US$20billion for humanitarian assistance following natural disasters since 2000.[6]

Against this backdrop, the International Law Commission (ILC) included the protection of persons in the event of disasters on its programme of work in 2006, and has since adopted eleven draft articles on the topic. As it is easy to fall into the trap of enchanting international instruments with unwarranted power, or of treating structural outcomes as a guarantee or substitute for humanitarian results[7], it is appropriate to examine some of the issues raised by the proposed form and function of the draft articles as they will have an important impact on how issues such as sovereignty, non-intervention, and individuals' rights and needs are conceived in disaster settings. A fundamental question that has been raised through the work of the ILC is the balance to be struck between technical and logistical responses to disasters that focus on the practical and operational aspects of international humanitarian responses, with rights-based approaches that focus on the entitlement of victims to a certain level of services in disaster settings and the enforceability of these rights and claims. The ultimate form that the ILC Draft Articles on the Protection of Persons in the Event of Disasters take will reflect decisions made by the ILC and states as to the respective weight ascribed to limitations on state sovereignty contrasted with individual and group rights.

The overall aim of this article is to provide an analysis of the potential forms of international regulation open to the ILC and states in the context of humanitarian responses to disasters. However to avoid enchanting the ILC draft articles with unwarranted power, any examination of form requires an understanding of the substantive subject matter of the planned international regulation. This article will therefore provide an overview of the international legal regulation of humanitarian

[6] The UN Office for the Coordination of Humanitarian Affairs tracks donations to international disaster appeals through its Financial Tracking Service (FTS) which covers all reported international humanitarian aid (including NGOs, the Red Cross Red Crescent Movement, bilateral aid, in-kind aid and private donations). The UNOCHA FTS is available at: http://fts.unocha.org/pageloader.aspx?page=home.

[7] Kennedy, *Dark Sides of Virtue*, 116.

assistance following natural and human-made disasters, and the ILC's work to date on the protection of persons in the event of disasters. It will then examine two key issues that remain to be addressed by the ILC and representatives of states in the UN General Assembly Sixth Committee as they debate the draft articles. Drawing on the UN Guiding Principles on Internal Displacement, the development and implications of binding and non-binding international texts will be examined, followed by an analysis of the suggested framework convention approach identified by the Special Rapporteur as a potential outcome of the ILC work.

B. International Legal Regulation of Humanitarian Assistance

1. Defining 'Humanitarian Assistance'

A wide range of divergent rules exist which attempt to regulate the organisation, planning and implementation of national and international responses to natural and human-made disasters. Minimum standards, model rules, guiding principles and technical requirements all have a direct impact on the delivery of humanitarian assistance.[8] Yet there is an extremely limited body of international law which directly deals with natural or human-made disasters – there is no recognised *lex specialis* for disasters. As highlighted by the IFRC in 2000:

> At the core [of humanitarian assistance] is a yawning gap. There is no definitive, broadly accepted source of international law which spells out legal standards, procedures, rights and duties pertaining to disaster response and assistance. No systematic attempt has been made to pull together the disparate

[8] See: D Cubie, 'An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?', 2 *Journal of International Humanitarian Legal Studies* Vol. 2 – forthcoming.

> threads of existing law, to formalize customary law or to expand and develop the law in new ways.[9]

Indeed, there is no universally accepted legal definition of what constitutes 'humanitarian assistance', and the terms 'assistance', 'relief' and 'aid' are generally used interchangeably. While humanitarian assistance logically includes goods that are necessary to save and sustain life such as food and medical supplies, it can also include the broader conception of 'humanitarian action' which includes not just material assistance but all actions taken to ensure respect for people in disaster settings. Although the International Court of Justice examined the principles of humanitarian assistance in the context of sovereignty and non-intervention in the Nicaragua case, they did not examine the content of such assistance beyond noting the vague and circular definition provided in US legislation at the time, namely: '"humanitarian assistance" means the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death.'[10]

The two binding universal international legal texts of direct relevance to the provision of humanitarian assistance[11], namely the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief

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[9] IFRC, *World Disasters Report 2000*, International Federation of Red Cross and Red Crescent Societies (Geneva: 2000), 145.

[10] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, 14, para 97.

[11] Other multilateral conventions, such as the 1965 UN Convention on Facilitation of International Maritime Traffic, 591 UNTS 265 (entered into force 5 March 1967), include provisions of relevance to disaster responses but do not have the primary aim of regulating international humanitarian assistance. There are also multilateral conventions that regulate specific types of human-made disasters, such as the 1986 Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency, 1457 UNTS 133 drawn up following the Chernobyl nuclear disaster. However, it was only during the 1990s that a broader conception of the legal framework for responses to natural and human-made disasters became apparent, to a large part through the work of the Red Cross Red Crescent Movement, academic institutes such as the International Institute of Humanitarian Law (IIHL), and articles such as R Hardcastle and A Chua, 'Humanitarian assistance: towards a right of access to victims of natural disasters', 325 *International Review of the Red Cross*, December 1998, 589, and P Walker, 'Victims of natural disaster and the right to humanitarian assistance: a practitioner's view', 325 *International Review of the Red Cross*, December 1998, 611.

Operations[12] and the Framework Convention on Civil Defence Assistance[13], similarly provide limited guidance in determining the limits of what constitutes humanitarian assistance. Reflecting the specific aims and objectives of civil defence organisations, Article 1(d) of the Framework Convention states:

> 'Assistance' means any action undertaken by the Civil Defence Service of a State for the benefit of another State, with the objective of preventing, or mitigating the consequences of disasters. This includes all duties assigned to the Civil Defence Service of the Parties and accepted by the Beneficiary Parties, potentially with the assistance of any other partner.

The Tampere Convention meanwhile does not provide a definition of 'assistance' but does clarify that 'relief operations' encompasses 'those activities designed to reduce loss of life, human suffering and damage to property and/or the environment caused by a disaster'.[14] Other international sources have been equally reluctant to provide a detailed definition of assistance, with GA Resolution 46/182 simply calling on States to facilitate the work of humanitarian agencies, in particular in the supply of food, medicines, shelter and health care.[15] However, the non-binding Guiding Principles on a Right to Humanitarian Assistance developed in 1993 did identify specific actions:

> Humanitarian assistance may consist of any material indispensable to the survival of victims, such as foodstuffs, water, medication, medical supplies and equipment, minimum shelter, clothing; of services, such as medical services,

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[12] Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (1998), 2296 UNTS 5 (entered into force 8 January 2005).

[13] Framework Convention on Civil Defence Assistance, International Civil Defence Association, 2172 UNTS 213 (entered into force 23 September 2001).

[14] Article 1(12).

[15] *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res. 46/182, 19 December 1991, Annex, Principle 6.

> tracing services, religious and spiritual assistance, as well as civil defence, in conformity with the tasks defined in international humanitarian law.[16]

While such a definition attempts to give guidance on the types of material and services that should be considered as humanitarian, the expanding concept of humanitarian action and increased awareness of the interconnections between 'humanitarian' actions and long-term developmental needs of communities means that humanitarian agencies tend to stress a broad definition of humanitarian assistance that encompasses building resilience and preventative measures.[17] UNOCHA, as the global co-ordinating agency, defines 'humanitarian assistance' as: 'Aid that seeks to save lives and alleviate suffering of a crisis-affected population … Assistance may be divided into three categories – direct assistance, indirect assistance and infrastructure support – which have diminishing degrees of contact with the affected population'.[18] Meanwhile, rather than focusing on a definition of 'relief', Irish Aid's Humanitarian Relief Policy[19] provides guidance on 'humanitarian needs':

> Humanitarian need arises when an individual or community (temporarily or otherwise) is no longer able to ensure its own security and survival … Humanitarian relief is the response to an identified and acute need and is intended to save and protect lives. It includes the protection of civilians and

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[16] *Guiding Principles on the Right to Humanitarian Assistance*, International Institute of Humanitarian Law (IIHL), April 1993, Principle 9. XVIIth Round Table on Current Problems of Humanitarian Law: 'The Evolution of the Right to Assistance', IIHL, San Remo, Italy, 2-4 September 1992.

[17] As noted in the 2010 Humanitarian Accountability Partnership's *Standard in Accountability and Quality Management*: 'The work of many organisations is not limited to providing humanitarian relief, but includes all types of assistance to people affected by or prone to disasters, conflict, poverty or other crises. The dividing line between humanitarian and development assistance is fluid. For example, activities such as disaster risk reduction include both types of assistance and, over time, an organisation may provide both disaster relief and development aid to the same group of people', 2.

[18] UNOCHA, *Glossary of Humanitarian Terms in relation to the Protection of Civilians in Armed Conflict*, UN Office for the Coordination of Humanitarian Affairs, Policy Development and Studies Branch (New York, 2003), 13. It should be noted that the terms and definitions in the glossary were assembled based on their common usage and understanding within a humanitarian context particularly, but not exclusively, as relating to the protection of civilians in armed conflict.

[19] Irish Aid, *Humanitarian Relief Policy*, May 2009, 7. Available at www.irishaid.gov.ie/article.asp?article=1465.

those no longer taking part in hostilities, the provision of food, water, sanitation services, shelter, health, protection and other forms of life saving assistance.

Meeting humanitarian needs through a proactive approach to disaster risk reduction and prevention measures was highlighted in the Hyogo Framework for Action 2005-2015, which emphasised the need for international cooperation and the benefit of risk assessment and early warning systems as a more cost effective approach than the provision of assistance for post-disaster response and recovery.[20] The Framework for Action recognised the importance of international law in this process: 'In the coming years, consideration should be given to ensuring the implementation and strengthening of relevant international legal instruments related to disaster risk reduction'.[21]

From an operational perspective, humanitarian assistance can be understood as encompassing actions at all phases of a disaster: disaster prevention and preparedness, relief coordination, reconstruction, protection and support services in addition to the more traditional aspects of emergency food, medical care, shelter and other relief materials. Too strict a definition of 'assistance' may ignore the diversity of regional, cultural or religious contexts in which humanitarian operations are undertaken, and the varying needs that different disaster scenarios create. Yet the lack of a universal international legal definition also reflects the disparate and limited sources of legal authority for the provision of humanitarian assistance following natural and human-made disasters. At a national level, this may mean that victims of a disaster have no

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[20] UNISDR, *Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters*, World Conference on Disaster Reduction 18-22 January 2005, Kobe, Hyogo, Japan, UN International Strategy for Disaster Reduction, Priorities for Action 2005-2015, III (b) and (i), at 4-5. As the Hyogo Framework for Action was developed through the UN International Strategy for Disaster Reduction, the UN Secretary-General reports biennially on the progress of the Framework for Action, and the UN General Assembly has produced a series of Resolutions entitled 'International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, from Relief to Development'. For example, GA Res. 63/141, 10 March 2009 welcomed the cooperation among States, humanitarian agencies, other relevant organisations and civil society in the coordination and delivery of emergency relief, and stressed the need to continue such cooperation and delivery throughout relief operations and medium- and long-term rehabilitation and reconstruction efforts, in a manner that reduced vulnerability to future natural hazards.

[21] *Hyogo Framework for Action*, 13.

domestic recourse to compel the authorities to provide adequate levels of pre- or post-disaster support.[22] Alternatively, international assistance operations may be delayed or refused due to concerns (legitimate or otherwise) as to the types of actions that may be undertaken under the heading 'humanitarian assistance'. Following Cyclone Nargis in 2008, the Myanmar government refused aid from countries it viewed as 'hostile' such as the US, UK and France, and also denied access for international experts including from UN agencies such as the World Food Programme.[23] Meanwhile, despite the fact that the Haitian government invited US troops into the country to assist in the immediate aftermath of the devastating January 2010 earthquake, both Fidel Castro and Hugo Chávez accused the US of leading an imperialist occupation under the guise of a humanitarian operation.[24] Nevertheless, international law is not entirely silent on the modalities or content of humanitarian assistance.

Previous attempts at codification of international responses to natural and human-made disasters have been made, most notably the adoption of the 1927 Convention establishing an International Relief Union[25] under the League of Nations, the 1982 UNITAR Model Rules for Disaster Relief Operations[26], and the 1984 draft UN Convention on Expediting the Delivery of Emergency Assistance[27]. Despite the failure of these initiatives to produce a universal international legal framework for disaster responses, international law does contain specific requirements and legal rules for the provision of humanitarian assistance, and useful analogies can be drawn

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[22] As noted by the IFRC, most countries do not have special laws in place for facilitating and regulating international relief. *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, International Federation of Red Cross and Red Crescent Societies (Geneva: 2007), 4. Hereinafter 'IDRL Guidelines'.

[23] S Ford, 'Is the Failure to Respond Appropriately to a Natural Disaster a Crime Against Humanity? The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis', 38 *Denver Journal of International Law & Policy* 2009-10, 227, 229-231.

[24] *US troops withdrawing from Haiti*, R Carroll, The Guardian, 8 March 2010.

[25] League of Nations, *Treaty Series*, vol.135, p247. For background to the IRU, see: P MacAlister-Smith, 'The International Relief Union: Reflections on the Convention Establishing an International Relief Union of July 12, 1927', 54 *Tijdschrift voor Rechtsgeschiedenis* 1986, 363.

[26] M el Baradei, *Model Rules for Disaster Relief Operations*, Policy and Efficacy Studies No. 8, UN Institute for Training and Research (UNITAR): 1982.

[27] A/39/267/Add.2 – E/1984/96/Add.2, 18 June 1984.

from other branches of international law.[28] Geneva Convention IV Relative to the Protection of Civilian Persons in Times of War[29] and Additional Protocols I[30] and II[31] provide the only universal treaty provisions explicitly recognising a right to humanitarian assistance for civilians, albeit that the rights are limited in scope and only applicable in armed conflicts.[32] As much of the academic and practitioner analysis of humanitarian assistance and humanitarian interventions have revolved around the provision of assistance in armed conflicts[33], international humanitarian law and international human rights law currently provide a key source of legal provisions and practice regarding access to and delivery of humanitarian assistance. Relevant provisions can also be found in refugee and displaced persons law and in international criminal law, and there is increasing recognition of the interconnection and overlap, as well as gaps, between these various branches of international law.[34]

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[28] For a comparison between the legal provisions for humanitarian assistance in the international humanitarian law of armed conflict and the rules applicable in disaster settings, see: D Fisher, 'Domestic regulation of international humanitarian relief in disasters and armed conflict: a comparative analysis', *International Review of the Red Cross*, Vol. 89, No. 866, June 2007, 345-372.

[29] Geneva Convention IV Relative to the Protection of Civilian Persons in Times of War, 973 UNTS 286 (entered into force 21 October 1950). Hereinafter 'GC IV'.

[30] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 4 (entered into force 7 December 1978).

[31] Protocol II Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 610 (entered into force 7 December 1978).

[32] Within GC IV, Article 49 confers limited rights to accommodation, hygiene, health, safety and nutrition during transfers or evacuations of civilians by an Occupying Power; Article 50 covers the situation of children, in particular unidentified, orphaned or separated children; Article 55 confers rights to food and medical supplies for civilians under an Occupying Power; Article 56 covers medical services; Article 58 ensures access to ministers of religion and religious books and articles; while Articles 59-63 cover relief schemes, consignments and relief deliveries for civilian populations and access for humanitarian agencies. Additional Protocol I builds on the protections provided for civilians during international armed conflicts set out in in GV IV, while Additional Protocol II simply provides that relief societies, such as the Red Cross, may offer their services to the victims of an internal armed conflict. For analysis of legal provisions relating to relief for civilian populations in armed conflicts, see: K Mackintosh, *The Principles of Humanitarian Action in International Humanitarian Law*, Humanitarian Policy Group Report 5, Overseas Development Institute, March 2000 (Study 4 in *The Politics of Principle: the principles of humanitarian action in practice*).

[33] For example: R Barber, 'Facilitating humanitarian assistance in international humanitarian and human rights law', *International Review of the Red Cross*, Vol. 91, No. 874, June 2009, 371; R Stoffels, 'Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps', *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, 515-546; and A Hehir, 'Guaranteeing the Security of the State and the Individual Through Codifying A Right of Humanitarian Intervention', University of Limerick Papers in Politics and Public Administration No. 10, 2005.

[34] See, for example: T Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument', *American Journal of International Law* Vol. 77, No. 3 (July 1983),

There are, however, fundamental differences between the factual situation of natural or human-made disasters and armed conflict or refugee and internal displacement scenarios. In general, a natural or human-made disaster will consist of one key event or series of linked events (as in the March 2011 Japanese earthquake, where the earthquake and resultant tsunami led to a nuclear emergency due to damage caused to the Fukushima nuclear power plant). As such, there is generally an identifiable start point to the disaster and while the recovery and rehabilitation of the communities affected may take years, the emergency phase of the operation (and therefore the need for humanitarian assistance as opposed to long-term developmental assistance) will generally only span a period of weeks or months after the key event.[35] However, in a situation of armed conflict the needs of the population for humanitarian assistance may continue for years, depending on the resolution or otherwise of the conflict. Similarly, while a displaced persons flow may have an identifiable start point, and a similar need for emergency assistance, the continuing need for the basic necessities for survival may continue for a long period. One only needs to think of the Bhutanese refugees who fled Bhutan for Nepal in the early 1990s. The initial phase of the operation required the establishment of mechanisms for emergency shelter, medical care and food. However, 20 years later nearly 60,000 refugees remain in seven camps in eastern Nepal receiving support and protection from the international community.[36]

589-606; R Brett and E Lester, 'Refugee law and international humanitarian law: parallels, lessons and looking ahead', *International Review of the Red Cross*, Vol. 83, No. 843, September 2001, 713-726; S Jaquemet, 'The cross-fertilization of international humanitarian law and international refugee law', *International Review of the Red Cross*, Vol. 83, No. 843, September 2001, 651-674.

[35] Slow-onset disasters, such as famines, may have a less identifiable start point but national and international humanitarian responses to such disasters generally follow the same trajectory of emergency relief operations followed by longer-term recovery, rehabilitation and developmental actions.

[36] See: *Trapped by Inequality: Bhutanese Refugee Women in Nepal*, Human Rights Watch (New York: September 2003); and information on the UNHCR country operations in Nepal at: www.unhcr.org/pages/49e487856.html.

2. Limitations on State Sovereignty

The lack of a unified body of binding law regulating humanitarian responses to natural and human-made disasters has meant that until recently any discussion around specific rights to humanitarian assistance was often subsumed within the contentious debate surrounding humanitarian interventions.[37] The ending of the Cold War in the early 1990s coincided with a series of complex humanitarian emergencies that forced the international community to examine the rationale for and limitations on military interventions by the international community for humanitarian purposes. As noted by Forsyth in 1996: 'Particularly large-scale relief requires the cooperation of those with the guns on the ground, whatever diplomats and lawyers might say about a right to humanitarian assistance. The only alternative to negotiated cooperation is to overwhelm with military force, which is not a viable option in most situations owing to lack of political will, as well as moral opposition, by important parts of the international community'.[38] Yet the military interventions in Somalia, Liberia, Rwanda, Haiti, the former Yugoslavia and Timor Leste in the 1990s reflected post-Cold War aspirations that a new world order was possible whereby the international community could intervene to protect civilian populations from gross and systematic human rights abuses.[39]

These humanitarian crises and military interventions therefore refocused the international debate as to the limits of state sovereignty. The former UN Secretary-General, Kofi Annan, took up the theme of redefining sovereignty through his vision of "two sovereignties" in 1999.[40] Under this concept, state sovereignty co-exists with individual sovereignty drawn from fundamental freedoms enshrined in the UN

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[37] Indeed, in some cases the right to humanitarian assistance is conflated with the potential for forcible humanitarian interventions. See: L Fielding, 'Taking the Next Step in the Development of New Human Rights: The Emerging Right to Humanitarian Assistance to Restore Democracy', 5 *Duke Journal of Comparative and International Law* 329, 1994-1995.

[38] D Forsyth, 'International Humanitarian Assistance: The Role of the Red Cross', 3 *Buffalo Journal of International Law* 235 1996-1997, at 239.

[39] For a succinct analysis of humanitarian interventions in Iraq, Somalia, the former Yugoslavia and Liberia, see C Greenwood, 'Is there a right of humanitarian intervention?', *The World Today*, February 1993, 34.

[40] K Annan, 'Two Concepts of Sovereignty', *The Economist*, 18 September 1999.

Charter and human rights treaties. Kofi Annan stressed that the conflicts and genocide of the 1990s, and the political changes resulting from the end of the Cold War, obliged the international community to rethink how the UN responded to humanitarian crises; and why states acted in some areas of conflict, but not in others even if the level of death and suffering was equally severe.

The UN responded to this call from the Secretary-General, and Canada supported the establishment of an International Commission on Intervention and State Sovereignty (ICISS). Their final report in December 2001 set forth the concept of the "Responsibility to Protect" or R2P.[41] Simply put, the Commission advanced the idea that 'sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states'.[42]

While initially Governments were reluctant to accept this seemingly major interference in their national sovereignty, the Outcome Resolution of the Heads of State and Government at the 2005 World Summit included the Responsibility to Protect doctrine; thereby confirming that states have the primary responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In parallel, the international community must provide assistance to states in building capacity to protect their populations from such international crimes; as well as assisting states before crises and conflicts break out. The international community also has a responsibility to take timely and decisive action to prevent and halt such crimes when a state is manifestly failing to protect its population.[43] While there have been subsequent calls to apply the R2P doctrine in a range of settings, from Darfur to the Democratic Republic of Congo to Libya, Governments and the UN have been slow to expressly invoke R2P, even in cases where international action ensues.

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[41] ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, December 2001.
[42] ibid, at viii.
[43] UN, *Implementing the Responsibility to Protect: Report of the Secretary-General*, Ban Ki-Moon, A/63/677, January 2009.

In reality, there is limited international consensus on what R2P means in practice[44], and there has been uneven support for the concept by the international community. So despite the introduction of the Responsibility to Protect doctrine, the question of intervention in sovereign states for humanitarian reasons remains highly contentious.[45]

The on-going debate around the legality and morality of humanitarian interventions is instructive for two key reasons. First of all, humanitarian intervention has traditionally been viewed from the perspective of intervention to stop a Government or other forces within a country from subjecting the population to large-scale human rights abuses. This was predominantly understood to occur in times of armed conflict, either of an international or non-international nature.[46] There was little, if any, discussion of forcible humanitarian interventions in the context of providing humanitarian assistance in non-conflict settings until 2008 and the perceived lack of response by the Myanmar Government to the needs of the victims of Cyclone Nargis.[47] Furthermore, while there may be an understandable focus on military enforcement actions, interventions by one state into the affairs of another

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[44] See, for example: R Cohen, 'The Burma Cyclone and the Responsibility to Protect', Brookings Institute, paper presented at the Congressional Briefing on Security for a New Century, 21 July 2008.

[45] For arguments supporting a broad application of humanitarian interventions, see: N Dorr, 'Humanitarian Intervention – Challenges for the International Community on the Eve of a New Century', 1999, *Trócaire Development Review*, 17-37. For counter arguments, see: F Weissman, '"Not In Our Name": Why Médecins Sans Frontières Does Not Support the "Responsibility to Protect"', *Criminal Justice Ethics*, Vol. 29, No. 2, August 2010, 194-207.

[46] See for example: J Dungel, 'A Right to Humanitarian Assistance in Internal Armed Conflicts Respecting Sovereignty, Neutrality and Legitimacy: Practice Proposals to Practical Problems', *Journal of Humanitarian Assistance*, May 2004, available at: http://sites.tufts.edu/jha/archives/838; and Y Dinstein, 'The Right to Humanitarian Assistance', *Naval War College Review*, Autumn 2000, 77–92.

[47] In May 2008 Cyclone Nargis killed at least 138,000 people and affected over 2.4 million in Myanmar. The ruling junta in Myanmar was extremely reluctant to allow Western aid agencies to access the victims of the cyclone, despite reports that the national response was simply unable to cope with the scale of the disaster. Arguing under the Responsibility to Protect doctrine, for the first time some donor Governments raised the prospect of military intervention to provide humanitarian assistance to the victims of a natural disaster. Ultimately, diplomatic and humanitarian pressure ensured that limited aid was provided to the victims without the need for military action, but this aid arrived weeks after the event and in much less quantities than could have been provided. See generally: Ford, *Failure to Respond*; J Wong, 'Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism', 84 *Tulane Law Review* 219 2009-2010; and TR Jackson, 'Bullets for Beans: Humanitarian Intervention and the Responsibility to Protect in Natural Disasters', 59 *Naval Law Review* 1 2010.

state do not necessarily require the use of force.[48] It is therefore important for any proposed regulation of international humanitarian responses to separate 'humanitarian interventions' from 'humanitarian assistance'.

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

As the UN agency responsible for promoting the codification and progressive development of international law, and considering the contentious debates over the acceptable limitations of state sovereignty in the face of large-scale human suffering, it is perhaps surprising that the International Law Commission (ILC) had not examined the issue of state responses to disasters before 2006. However, the extent of devastation across 13 countries that resulted from the 2004 Indian Ocean Tsunami starkly highlighted both the strengths and shortcomings of international humanitarian responses to massive natural disasters. The unprecedented geographic reach of the Tsunami, as well as the level of destruction in regions such as Aceh Province in Indonesia and in eastern and southern Sri Lanka, stretched the emergency response capacities of both national and international humanitarian agencies.[49] The subsequent conclusion of the Hyogo Framework for Action in 2005, and the work of the IFRC in promoting international disaster response laws, were instrumental to the inclusion of the protection of persons in the event of disasters on the ILC's programme of work. Considering the limited specific provisions of international law for the ILC to draw upon, the topic has progressed with unusual rapidity. Eduardo Valencia-Ospina was appointed as Special Rapporteur in 2008, and has already introduced four reports.[50]

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[48] Cohen, *The Burma Cyclone and the Responsibility to Protect*.

[49] For analysis of the Tsunami Evaluation Committee's work in evaluating the international response to the Indian Ocean Tsunami, see: J Telford and J Cosgrave, 'The international humanitarian system and the 2004 Indian Ocean earthquake and tsunamis', *Disasters*, 2007, 31(1): 1-28. See also: D Fidler, 'Disaster Relief and Governance after the Indian Ocean Tsunami: What Role for International Law?', 6 *Melbourne Journal of International Law* 458 2005.

[50] Preliminary Report, 8 May 2008, A/CN.4/598; Second Report, 7 May 2009, A/CN.4/615; Third Report, 31 March 2010, A/CN.4/629; and Fourth Report, 11 May 2011, A/CN.4/643. For analysis of

Moreover, following the ILC meetings in 2011, eleven draft articles have now been provisionally adopted along with draft Commentaries on articles 1-5.[51]

The specificity of legal requirements in a disaster setting have been recognised by the ILC[52], and as set out in draft article 2 the express purpose of the 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'. As such, the ILC is proposing a balancing of needs-based and rights-based approaches to disaster responses and has noted that these two approaches are not mutually exclusive. However, the draft articles to date have not included a definition of what 'humanitarian assistance' is, with the Commentaries noting instead that the use of the phrase 'essential needs' in draft article 2 is intended to refer to those needs related to survival or similarly essential needs in the aftermath of a disaster.[53] While such a formulation provides scope for an expansive view of the needs of survivors of a disaster, it could also be read in the more traditional sense of emergency food, shelter and medical care to the exclusion of broader rights such as the right of survivors and communities to actively participate in the delivery of support and services. Nevertheless, the Commentaries further note that the inclusion of the phrase 'with full respect for their rights' is intended to include the complete range of international human rights, such as the right to life, as well as rights acquired under the domestic legal system of the affected country.

To date, the ILC has been wary of enumerating the rights that may apply in the context of a disaster, with draft article 8 simply stating that: 'Persons affected by

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the ILC's work, see: A Pronto, 'Consideration of the Protection of Persons in the Event of Disasters by the International Law Commission', 15 *ILSA Journal of International & Comparative Law* 2008-09, 449; and J Benton-Heath, 'Disasters, Relief, and Neglect: The Duty to Accept Humanitarian Assistance and the Work of the International Law Commission', 43 *New York University Journal of International Law & Policy* 2010-11, 419.

[51] The text of the Commentaries can be found at: Official Records of the General Assembly, Sixty-fifth Session, Supplement No 10 (A/65/10), Chapter VII, para 331.

[52] Draft article 1 defines a 'disaster' as: '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'.

[53] See: ILC, *Commentaries*, draft article 2.

disasters are entitled to respect for their human rights'. The Chairperson of the Drafting Committee that examined draft article 8 has explained that the article is intended to reflect the broad spectrum of international and national human rights, including under customary international law, but also potential limitations of such rights, for example by means of derogations set out in international human rights law.[54] However, draft article 8 is intended to complement the commitment provided in draft article 7 that: 'States, competent inter-governmental organisations and relevant non-governmental organisations shall respect and protect the inherent dignity of the human person'. As explained by the Chairperson of the Drafting Committee, the phrase 'inherent dignity of the human person' is intended to reflect the wording of the International Covenant of Civil and Political Rights.[55] The references to rights, human rights and human dignity should also be read in conjunction with the requirement set out in draft article 6 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'. Taken together, draft articles 6-8 potentially provide a strong basis for ensuring both the rights and needs of people affected by disasters are met, and reflect the recognition that the aim of the ILC work is the protection of persons in the event of disasters and so individuals must remain at the heart of the discussions.[56]

The manner in which emergency responses to disasters interact with those affected by disasters is further elaborated in draft article 9 through the duty of an affected state to ensure the protection of persons and provision of disaster relief and assistance on its territory, and the corresponding right of the affected state to assume the primary responsibility for the direction, control, coordination and supervision of humanitarian activities on its territory. Moreover, should the extent of a disaster exceed the capacities of the national authorities, the affected state has an obligation to seek international assistance and while the provision of external assistance requires

[54] See: ILC, *Statement of the Chairperson of the Drafting Committee*, Protection of Persons in the Event of Disasters, 20 July 2010, 7-9.
[55] Article 10(1) of which reads: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. See: *Statement of the Chairperson*, 2010, 6.
[56] See for example: Provisional Summary Record of the 3057th ILC Meeting, A/CN.4/SR3057, 4 June 2010, Ms Jacobsson.

the consent of the affected state, such consent should not be withheld arbitrarily.[57] The Special Rapporteur has additionally proposed a draft article that sets out the right of states, the UN, and other competent inter-governmental and non-governmental organisations to offer their assistance to an affected state, although the ILC did not have time to consider this draft article during their sessions in 2011.

Drawing on the UN Charter and reflecting the awareness that international responses to natural and human-made disasters are predicated on the responses of states (both states affected by disasters and states offering their support), the conceptual framework for the draft articles has been identified as the duty of international cooperation.[58] Additionally, the relationship between the international humanitarian law of armed conflict and humanitarian assistance in disaster settings is addressed in draft article 4 which clearly states that the draft articles do not apply in situations where the rules of IHL apply. Nevertheless, while there has been general agreement on the broad content and structure of the draft articles, questions remain on sensitive issues including the likely impact on state sovereignty and the principle of non-intervention in the domestic affairs of states. Despite the ILC confirming that the Responsibility to Protect (R2P) doctrine would not play a role in their work on the topic[59], Alain Pellet announced during the July 2011 sessions that he believed the Commission had not provided sufficient attention to the concept, and that R2P could or should be the entire thrust of the draft articles.[60] Some States have expressed support for such a position and have maintained that R2P should not be excluded

[57] Draft article 10 (Duty of the affected state to seek assistance) and draft article 11 (Consent of the affected state to external assistance).

[58] For discussion by the Special Rapporteur of the international duty of cooperation, see: Provisional Summary Record of the 3015th ILC Meeting, A/CN.4/SR.3015, 14 July 2011, 14. See also draft article 5 (Duty to cooperate) and the Commentaries on draft article 5.

[59] For a summary of debates on the applicability of R2P, see: Official Records of the General Assembly, Sixty-third Session, Supplement No 10 (A/63/10), Chapter IX, paras. 247-250. For confirmation on the non-applicability of R2P, see: Official Records of the General Assembly, Sixty-fourth Session, Supplement No 10 (A/64/10), Chapter VII, para 164. The Irish Government has explicitly supported the Special Rapporteur's view that the concept of R2P does not apply in disaster response. See the statement by Ireland in the summary of the 22nd Meeting of the UNGA Sixth Committee of 2 November 2009 (A/C.6/64/SR.22), at para 14.

[60] Provisional Summary Record of the 3102nd ILC Meeting, A/CN.4/SR.3102, 11 July 2011.

from the Commission's deliberations.[61] In contrast, Stephen Vasciannie has argued that:

> People might be dying at the hands of a recalcitrant or incompetent Government, and the need to respect the most basic human rights might plead urgently in favour of a relief effort. The answer to that dilemma [is] not to allow intervention, but to encourage diplomatic action through the United Nations and by other peaceful means. In the case of disaster relief, the virtuous end of saving lives [does] not justify means that involve[s] taking lives.[62]

Considering that the UN Secretary-General has already made clear that any expansion of the Responsibility to Protect doctrine beyond the four enumerated international crimes of genocide, war crimes, ethnic cleansing and crimes against humanity would require the Member States of the UN to expressly do so[63], it is unlikely that the ILC will seriously consider progressively developing the international law on humanitarian interventions in disaster settings. Indeed, the extent of codification or progressive development that the draft articles should employ in general has also been debated but remains unanswered. As noted by the Special Rapporteur in his Preliminary Report in 2008: 'given the amorphous state of the law relating to international disaster response, striking the appropriate balance between *lex lata* and *lex ferenda* poses a singular challenge'.[64]

D. FUNDAMENTAL QUESTIONS OF FORM AND FUNCTION

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[61] See: Poland (A/C.6/64/SR.21, para 76); Hungary (A/C.6/65/SR.21, para 33); and Finland (on behalf of the Nordic countries) (A/C.6/65/SR.22, para 31) requesting clarification on the scope and limits of an affected state's exercise of its primary responsibility to protect persons affected by a disaster.

[62] Provisional Summary Record of the 2980th ILC Meeting, A/CN.4/SR.2980, 17 July 2008, Mr Vasciannie.

[63] See: *Implementing the Responsibility to Protect: Report of the Secretary-General*, Ban Ki-Moon, A/63/677, January 2009, 8.

[64] Valencia-Ospina, *Preliminary Report*, para 59.

1. Binding or Non-Binding?

If one turns from the question of content to what ultimate form the draft articles should take, a comment that appears regularly during interventions made by states in the UN General Assembly Sixth Committee and by ILC members themselves is that the work should be 'pragmatic'. The original suggestion from the Codification Division of the UN Office of Legal Affairs, which provides the ILC Secretariat, was for the elaboration of a set of provisions which would serve as a legal framework for the conduct of international disaster relief activities and clarify the core legal principles and concepts. The Secretariat proposal in 2006 identified a framework convention as a possible instrument for the finalised draft articles. The model suggested was the 1946 Convention on the Privileges and Immunities of the UN which, in regard to privileges and immunities, serves as a reference point and is routinely incorporated by reference into agreements between the UN, states and other entities. The Secretariat suggested that the ILC text could likewise serve as the basic reference framework for specific agreements between various actors in humanitarian response.[65] No final decision has yet been made, either by the Special Rapporteur or the ILC, as to the preferred form that the draft articles will take; although several members have stressed the need to come to an early decision on this point.[66] States meanwhile have been more reticent, with only Poland and Ghana explicitly supporting a binding convention format for the final draft articles. Most states, including Ireland, have reserved their positions on the final form of the draft articles, although certain states, in particular the UK, have expressed their preference for non-binding guidelines or a set of principles.[67]

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[65] General Assembly Official Records, Sixty-first session, Supplement No 10 (A/61/10), Annex C, para 24.

[66] See, in particular, the records of the 2979th to 2982th ILC meetings in July 2008 (A/CN.4/SR.2979, A/CN.4/SR.2980, A/CN.4/SR.2981, A/CN.4/SR.2982).

[67] See, in particular, summary of the 22nd to 25th meetings of the UNGA Sixth Committee in 2008 (A/C.6/63/SR.22 – A/C.6/63/SR.25), and summary of the 20th to 22nd meetings of the UNGA Sixth Committee in 2009 (A/C.6/64/SR.20 – A/C.6/64/SR.22). The Irish Delegation has not made any references to the final form of the draft articles in their statements in the UNGA Sixth Committee in 2009 and 2010. See: Summary of the 22nd meeting of the UNGA Sixth Committee of 2 November 2009 (A/C.6/64/SR.22), and Summary of the 24th meeting of the UNGA Sixth Committee of 29 October 2010 (A/C.6/65/SR.24).

An interesting analogy can be made with the UN Guiding Principles on Internal Displacement.[68] During the 1980s and early 1990s, a wide range of humanitarian agencies, academics and states had called for the elaboration of international norms covering large-scale non-international population movements. So following a request from the UN Commission on Human Rights in 1993, a set of guiding principles were developed by a group of international legal experts, and subsequently presented by the Representative of the Secretary-General on Internally Displaced Persons to the Commission on Human Rights in 1998. The Guiding Principles have been widely endorsed by UN agencies, humanitarian organisations and states, and were subsequently revised in 2004. The Guiding Principles set out 30 principles covering the 'life-cycle' of displacement, namely: protection from displacement *ab initio*; protection of fundamental rights during displacement; the provision of humanitarian assistance; and durable solutions of return, resettlement or reintegration. The original request from the Commission on Human Rights was to develop 'an appropriate framework … for the protection of internally displaced persons'. However, the request was careful to avoid the term 'legal' when referring to the development of this framework.[69] The Guiding Principles are intended to provide protection to people forced to flee their homes as a result of, or in order to avoid, the effects of armed conflict, situations of generalised violence, violations of human rights, or natural and human-made disasters.[70] As such, they avoid some of the definitional problems faced by UNHCR and national authorities in the refugee determination process, and are intended to provide protection to a broad range of people forced to move internally within a country. Moreover, by expressly including victims of natural and human-made disasters, the Guiding Principles provide a detailed framework for the provision of assistance to those internally displaced by disasters.

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[68] UN, Commission on Human Rights, *The Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2 (1998).

[69] W Kälin, 'How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework', presentation at Roundtable Meeting, Ralph Bunche Institute for International Studies, 19 December 2001; and R Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting', 10 *Global Governance* 2004, 459.

[70] Introduction, para 2, Guiding Principles on Internal Displacement.

Despite the normative format of the Guiding Principles, they are not an international treaty so do not carry the binding force of international law. In his Preface to the annotated version of the Guiding Principles in 2008, Walter Kälin, Representative of the UN Secretary-General on the Human Rights of IDPs states:

> These Principles, although not a binding legal instrument, have … gained considerable authority. [T]he September 2005 World Summit unanimously recognized them as an "important international framework for the protection of internally displaced persons", and the General Assembly has not only welcomed "the fact that an increasing number of States, United Nations agencies and regional and non-governmental organisations are applying them as a standard" but also encouraged "all relevant actors to make use of the Guiding Principles when dealing with situations of internal displacement".[71]

It has been argued that this wide-spread acceptance by states stems from the fact that the Guiding Principles represent a restatement of existing international law, rather than creating new rights for IDPs.[72] To date, at least 20 states have adopted national laws or policies based on the Guiding Principles, including states with large IDP populations such as Colombia, Sri Lanka and Uganda.[73] Arguably, the process that led to the creation of the Guiding Principles, whereby a group of international legal experts were convened by a Representative of the Secretary-General rather than through the usual deliberative procedures of the General Assembly, ILC or Security

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[71] W Kälin, *Guiding Principles on Internal Displacement: Annotations*, ASIL & Brookings-Bern Project on Internal Displacement, Studies in Transnational Legal Policy, No 38 (2008), vii. (Footnotes omitted).

[72] Cohen, *Guiding Principles*, 473-474. Cohen also argued another reason for the wide-spread support was the inclusive process by which they were developed. This meant that leading members of the Inter-Agency Standing Committee, which includes UN agencies, the Red Cross Red Crescent Movement and inter-governmental and non-governmental humanitarian agencies endorsed the Guiding Principles soon after their publication. See also: H Entwisle, 'Tracing Cascades: The Normative Development of the UN Guiding Principles on Internal Displacement', 19 *Georgetown Immigration Law Journal* 2004-05, 369, 384.

[73] R Cohen, 'Reconciling R2P with IDP Protection', Brookings-LSE Project on Internal Displacement, March 2010, 8. Available at: www.brookings.edu/articles/2010/0325_internal_displacement_cohen.aspx.

Council, allowed for a more inclusive and less state-centric approach.[74] As Walter Kälin has observed: 'where the Guiding Principles were met with resistance, it was not because of their content but because of a suspicion that they might be binding regardless of all assertions to the contrary'.[75]

The Guiding Principles have therefore provided a flexible approach, by establishing rights and responsibilities in regard to IDPs, while at the same time allowing states to incorporate them into their domestic laws in a manner that reflects their national context.[76] It follows that there could be a correspondingly strong argument for the ILC draft articles on the protection of persons in the event of disasters to take a non-binding form, as a means of informing and guiding domestic and regional approaches without binding states to additional international obligations.

However, General Assembly Resolution 46/182 of 1991[77] has already set out non-binding 'Guiding Principles' for UN humanitarian responses, and the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief[78] elaborates ten points of principle which non-governmental humanitarian organisations should voluntarily adhere to in their disaster response work. At the state level, in 2007 the IFRC introduced Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance[79] which are aimed at local and national state authorities to promote the development of domestic legal preparedness for disasters. To complement the

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[74] In addition to the work undertaken by the independent legal experts, a series of meetings were organised with regional and international organisations, humanitarian and human rights NGOs, women's and children's advocacy groups, legal associations, and research institutions. The Guiding Principles were finalised at a conference of fifty international experts in Vienna in 1998, hosted by the government of Austria. For background see: www.idpguidingprinciples.org.

[75] Kälin, *Guiding Principles*, 7.

[76] See: Entwisle, *Tracing Cascades*; and AM Abebe, 'Special Rapporteurs as Law-Makers: the developments and evolution of the normative framework for protecting and assisting internally displaced persons', 15 *International Journal of Human Rights* 2, February 2011, 286.

[77] Strengthening of the coordination of humanitarian emergency assistance of the United Nations, GA Res. 46/182 of 19 December 1991.

[78] 'Resolutions of the 26th International Conference of the Red Cross and Red Crescent: Resolution 4', *International Review of Red Cross*, No. 310, 1996.

[79] IFRC, *IDRL Guidelines*.

Guidelines, the IFRC is currently working on a draft national Model Act to further assist states to integrate the recommendations of the Guidelines into their national laws.[80] Moreover, the Guiding Principles on Internal Displacement themselves specifically cover persons displaced internally as a result of natural disasters. The ILC is well aware of the need not to duplicate instruments that are already in existence.

Nevertheless, the ILC is also mindful of the potential importance of non-binding texts. Robert Rosenstock, former Chairperson of the ILC, has stated that 'codification of *lex lata* may be no less effective if contained in a paragraph of a report rather than in an article of a multilateral treaty'.[81] In the context of the ILC draft articles on State Responsibility, James Crawford noted that although the eventual product of more than 40 years deliberations was likely to be a statement or text appended to a General Assembly resolution, he doubted whether this would affect the influence that the text would have, as the draft articles on state responsibility were being cited by courts and tribunals and influencing the development of international law even prior to their formal conclusion.[82]

Yet it can be argued that the topic of international disaster response law requires a more systematic approach to codification. While the Guiding Principles on Internal Displacement have proven to be an innovative and effective instrument[83], the context of disaster response may require a different approach. There is already a plethora of non-binding resolutions, codes of conduct, and minimum standards

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[80] The IFRC is working in conjunction with the UN Office for the Coordination of Humanitarian Affairs (UNOCHA) and the Inter-Parliamentary Union to draft a Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance. A pilot version of the Model Act was presented to states and humanitarian agencies at the 31st International Conference of the Red Cross Red Crescent Movement in November 2011. A consultation draft of the Model Act is available at: www.ifrc.org/en/what-we-do/idrl/model-act-on-idrl.

[81] R Rosenstock, 'The ILC and State Responsibility', 96 *American Journal of International Law* 2002, 792, 792.

[82] J Crawford, 'Responsibility to the International Community as a Whole', 8 *Indiana Journal of Global Legal Studies* 2, Spring 2001, 303, 310-111. See also: D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority', 96 *American Journal of International Law* 2002, 857.

[83] Both Walter Kälin and Roberta Cohen have argued against the creation of a multilateral binding convention on IDPs. See: Kälin, *How Hard is Soft Law*, 2-5; and Cohen, *Guiding Principles*, 475-476.

relating to humanitarian assistance, which cover both humanitarian principles and operational responses.[84] There are also a wide range of bilateral, trilateral and regional instruments relating to disaster risk reduction, civil defence and mutual assistance that have a direct bearing on the topic.[85] In light of this, the question that the ILC has not yet addressed is whether an additional non-binding, but potentially authoritative, instrument would ultimately improve outcomes for persons affected by natural and human-made disasters.[86] Alternatively, would a binding multilateral treaty ensure a greater level of compliance by states, albeit to potentially less rigorous standards?

2. The Framework Convention Approach

International disaster response laws are still evolving, and the Special Rapporteur noted in his Preliminary Report that 'the special characteristics of such a novel undertaking might make it advisable to arrive at an early understanding of what the final form should be, especially if guidelines, rather than a convention, might make the final draft more acceptable to States'.[87] The possible forms that international legal texts can take are multitudinous. In 2005, Dr Boško Jakovljević, who has acted as a legal advisor to the Red Cross Red Crescent Movement since the mid-1960s, identified the following forms of international instrument that could be relevant for international disaster response laws:

> a declaration of basic or core principles; a declaration of operative principles and rules; model bilateral or regional agreement; a declaration by one of the UN bodies on the need for the consolidation of the rules called "*IDRL*"; guidelines

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[84] See: Cubie, *An Analysis of Soft Law Applicable to Humanitarian Assistance*.

[85] See: *Law and Legal Issues in International Disaster Response: A Desk Study*, International Federation of Red Cross and Red Crescent Societies (Geneva: 2007); and *Secretariat Memorandum on the Protection of Persons in the Event of Disasters*, 60th Session of the ILC (11 December 2007, A/CN.4/590).

[86] Arnold Pronto, Senior Legal Advisor to the Secretariat of the ILC, has highlighted that in any event it may not be correct to portray the status of a particular instrument as being 'non-binding' when some of its provisions may actually be binding at the international level, either by virtue of an existing treaty arrangement or customary rule, or binding internally within a state by virtue of its domestic law. See: Pronto, *Consideration of the Protection of Persons*, 455-57 for a discussion of whether the ILC draft articles should be binding or non-binding.

[87] Valencia-Ospina, *Preliminary Report*, para 60.

> or a handbook for those engaged in these operations; set of recommendations by a high international body, such as the UN General Assembly or ECOSOC, or the International Red Cross and Red Crescent Conference; set of principles and rules on the powers and role of the international co-ordinator; regional and recommendable rules and good practices; amendments to the international conventions regulating specific aspects of relief operations.[88]

Considering such a wide range of potential texts, one may well ask: what is the most appropriate form for codification of international disaster response law, and will the choice of instrument potentially affect the outcomes for persons affected by disasters?

As highlighted during the ILC discussions in 2008, the ultimate form of the draft articles will be influenced by the balance between codification and progressive development of international law undertaken. Georg Nolte has argued that a binding convention would make sense only if those states that typically hesitated to allow a free flow of disaster relief would be likely to ratify it, and such states would ratify a convention only if it was a credible effort to codify existing law and ensure good practice. If, on the other hand, the emphasis was placed on progressive development, then guidelines would be more appropriate.[89] Donald McRae, meanwhile, has argued that the pragmatic goal was to lay down a framework of rules, guidelines or mechanisms that would facilitate practical international cooperation in responding to a disaster, in order to make such responses more effective and thus provide protection to individuals who were entitled to it. Nevertheless, he observed that such principles or guidelines would involve placing obligations on states, international organisations

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[88] B Jakovljević, 'Some Reflections on International Disaster Relief Law', paper presented at International Institute of Humanitarian Law conference, in panel discussion on 'The Protection of Human Beings in Disaster Situations – The Tsunami Tragedy – International Solidarity', San Remo, Italy, 8-10 September 2005, 171. It should be noted that Dr Jakovljević cautioned that a universal international convention, or even a framework convention, which contained specific and concrete obligations should only be considered at a later date, when international disaster response laws have attained a certain degree of general recognition on the main principles and rules. One could argue that in the intervening years the involvement of the ILC in developing draft articles on the protection of persons in the event of disasters is helping to consolidate the main principles and rules.

[89] Provisional Summary Record of the 2980th ILC Meeting, A/CN.4/SR.2980, 17 July 2008, Mr Nolte.

and non-governmental organisations which might ultimately mean the conclusion of a draft convention.[90]

The arguments against proceeding to a diplomatic conference to produce a multilateral convention are well-known: the length of time it takes to develop international consensus, particularly in novel areas of the law; the risk that states will unpick or dilute carefully crafted compromises developed by the ILC in the course of their deliberations; the possibility that the topic will become politicised; if a text is finally agreed the lack of willingness by states to ratify treaties; and finally the effect that reservations made by states have on the normative content of treaties, particularly human rights treaties.[91] With challenges like those, one would be forgiven for despairing for the future of any multilateral convention process. However, while noting that deferring a decision on form can focus delegates' minds on the content of a text, James Crawford pointed out in his First Report as Special Rapporteur on State Responsibility that the law of treaties was initially thought not to be appropriate for codification or progressive development. It was even argued that presenting the topic in the form of a treaty itself was logically excluded. Yet the Vienna Convention on the Law of Treaties is recognised as having had a more lasting and beneficial effect as a binding multilateral convention than it would have had as a non-binding resolution or declaration.[92] Meanwhile, during the debates on the ultimate form of the draft articles on state responsibility, it was argued that it would be unrealistic to expect the General Assembly to adopt the text as a declaration without first substantially amending the draft articles. Furthermore, there was no guarantee that states would not

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[90] *Provisional Summary, 2980th Meeting*, Mr McRae.

[91] D Bodansky and J Crook, 'Symposium: The ILC's State Responsibility Articles: Introduction and Overview', 96 *American Journal of International Law* 2002, 773, 790-791. See also: Kälin, *How Hard is Soft Law*, 2-5; Cohen, *Guiding Principles*, 475-476; and Caron, *Articles on State Responsibility*, 863-865.

[92] J Crawford, First Report on State Responsibility, A/CN.4/490, 24 April 1998, para 41. Although, it should be noted that Crawford has also argued that 'the Vienna Convention has hardly ever been applied, as a treaty, to other treaties … [Therefore] there has not yet been a case where it would clearly have made a difference to the result whether the Vienna Convention applied *qua* treaty, as distinct from *qua* authoritative statement of the customary international law of treaties'. See: Crawford, *Responsibility to the International Community*, 310.

attach interpretative declarations to the instrument; therefore a General Assembly declaration entailed the same problems as a convention, but without the advantages.[93]

Indeed, writing in 1985 just after the publication of the unsuccessful draft Convention on Expediting the Delivery of Emergency Assistance, Peter MacAlister-Smith noted 'an international declaration on humanitarian assistance ... should not be expected to contribute greatly to solving the problematic aspects of international relief action. Such a declaration is likely to be simply an expression of aspirations'.[94] He continued: 'It may be most productive in the long run to proceed cautiously with initial efforts to codify relief law. A set of technical rules of a relatively detailed and specialised nature which could be adopted and applied without deviating from currently accepted practices could prove to be a useful and realistic way of expediting international relief'.[95]

The Secretariat's suggestion of a framework convention has received a certain level of support within the ILC, with Alain Pellet describing the approach as an appropriate compromise between a traditional treaty which is 'hard' in form and substance, and 'soft' instruments whose good intentions set alarm bells ringing in advance.[96] Indeed, a binding framework convention may be the most appropriate form of instrument to improve humanitarian responses. States and humanitarian actors would be able to work together from an agreed understanding of the rights and responsibilities required in disaster settings, provided such a convention works in conjunction with other regional and international agreements on mutual assistance, civil defence and disaster management. In fact, as highlighted by Shinya Murase, a framework convention may actually facilitate such bilateral, trilateral or regional agreements.[97] This approach would also recognise that international disaster response laws are still evolving and may require amendment and development in the coming

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[93] Official Records of the General Assembly, Fifty-third Session, Supplement No 10 (A/56/10), Chapter IV, para 65.

[94] P MacAlister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization*, Martinus Nijhoff Publishers, 1985, 160.

[95] ibid.

[96] Provisional Summary Record of the 2981st ILC Meeting, A/CN.4/SR.2981, 18 July 2008, Mr Pellet.

[97] *Provisional Summary*, *3102nd Meeting*, Mr Murase.

years. One can envisage an overarching framework convention which provides a solid base by ensuring agreed definitions and principles for humanitarian responses, both between parties to the convention and as an authoritative point of reference for the conclusion of bilateral, trilateral and regional agreements. Over time, this could then be followed by protocols or subsidiary agreements on technical or operational matters, similar to the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, the UNITAR Model Rules for Disaster Relief Operations, or the IFRC IDRL Guidelines and national Model Act.

Yet such a conclusion raises the question of what the normative content of such a framework convention should be. Is it intended as a convention that will facilitate the operational aspects of international humanitarian relief between states? If this is the case, then does the Framework Convention on Civil Defence Assistance provide the correct model? This Framework Convention has limited, but important, objectives: a) promoting co-operation between Civil Defence Services, particularly with regard to training of personnel and exchange of information and expertise; and b) reducing obstacles to assistance and particularly delays in intervention. Alternatively, does the Council of Europe Framework Convention on the Protection of National Minorities[98] provide a more appropriate model? By detailing a range of rights and freedoms that states must respect in regard to individuals of national minorities, the convention provides a framework for the protection of persons, as well as the cooperation of states.[99]

For the context of disaster response, the approach to be taken is perhaps more a question of emphasis. For example, is the emphasis on improving the efficiency of inter-state relationships during a disaster, allowing for expedited delivery of relief goods and assistance, thereby ensuring that people affected by a disaster have access

[98] Framework Convention on the Protection of National Minorities, Council of Europe (1995), UNTS, Vol 2151 No 37548, p243 (entered into force 1 February 1998).
[99] The Framework Convention is not without its critics, see: G Alfredsson, 'A Frame with an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures', 7 *International Journal on Minority and Group Rights*, 2000, 291.

to sufficient and appropriate support? Or is the emphasis on the individual rights and concomitant state responsibilities that arise in regard to natural and human-made disasters? Focusing on the first may help reassure states that no radical incursions into state sovereignty or interference in their domestic affairs are envisaged. However, we must not forget that there are a minority of states that may be unwilling to provide the necessary and appropriate assistance to persons in their territory who require protection. The reluctance of the Myanmar Government to accept humanitarian assistance immediately following Cyclone Nargis in May 2008 is perhaps the best known example. Yet the limited national response to the severe cholera epidemic that hit Zimbabwe in 2008 also prompted calls for forcible humanitarian interventions.[100] Ultimately, in both these cases it was diplomatic pressure from neighbouring states that had the greatest impact on allowing humanitarian access to the survivors, although it has been argued that the invocation of forcible intervention via the Responsibility to Protect doctrine by France following Cyclone Nargis assisted neighbouring states to access the survivors through diplomatic means.[101] While hard cases may make bad law, in the most recent session of the ILC Ernest Petrič argued that it is precisely the purpose of the law to regulate irregular situations, such as when states refuse to provide assistance to persons in need on their territory. It followed, he maintained, that it was on this aspect of the topic that the Commission should concentrate more.[102]

It is notable that the original memorandum from the Secretariat in 2006 was entitled 'International disaster relief law', but that the Commission decided to change the title of the topic to 'Protection of persons in the event of disasters'.[103] It has been argued that this change in the title, and therefore in the emphasis of the topic, indicates a preference for concentrating on the protection of persons and specific

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[100] See, eg: S Davies, 'Is There an International Duty to Protect Persons in the Event of an Epidemic?', III *Global Health Governance* 2 (Spring 2010).

[101] Cohen, *The Burma Cyclone and the Responsibility to Protect*.

[102] Provisional Summary Record of the 3103rd ILC Meeting, A/CN.4/SR.3103, 12 July 2011, Mr Petrič.

[103] Provisional Summary Record of the 2978th ILC Meeting, A/CN.4/SR.2978, 15 July 2008, Mr Valencia-Ospina (Special Rapporteur).

standards of treatment to which individual victims of disaster are entitled, rather than on the operational aspects of relief.[104] Yet the mere fact that the ILC is examining the protection of persons in the event of disasters risks raising expectations within the humanitarian community regarding the development of a new approach to individual rights in disaster settings. However perhaps, as advocated by Donald McRae, it is through facilitating the operational responses of states and international humanitarian actors that the ILC can ensure the greatest humanitarian results for individuals.

CONCLUSION

The international legal framework for humanitarian responses to disasters is still evolving, and like surgeons, different contexts require different instruments. So while the Guiding Principles on Internal Displacement succeeded as a non-binding document, the multitude of existing non-binding texts relevant to humanitarian responses need to be condensed and formalised. The ILC programme of work on the protection of persons in the event of disasters provides an opportunity for this to occur, and for the development of an international consensus on both the form and content of a binding text. Yet a new international law instrument will not act as a panacea for the millions of victims of natural and human-made disasters each year. More to the point, the evidence base for analysing whether or not a universal multilateral convention is the most effective means of promoting the protection of persons in the event of disasters is not available. Therefore, despite David Kennedy's warnings, one must currently proceed on the assumption that facilitating states and humanitarian actors working together from an agreed understanding of the rights and responsibilities required in disaster settings will lead to improved humanitarian

[104] *Provisional Summary, 2978th Meeting*. See also: *Provisional Summary*, *2980th Meeting*, Mr Saboia.

outcomes for the victims of a disaster.[105] This implies an interconnection and synthesis of national, regional and international legal frameworks.

It follows that focusing on developing a binding international framework of agreed responsibilities for affected states, donor states and other humanitarian agencies at all stages of a disaster has the potential to improve disaster responses, and therefore the actual outcomes for individuals affected by disasters. This necessitates a broadly state-centric approach to the final text, as the authorities of an affected state will understandably want to ensure a certain level of control and coordination of relief activities taking place on their territory. Yet non-state humanitarian actors provide the majority of humanitarian assistance, either directly or through funding received from donor governments. It is therefore of crucial importance that the international framework developed provides inter-governmental and non-governmental humanitarian actors with legal certainty and standing commensurate to the role that they play in disaster response. Furthermore, if the aim of the instrument is to provide protection to persons, then the rights of individuals and groups affected by disasters must remain at the forefront of the debate.

The ILC is engaged in a delicate balancing act, trying to ensure that the rights and responsibilities of all actors in a disaster setting (states, humanitarian agencies, local communities and individuals) are respected. If too much emphasis is placed on the right of states to non-intervention in their domestic affairs, individuals may then suffer from a lack of assistance in a time of great need. Conversely, if it is felt that too much emphasis is placed on the rights of individuals within the ILC draft articles, then states may not move towards the conclusion of a binding international legal framework for the protection of persons in the event of disasters. In recognition of the potentially insurmountable difficulties in securing international agreement on a substantive convention, the format of a framework convention should be seriously considered as a means of providing an overarching umbrella for international

[105] MacAlister-Smith argued in 1985 that: 'Relief must above all be effective, and better implementation depends on better planning, law, and organization'. See: MacAlister-Smith, *International Humanitarian Assistance*, xii.

agreement and cooperation in disaster response. However, rather than a purely technical approach as represented by the 1946 Convention on the Privileges and Immunities of the UN, the Framework Convention on Civil Defence Assistance and Council of Europe Framework Convention on the Protection of National Minorities might provide more appropriate models for consideration.