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The Right to Humanitarian Assistance in Natural and Human-Made Disasters: progress and challenges for an emerging international legal framework

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Submitted for the award of PhD in Law

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Table of Contents

Table of Contents 1
Abstract 5
Acknowledgements 6
Plagiarism Statement 7
List of Abbreviations 8

Chapter 1: Introduction 10
A. Background and Rationale for Thesis 10
i. Sovereignty in the face of a humanitarian crisis 10
ii. Regulating international humanitarian responses 12
B. Definitions 16
C. Methodological Approach 19
i. Situating thesis 19
ii. The concepts of transnational law and transnational legal process 25
a. Legal process approaches 25
b. Transnational legal process 26
iii. Juridification in disaster settings 29
iv. The application of transnational legal process to disaster response laws 31
D. Chapter Outlines 35

Chapter 2: Creation and Elaboration of Norms in International Law 39
A. Creation and Enforcement of Rights under International Law 43
i. Determining what constitutes a "human right" 43
ii. Normative stages of human rights 48
iii. Compliance with international law 52
B. Relative Normativity in International Law 55
i. Terminology: "soft law" and "non-binding normative standards" 55
ii. Normative hierarchies in international law 58
a. Conceptual basis 58
b. Normative hierarchies and a right to humanitarian assistance 61
iii. Relative normativity of non-binding sources 62
C. Limitations on Sovereignty in International Law 65

Chapter 3: The Evolution of International Legal Responses to Disasters 69
A. Foundations of the Humanitarian Imperative 69

i. Conceptual bases of "humanitarianism" 70
a. The humanitarian imperative 70
b. Humanitarian principles 72
ii. Humanitarian action in disasters 75
a. The concept of "humanitarian action" 75
b. Phases of a disaster 77
B. Conceptual Considerations for International Legal Frameworks for Disasters 82
i. Sovereignty and human rights 82
ii. Contrasting approaches: Technical and operational versus rights-based 84
iii. Binding and non-binding forms of rules 87
C. Codification and Regulation of International Disaster Operations (1927 – 2010) 88
i. The League of Nations and the International Relief Union 88
ii. Attempts at codification under the United Nations 93
iii. Structuring and coordinating humanitarian relief operations 97
a. International frameworks for humanitarian operations 97
b. Coordination of international humanitarian responses 101

Chapter 4: Towards an *Acquis Humanitaire* **104**
A. The Boundaries of "Humanitarian Assistance" 106
i. Defining "humanitarian assistance" 106
ii. Separating humanitarian intervention and humanitarian assistance 110
B. Provisions on Humanitarian Assistance in International Law 114
i. International humanitarian law of armed conflict 115
ii. International law on refugees and internally displaced persons 121
iii. International criminal law 124
a. Attacks against humanitarian personnel 124
b. International criminal liability for denial of humanitarian assistance 125
C. The Emerging *Acquis Humanitaire* 128
i. Developing a "law of …" 128
ii. Conceptual underpinnings of the "*acquis humanitaire*" 131
iii. Demarcating the "*acquis humanitaire*" 133
D. Conclusion: The Potential Crystallisation of a "Right to Humanitarian Assistance" 136

Chapter 5: The Right to Humanitarian Assistance: *lex lata* or *lex ferenda*? **139**
A. Defining a "Right to Humanitarian Assistance" 140
i. Individual right to request or receive humanitarian assistance 142
a. During armed conflicts 142

b. Following natural or human-made disasters 144
ii. Organisational right to offer humanitarian assistance 146
B. Sources of a "Right to Humanitarian Assistance" 149
i. Emergence and development of a "right to humanitarian assistance" 149
ii. A right to humanitarian assistance in disaster settings 153
iii. The right to humanitarian assistance in non-binding normative standards 158
iv. Customary international law and state practice 161
C. Conclusion: Current Status of a "Right to Humanitarian Assistance" 169

Chapter 6: Applying Human Rights Norms in Disaster Settings 174
A. Human Rights Implications of Disasters 176
i. Recognition of disasters in international human rights law 178
ii. A hierarchy of rights? 181
iii. Human rights-based approaches to disaster preparedness and response 183
iv. Accountability for disaster preparedness and response 185
B. Implementation of Human Rights Law in Disaster Settings 188
i. Classification of rights 188
ii. Human rights and the ILC draft articles on the protection of persons in the event of disasters 192
C. Juridification of Disaster Settings 195
i. Enforcement of human rights law by individuals 195
ii. Promoting compliance with human rights law within states 200
D. Conclusion: A Composite Right to Humanitarian Assistance? 202

Chapter 7: Emerging International Legal Frameworks for Humanitarian Responses to Disasters 206
A. Codification and Progressive Development of International Law 207
i. Benefits and drawbacks to codification 207
ii. Codification or progressive development? 210
B. The ILC Draft Articles on the Protection of Persons in the Event of Disasters 212
i. Scope of an international legal framework for disaster response 212
ii. The right to humanitarian assistance in the ILC draft articles 215
a. The right to request and receive humanitarian assistance 215
b. The right to offer humanitarian assistance 218
iii. Conceptual framework for the ILC draft articles 219
a. Sovereignty and non-intervention 219
b. The duty to cooperate and international solidarity 221

c. Does the Responsibility to Protect doctrine apply in disasters? 223
C. Developing International Legal Frameworks for Humanitarian Responses to Disasters 226
i. Forms of international instrument 226
ii. The Framework Convention approach 228
iii. Universal and regional approaches to codification 232
D. Proposals for Systemic Oversight of Human Rights in Disasters 234
i. Reform of the UN human rights system 235
ii. The UN Human Rights Council 237
a. Reporting via the Universal Periodic Review Process 237
b. Examination via the Special Procedures 238
iii. The UN Human Rights Treaty Bodies 240
E. Conclusion: Progress and Challenges 242

Chapter 8: Conclusions **244**
A. The Human Rights Implications of Disasters 245
B. The Emerging International Legal Framework 248
C. The Crystallisation of a Right to Humanitarian Assistance 251

Bibliography 254
Case Law 254
International Instruments 255
UN Documents 259
Articles 265
Books 280
Chapters in Edited Volumes 281
Working Papers and Presentations 283
Reports and Policy Papers 286
News Reports and Internet Resources 293

Abstract

Natural and human-made disasters cause on average 120,000 deaths and over US$140 billion in damage to property and infrastructure every year, with national, regional and international actors consistently responding to the humanitarian imperative to alleviate suffering wherever it may be found. Despite various attempts to codify international disaster laws since the 1920s, a right to humanitarian assistance remains contested, reflecting concerns regarding the relative importance of state sovereignty vis-à-vis individual rights under international law. However, the evolving *acquis humanitaire* of binding and non-binding normative standards for responses to humanitarian crises highlights the increasing focus on rights and responsibilities applicable in disasters; although the International Law Commission has also noted the difficulty of identifying *lex lata* and *lex ferenda* regarding the protection of persons in the event of disasters due to the "amorphous state of the law relating to international disaster response." Therefore, using the conceptual framework of transnational legal process, this thesis analyses the evolving normative frameworks and standards for rights-holders and duty-bearers in disasters. Determining the process whereby rights are created and evolve, and their potential internalisation into domestic law and policy, provides a powerful analytical framework for examining the progress and challenges of developing accountable responses to major disasters.

Publications arising from this thesis

- D. Cubie, 'An Enchanted Tool? Humanitarian Assistance and the ILC Draft Articles on the Protection of Persons in the Event of Disasters' (2009-2010) IV-V *Irish Yearbook of International Law* 119
- D. Cubie, 'An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?' (2011) 2 *Journal of International Humanitarian Legal Studies* 177
- D. Cubie, 'Is the Wilful Denial of Humanitarian Assistance in Natural or Human-Made Disasters a Crime Against Humanity?' (Summer 2012) *ASIL Accountability Newsletter*
- D. Cubie and M. Hesselman, 'Monitoring and Accountability of the Human Rights Implications of Disasters: Proposals for Systemic International Oversight', currently under consideration by the *Netherlands Quarterly of Human Rights*
- D. Cubie, 'Clarifying the "Acquis Humanitaire": A Transnational Legal Perspective on the Internalization of Humanitarian Norms', in *The International Law of Disaster Relief* (Cambridge University Press – forthcoming)

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I also generously received from funding from the Irish Research Council and the Faculty of Law at University College Cork, and benefitted greatly from research visits to: the Lauterpacht Centre for International Law at the University of Cambridge in August 2011; the Centre for the Study of Human Rights Law at the University of Strathclyde in April 2013; and the Department of Constitutional Law and International Law at the University of Groningen in May 2013. In particular, I would like to thank Thérèse O'Donnell for her kindness and time, even on maternity leave, while I was in Strathclyde. Likewise, I would like to thank Professor Marcel Brus, Dr André de Hoogh, Marlies Hesselman and all the researchers in the Department of Constitutional Law and International Law at the University of Groningen for their support, despite the brevity of my visit.

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Plagiarism Statement

I confirm that this work is entirely my own and does not involve any plagiarism or collusion on my part.

Signed: _____

List of Abbreviations

AP	Additional Protocols to the Geneva Conventions
ASEAN	Association of Southeast Asian Nations
AU	African Union
CERF	Central Emergency Revolving/ Response Fund
CDAC	Communicating with Disaster Affected Communities
DFID	Department for International Development (UK)
DRR	Disaster Risk Reduction
ECHO	European Community Humanitarian Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
GC	Geneva Conventions
HRC	Human Rights Council
IASC	Inter-Agency Standing Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDMC	Internal Displacement Monitoring Centre
IDP	Internally Displaced Person
IDRL	International Disaster Response Laws, Rules and Regulations
IFRC	International Federation of Red Cross and Red Crescent Societies
IHL	International Humanitarian Law (of armed conflict)
IIHL	International Institute of Humanitarian Law
ILC	International Law Commission

IPCC	Intergovernmental Panel on Climate Change
IR	International Relations
MSF	Médecins san Frontières
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organisation for Security and Cooperation in Europe
RCRC	Red Cross Red Crescent
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UNDRO	United Nations Disaster Relief Co-ordinator
UNFTS	United Nations Financial Tracking System
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNISDR	United Nations International Strategy for Disaster Reduction
UNITAR	United Nations Institute for Training and Research
UNOCHA	United Nations Office for the Co-ordination of Humanitarian Affairs
UNSC	United Nations Security Council
UPR	Universal Periodic Review
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation

Chapter 1

Introduction

A. Background and Rationale for Thesis

i. Sovereignty in the face of a humanitarian crisis

The 7.0 magnitude earthquake which struck Haiti on 12 January 2010 caused massive loss of life and destruction of property and infrastructure. While the total number of fatalities will probably never be known, the International Federation of Red Cross and Red Crescent Societies (IFRC) reported there were over 222,000 deaths and 300,000 injuries; while over 1.5 million people were made homeless.[1] The earthquake compounded pre-existing structural problems, severe poverty and low levels of development – even before the earthquake Haiti was one of the poorest countries in the world, with limited access to education, health and sanitation services.[2] As the capital Port-au-Prince was so extensively damaged, large numbers of state workers were killed or injured. Civil servants, teachers, medical staff and politicians were all badly affected which compounded the difficulties in organising and implementing the extensive relief operation required. Even the National Disaster Risk Management System sustained heavy losses of staff and material resources. The official report on the response to the earthquake highlights the challenges faced by the national authorities:

> The buildings of the Ministry of the Interior, which housed the Emergency Operations Centre and the Direction de la Protection Civile, were destroyed, the Port-au-Prince fire station was seriously damaged, and many Government vehicles were rendered unusable. Port-au-Prince had no municipal petrol reserves, and few Government officials had functioning mobile phones prior to the earthquake, which complicated communications and transportation in the immediate aftermath.[3]

[1] IFRC, *Haiti: Earthquake*, Operations Update No.27, 16 June 2011.
[2] In 2010, Haiti was ranked 145 out of 169 countries by the UNDP; Haiti is now ranked 161 out of 186 countries. See: UNDP, *Human Development Report 2013*, available at: <http://hdrstats.undp.org/en/countries/profiles/HTI.html> accessed 25 September 2013.
[3] *Response to the Humanitarian Crisis in Haiti Following the 12 January 2010 Earthquake: Achievements, Challenges and Lessons To Be Learned*, Inter-Agency Standing Committee, July 2010, 7-8.

In such a scenario, it was unrealistic to expect that the national authorities would be able to provide the necessary humanitarian assistance without international support.

Faced with such devastation, it was understandable that immediately following the earthquake the Haitian government signed an accord with the US government for US troops to control the airport, seaport and to provide security across Port-au-Prince. In total, over 20,000 US troops assisted in the emergency phase of the operation, before the majority withdrew in early March 2010.[4] This was a pragmatic and responsible approach by the government, considering its inability to provide the services and security required for its own citizens or for humanitarian agencies. So when, only days after the earthquake struck, President Préval was asked if foreign troops threatened Haiti's sovereignty he tersely replied, "We are talking about people suffering and you are talking about ideology."[5] Even so, the arrival of four US Black Hawk helicopters into the ruins of the Presidential Palace received a mixed welcome in a country that was occupied by US forces between 1915 and 1934,[6] and which has seen UN peacekeeping forces in the country for many of the past 20 years.

Such responses reflect the evolving relationship between the concept of sovereignty and the practical delivery of humanitarian assistance following natural and human-made disasters. The abandonment of a traditional view of state sovereignty as exemplified by the Westphalian model,[7] and introduction of limitations on the actions of sovereign states via *jus cogens* norms, the UN Charter, international human rights treaties and concepts such as sovereignty as responsibility and the Responsibility to Protect doctrine, underscore the increasing prominence placed on human rights over the past 60 years. Nevertheless, Article 2(7) of the UN Charter clearly sets out the concept of non-intervention in the internal affairs

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[4] *US troops take over palace as Haiti aid effort steps up a gear*, P. Naughton, The Times, 19 January 2010, available at: <www.thetimes.co.uk/tto/news/world/americas/article2001965.ece> accessed 25 September 2013; *US Forces in Haiti to Grow to 20,000*, J. Kruzel, American Forces Press Service, US Department of Defense, 21 January 2010, available at <www.defense.gov/News/NewsArticle.aspx?ID=57661> accessed 25 September 2013; *US troops withdrawing from Haiti*, R. Carroll, The Guardian, 8 March 2010, available at: <www.guardian.co.uk/world/2010/mar/08/us-troops-withdraw-haiti-earthquake?INTCMP=SRCH> accessed 25 September 2013.

[5] *Haiti earthquake: Sovereignty takes back seat as US takes command*, R. Carroll and T. Phillips, The Guardian, 29 January 2010, available at: <www.guardian.co.uk/world/2010/jan/29/haiti-us-aid-role> accessed 25 September 2013.

[6] S. Castor and L. Garafola, 'The American Occupation of Haiti (1915-34) and the Dominican Republic (1916-24)' (Winter-Spring 1974) 15(1/2) *Massachusetts Review* 253.

[7] State sovereignty has never been "absolute" and throughout history sovereigns have faced a range of responsibilities, including those coming from divine and natural law sources. Furthermore, the French and American Revolutions were primarily based on the concept of popular sovereignty derived from the consent of the people and the rights of man. See: L. Glanville, 'The Antecedents of "Sovereignty as Responsibility"' (June 2011) 17(2) *European Journal of International Relations* 233; L. Glanville, 'The Myth of "Traditional" Sovereignty' (2013) 57 *International Studies Quarterly* 79.

of sovereign states, and stresses that nothing contained in the Charter authorises the UN to intervene in matters which are essentially within the domestic jurisdiction of states.[8] On this basis, the requirement of state consent for international humanitarian operations, whether undertaken by the UN, inter-governmental or non-governmental agencies, has been reaffirmed in a broad range of binding and non-binding documents.[9] Despite on-going debates over a right to humanitarian intervention[10] and the evolving Responsibility to Protect doctrine,[11] it follows that the delivery of humanitarian assistance to people affected by disasters must be viewed in light of the continuing fundamental role played by state sovereignty.

ii. Regulating international humanitarian responses

Haiti is not alone in facing such serious and fundamental threats to its population, infrastructure and institutions. Natural and human-made disasters consistently cause huge devastation globally, affecting an average of 190 million people each year with approximately 120,000 deaths and over US$142 billion in damage to property and infrastructure.[12] Over 245 million people were affected by natural or human-made disasters in 2011 alone,[13] including the March 2011 Japanese earthquake and tsunami which killed nearly 20,000 people and initially displaced 440,000 people.[14] In many cases there is a swift and impressive response – in 2012 an estimated US$18 billion was provided globally in humanitarian assistance

[8] See also: UNGA Res 2625 (XXV), 24 October 1970, Annex: *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*.
[9] For example: UNGA Res 46/182, 19 December 1991, Annex: Guiding Principles, art I(3); Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (adopted 18 June 1998, entered into force 8 January 2005) 2296 UNTS 5, art 4(5).
[10] For discussion of humanitarian interventions, see: Section A(ii), Chapter 4.
[11] For discussion of the applicability of the Responsibility to Protect doctrine in natural and human-made disasters, see: Section B(iii)(c), Chapter 7.
[12] Estimated annual average statistics based on years 2003-2012. Information compiled from the International Disaster Database, Centre for Research on the Epidemiology of Disasters, available at: <www.emdat.be> accessed 25 September 2013. There is considerable variation in the impact of natural disasters on a yearly basis. The estimated deaths from natural disasters for 2008-2011 were: 235,000 deaths in 2008; 10,655 deaths in 2009; 390,300 deaths in 2010; and 30,773 deaths in 2011. See: E. Ferris and D. Petz, *A Year of Living Dangerously: A Review of Natural Disasters in 2010*, Brookings-LSE Project on Internal Displacement, April 2011, 7-8; D. Guha-Sapir *et al*, *Annual Disaster Statistical Review 2011: The numbers and trends*, Centre for Research on the Epidemiology of Disasters (CRED), Université catholique de Louvain (2012), 1.
[13] Guha-Sapir, ibid 1.
[14] See: IFRC, *Japan Earthquake and Tsunami Information Bulletin No.3*, 15 March 2011, available at <www.ifrc.org/docs/appeals/11/JPeqIB3.pdf> accessed 25 September 2013; and statistics from the International Disaster Database, CRED (n.12).

including food, shelter and medical care.[15] Yet despite international law recognising a limited right to humanitarian assistance for civilians in times of war through the international humanitarian law of armed conflict, there is no consensus on whether a right to humanitarian assistance following natural or human-made disasters currently exists in international law. To date, there are no binding international treaties covering the right to humanitarian assistance for civilian populations, or even a codified body of law regulating access to and delivery of humanitarian assistance following such disasters.

Nevertheless, authoritative non-binding international documents have claimed that a right to humanitarian assistance does exist.[16] Notably, the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief asserts that "the right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries,"[17] and the Red Cross argues that international human rights law, customary law and the growing number of soft law instruments, such as the Code of Conduct, support a right to humanitarian assistance.[18] International human rights law already obliges states to protect a range of rights that are equally applicable in the event of natural or human-made disasters, including the rights to life, health and medical services, and an adequate standard of living. Meanwhile specialised multilateral treaties also provide rights of direct relevance for humanitarian assistance operations, including those in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations[19] and the Framework Convention on Civil Defence Assistance[20]. However, there is an increasing awareness of the need to provide greater clarity on both the international regulation and operation of humanitarian assistance, as reflected in the current work of the International

[15] Development Initiatives, *Global Humanitarian Assistance Report 2013*, 11. Available at: <www.globalhumanitarianassistance.org/reports> accessed 25 September 2013.
[16] See: *Guiding Principles on the Right to Humanitarian Assistance*, International Institute of Humanitarian Law (IIHL), San Remo, Italy, April 1993, Principle 1: "Every human being has the right to humanitarian assistance in order to ensure respect for the human rights to life, health, protection against cruel and degrading treatment and other human rights which are essential to survival, well-being and protection in public emergencies"; *Guiding Principles on Internal Displacement*, UN High Commissioner for Human Rights, 1998, Principle 3(2): "Internally displaced persons have the right to request and to receive protection and humanitarian assistance from [national] authorities."
[17] Principle 1. The Code of Conduct was jointly published by the International Federation of Red Cross and Red Crescent Societies (IFRC) and the International Committee of the Red Cross (ICRC) in 1994.
[18] D. Fisher, 'The Right to Humanitarian Assistance', in W. Kälin *et al* (eds), *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges*, ASIL and Brookings-Bern Project on Internal Displacement, Studies in Transnational Legal Policy, No.41 (2010), 51-52.
[19] Tampere Convention (n.9).
[20] Framework Convention on Civil Defence Assistance, International Civil Defence Association (adopted 22 May 2000, entered into force 23 September 2001) 2172 UNTS 213.

Law Commission on the protection of persons in the event of disasters, and the elaboration of the human rights implications of disasters, as evidenced by the UN Human Rights Council's decision in March 2013 to commission research on the "best practices and main challenges in the promotion and protection of human rights in post-disaster and post-conflict situations."[21]

This is not the first time that the international community has recognised the fundamental legal challenges created by natural and human-made disasters. The establishment of the International Relief Union (IRU) in 1927 provided the international community with its first global approach, and corresponding legal framework, for responding to disasters. Yet the IRU floundered, not least due to funding restrictions and the importance states placed on sovereignty. As a result, despite a range of initiatives in the intervening period, including the 1984 draft UN Convention on Expediting the Delivery of Emergency Assistance, global humanitarian responses to disasters remain within a non-binding framework. Urgency to address the topic has been prompted in part by the increasing number of actors involved in disaster response, which has moved beyond the "traditional" actors of UN agencies and a few large non-governmental organisations (NGOs). From 100 international NGOs responding to the Gujarat earthquake in 2001 and 200 after the 2004 Indian Ocean Tsunami, over 400 international NGOs responded following the Haiti earthquake of 2010;[22] while, increasingly, philanthropic and for-profit businesses respond directly in disaster zones, and military forces actively engage in the physical delivery of aid. Furthermore, the past 25 years have witnessed a growth of regional and sub-regional civil defence and mutual assistance agreements, with binding approaches in place in Asia, the Caribbean, the Middle East, Europe and the Americas.[23]

Perhaps most importantly, in 2006 the International Law Commission (ILC) was tasked with examining the protection of persons in the event of disasters. As the UN agency responsible for promoting the codification and progressive development of international law, it is maybe surprising that the ILC had not examined the issue of state responses to disasters before then.

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[21] UNHRC Res 22/16, 18 March 2013: *Promotion and protection of human rights in post-disaster and post-conflict situations* (A/HRC/22/L.23).

[22] IFRC, 'Law and legal issues in international disaster relief operations: Introduction', I. Granger, presentation, Saint Lucia, 21 May 2010, available at: <www.oas.org/dsd/Energy/Meeting/Documentos/Isabelle_Granger_20100521.pdf> accessed 25 September 2013.

[23] For a detailed review of such agreements, see: IFRC, *Law and Legal Issues in International Disaster Response: A Desk Study* (2007); *Secretariat Memorandum on the Protection of Persons in the Event of Disasters*, 60th Session of the ILC (11 December 2007, A/CN.4/590).

Although considering the abortive attempts at codification of international disaster response laws in the 1920s and 1980s, it might seem that the challenges of producing an acceptable binding international legal framework are insurmountable. As the Aga Khan stated in 1985: "a truly workable international humanitarian order requires free consent and voluntary cooperation, which in turn presupposes an active and spontaneous sense of responsibility. Compulsion, then, can never be a response to such requirements, it is not only undesirable but also impractical."[24] Yet a series of events, including the 2004 Indian Ocean Tsunami and conclusion of the Hyogo Framework for Action in 2005,[25] and the work of the IFRC on International Disaster Response Laws (IDRL), led to the inclusion of the protection of persons in the event of disasters on the ILC's programme of work. Eduardo Valencia-Ospina was appointed as Special Rapporteur, and has produced five reports on the topic since 2008.[26]

Considering the important role that the ILC process plays in the evolution and elaboration of international norms, its work on the protection of persons in the event of disasters will be referenced throughout this thesis. Indeed, it is not possible to discuss and analyse the existence and status of any potential right to humanitarian assistance without reference to the recent deliberations within the ILC and by state representatives at the UN General Assembly Sixth Committee. However, in addition to this work to develop a universal legal framework for humanitarian responses to disasters, the expansion of international human rights law is also of fundamental importance when considering the human impacts of massive natural and human-made disasters. Behind the statistics and news reports lie the individual lives that are devastated through death, injury and destruction of livelihoods. Reflecting the personal tragedies that disasters entail, academics and practitioners, not least the international Red Cross Movement,[27] have proposed that a right to humanitarian assistance exists, either as a distinct and identifiable right or as a composite right based on the provisions of international human rights law ensuring the right to life, dignity and an adequate standard of living. Such approaches focus on the intended practical outputs, in other words to ensure that people

[24] Prince Sadruddin Aga Khan, Preface, in P. Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff 1985).
[25] UNISDR, *Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters*, as adopted at the World Conference on Disaster Reduction, 18-22 January 2005, Kobe, Hyogo, Japan (A/CONF.206/6).
[26] *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; *Fourth Report*, 11 May 2011, A/CN.4/643; *Fifth Report*, 9 April 2012, A/CN.4/652.
[27] The "international Red Cross Movement" encompasses the International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (IFRC) and 186 national Red Cross or Red Crescent Societies.

affected by disasters have sufficient food, medical care, shelter, education, safety from violence, and participation in the process of rebuilding their own lives.

In describing the work of the first OSCE High Commissioner for National Minorities, Stephen Ratner has argued that: "In short, he uses norms to achieve solutions, and seeks solutions consistent with norms."[28] As a result, the High Commissioner was able to produce identifiable benefits for national minorities based on international human rights norms. Similarly, I will argue that the evolving appreciation of the potential existence of a right to humanitarian assistance following natural and human-made disasters, and the recognition of the human rights implications of disasters relies heavily on transnational interactions, interpretations and ultimately the internalisation of humanitarian and human rights norms into domestic legal systems. How the emerging global legal frameworks for humanitarian responses to disasters can therefore promote and protect the rights of persons affected by disasters forms the core of this thesis. A final important caveat should be made at this stage. This thesis focuses on the response to major natural or human-made disasters, rather than examining in detail activities and legal frameworks for the preparation for and prevention of disasters. However, this is not to minimise the importance of international legal frameworks for disaster risk reduction, such as the Hyogo Framework for Action.[29] Indeed, as set out in the following chapters, the on-going cycle of preparation for, and then response to disasters requires a coordinated and integrated approach to actions taken before, during and after a disaster occurs. Furthermore, international human rights law requires states to take preventative actions to ensure that violations of human rights are minimised or do not occur in the first place.

B. Definitions

Before commencing any substantive discussion of the rights and obligations at play in a disaster setting, it is necessary to determine what is meant by a "disaster."[30] Despite the wide spread colloquial use of the phrase "natural disaster," it is hard to identify catastrophic events

[28] S. Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?' (2000) 32 *NYU Journal of International Law and Politics* 591, 622.
[29] Hyogo Framework for Action (n.25).
[30] As international humanitarian law (IHL) forms a *lex specialis* for situations of armed conflict, this thesis will primarily focus on the issues raised surrounding a right to humanitarian assistance in non-conflict settings. However, as IHL does include certain rights to assistance for civilian populations in times of war it will be necessary to discuss aspects of IHL of direct relevance to the development of international legal frameworks for disasters. See in particular Chapter 4: Towards an *Acquis Humanitaire*.

which result purely from "natural" causes.[31] As noted by the Internal Displacement Monitoring Centre (IDMC), so-called natural disasters are often strongly influenced by human actions, including urban development, deforestation, dam-building, release of flood waters and anthropogenic climate change.[32] As a result, a range of rapid or slow onset events precipitated by natural, technological or human-made hazards exist. Natural hazards are typically broken down into five categories: geophysical (earthquakes, landslides, tsunamis and volcanic activity); hydrological (avalanches and floods); climatological (extreme temperatures, drought and wildfires); meteorological (cyclones and storms/wave surges); or biological (disease epidemics and insect/animal plagues). Meanwhile, technical and human-made hazards (such as complex emergencies, famine, displaced populations, industrial accidents and transport accidents) are events caused by humans occurring in or close to human settlements, including environmental degradation, pollution and accidents.[33] Such hazards only become a "disaster" when they negatively affect human life, livelihoods or property.

Therefore, one needs to examine the impact of a natural or human-made hazard before one can determine that a "disaster" has occurred. A hurricane in the middle of an ocean which has little impact on humans should be viewed differently to a similar hurricane in a densely populated coastal area. Hence, one broadly accepted definition of a "disaster" is a natural hazard plus vulnerability.[34] Such an approach is intended to highlight that people are impacted differently by the same event, and recognises the differential vulnerabilities within and between populations to diverse natural hazards. Alternatively, the UN Office for Disaster Risk Reduction defines a "disaster" as a "serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental

[31] Nevertheless, in recognition of this widespread usage and the divergent legal and policy approaches taken to the concepts of "hazard," "vulnerability" and "disaster" set out below, for consistency this thesis will use the terminology of "natural and human-made disasters."
[32] Internal Displacement Monitoring Centre (IDMC), *Global Estimates 2012: People displaced by disasters*, May 2013, 10.
[33] The Centre for Research on the Epidemiology of Disasters (CRED) in the Université catholique de Louvain has maintained an Emergency Events Database (generally known as "EM-DAT") since 1988 which contains statistical data on the occurrence and effects of over 18,000 disasters from 1900 to present. For information on the definitions and criteria used by CRED for their statistical data, see: <www.emdat.be/explanatory-notes> accessed 25 September 2013. See also: IFRC, *Types of disasters: Definition of hazard*, available at: <www.ifrc.org/en/what-we-do/disaster-management/about-disasters/definition-of-hazard> accessed 25 September 2013; IDMC, ibid 9.
[34] T. Cannon, 'Reducing People's Vulnerability to Natural Hazards: Communities and Resilience', United Nations University, World Institute for Development Economic Research, Research Paper No.2008/34, April 2008, 2. As noted by the IDMC *Global Estimates Report 2012* (n.32): "Disasters result from a combination of risk factors: the exposure of people and critical assets to single or multiple hazards together with existing conditions of vulnerability, including insufficient capacity or measures to reduce or cope with potential negative consequences," 10.

losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources."[35] Such an approach focuses on the coping strategies of the local community or state authorities, and the potential need for external assistance to respond to the disruption caused.[36]

The instinctual desire to assist persons affected by catastrophic events, either at a local level when neighbours help each other during times of crisis or at a global level whereby governmental and non-governmental humanitarian actors offer their services to support an afflicted population, has led to an increasingly complex web of organisations and relationships which is often broadly called "humanitarian assistance." Indeed, as explained in Chapter 3, the human suffering caused by natural or human-made disasters has prompted the elaboration of a "humanitarian imperative" which claims the right and obligation to alleviate that suffering wherever it may be found.[37] As a result, a range of humanitarian principles, including humanity, impartiality and neutrality have been elaborated, not least by non-governmental organisations such as the Red Cross Movement. Yet to date, there is no universally accepted legal definition of what constitutes "humanitarian assistance." While responses to wars and disasters were traditionally couched in the terminology of "charity," "aid," "relief" and more recently as "assistance" or "support," from an operational perspective, humanitarian agencies have increasingly used the concept of "humanitarian action" to encompass a broad range of activities covering all stages of emergency prevention, mitigation and response. So while humanitarian assistance was traditionally seen to primarily include physical goods necessary to save and sustain life, such as food and medical supplies, the broader conception of "humanitarian action" is intended to include not just material assistance but all actions taken to ensure respect for people in disaster settings. This reflects an increasing focus on human rights protection, in addition to ensuring that individuals' needs for material assistance are fulfilled. However, despite agencies' operational focus on "humanitarian action," this thesis will use the language of a "right to humanitarian assistance" as this is the form consistently adopted in debates by both governmental and non-governmental actors.[38]

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[35] UN Office for Disaster Risk Reduction (UNISDR), *Terminology*, available at: <www.unisdr.org/we/inform/terminology#letter-d> accessed 25 September 2013.

[36] For discussion of the legal definitions and approaches in various international texts, see: Valencia-Ospina, *Preliminary Report* (n.26) para.44-49.

[37] See in particular: Section A, Chapter 3.

[38] For full details of the development of the concepts of the "humanitarian imperative," "humanitarian principles" and "humanitarian action," see: Section A, Chapter 3. For discussion of the legal definitions of "humanitarian assistance," see: Section A, Chapter 4.

Such changes in theoretical basis and definitional boundaries of "humanitarian assistance" are of fundamental importance when one links the concept of state sovereignty with the provision of external assistance. After a major disaster, are external actors only expected to provide life-saving material support, such as food and medicine, or should their humanitarian actions encompass the full range of civil, political, economic, social and cultural rights set out in international human rights law? Does the government of an affected country have the ability to limit not just the types of external actors allowed into a disaster zone but also the types of protection activities they may engage in? Hugo Slim may have attacked the commodification of humanitarianism and its subsequent reduction to basic packages of material help as a "serious heresy which undermines wider humanitarian values,"[39] yet the denial of access to humanitarian agencies following the devastating Cyclone Nargis in Myanmar in May 2008 prompted heated debate as to the acceptable limitations that may be imposed on individual humanitarian agencies and on the international community as a whole by an affected government.[40]

C. Methodological Approach

i. Situating thesis

Based on the foregoing, this thesis aims to address three interconnected questions regarding the status and implications of a potential right to humanitarian assistance following natural and human-made disasters, and the current evolution of international legal frameworks for disaster preparedness and response, namely:

1. Does a specific right to humanitarian assistance for victims of natural and human-made disasters currently exist under international law?

[39] H. Slim, 'Relief Agencies and Moral Standing in War: Principles of humanity, neutrality, impartiality and solidarity' (November 1997) 7(4) *Development in Practice* 342, 345

[40] Cyclone Nargis killed at least 138,000 people and affected over 2.4 million. The ruling junta in Myanmar was extremely reluctant to allow Western aid agencies to access the victims, despite reports the national response was unable to cope with the scale of the disaster. Arguing under the Responsibility to Protect doctrine, for the first time donor governments raised the prospect of military intervention to provide humanitarian assistance to victims of a natural disaster. Ultimately, diplomatic and humanitarian pressure ensured limited aid was provided 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: 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' (2009-2010) 38 *Denver Journal of International Law and Policy* 227, 229-231.

2. To what extent do existing international human rights standards, and related monitoring and accountability mechanisms, provide protection to victims of natural and human-made disasters?
3. What are the implications for rights-holders and duty-bearers from the codification of specific rights following natural or human-made disasters through a unified or series of binding international treaties?

Underpinning these three questions are broader meta-questions regarding the status of international norms and the creation or development of new rights and norms through state and non-state actor practice and international consensus. Hence drawing on theories of transnational legal process, in particular as developed by Harold Koh,[41] this thesis will initially answer the question: what status (if any) does a right to humanitarian assistance actually hold in international law? To answer this question, it is necessary to break it down into two separate parts: namely is there a right for humanitarian actors to offer humanitarian assistance, or alternatively is there an individual right of victims to request and receive humanitarian assistance? My research will show that while certain rights to humanitarian assistance exist in binding international law during situations of armed conflict,[42] to date there is no positive obligation on states or humanitarian actors to provide humanitarian assistance following natural or human-made disasters, and therefore there is no specific right to receive humanitarian assistance under international law.[43] Nevertheless, while a binding universal right to humanitarian assistance does not currently exist as an identifiable right on its own, various provisions of international law do provide explicit rights and duties that are

[41] Professor Koh initially developed his views on transnational legal process in: H. Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181, and has expanded his thesis in numerous texts including: H. Koh, 'Review Essay: Why do Nations Obey International Law?' (June 1997) 106(8) *Yale Law Journal* 2599; H. Koh, 'Bringing International Law Home' (1998-1999) 35 *Houston Law Review* 623; H. Koh, 'How is International Human Rights Law Enforced?' (1998-1999) *Indiana Law Journal* 1397; H. Koh, 'Transnational Legal Process after September 11th' (2004) 22 *Berkeley Journal of International Law* 339.

[42] See: Geneva Convention IV relative to the Protection of Civilian Persons in Times of War (adopted 12 August 1949, entered into force 21 October 1950) 973 UNTS 286; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 4; Protocol II Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 610; plus the rules of customary international law relevant to the law of armed conflict.

[43] Of note, although the International Court of Justice examined the provision of humanitarian assistance by the United States of America in the context of armed conflict in the Nicaragua case, the legal question before the Court was whether or not the actions of the USA amounted to an unlawful intervention in the domestic affairs of Nicaragua contrary to international law. The Court did not address the existence of either a right to offer or a right to receive humanitarian assistance in general or in the specific context of natural and human-made disasters. See: Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment of 27 June 1986, I.C.J. Reports 1986. For more discussion of the Nicaragua case, see: Section A(i)(b), Chapter 3, and Section A(ii), Chapter 4.

applicable in times of disaster. In particular, international human rights law obliges states to protect a range of rights of direct relevance in humanitarian responses, including the rights to life,[44] health and medical services,[45] and an adequate standard of living.[46]

It follows that the existence of rights and duties in disaster settings therefore has direct implications for a wide range of rights-holders and duty-bearers, both in the context of the relationship between a state and persons affected by disasters on its territory, and at the international level between states.[47] It is well established that a state has the primary responsibility to ensure the human rights of persons in its territory, while one of the fundamental purposes of the UN is to achieve "international cooperation in solving international problems of [a] … humanitarian character."[48] Nevertheless, the international normative obligations and institutional frameworks for disaster response are not yet settled, as evidenced by the on-going work of the ILC[49] and the continuing promotion of disaster response laws by the international Red Cross Movement.[50] The diverse sources and nature of these initiatives suggests that the international community is engaged in a process of norm creation, elaboration and interpretation reflecting the need for legal clarity on the rights and responsibilities applicable in disaster response operations. Situating my overall findings within the framework of transnational law,[51] and the concomitant implications for the

[44] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 3; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6(1); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 1.

[45] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 12.

[46] UDHR (n.44) art 25; ICESCR, ibid art 11.

[47] For discussion of the connections between international human rights law and the law of state responsibility, see: T. Meron, 'State Responsibility for Violations of Human Rights' (April 1989) 83 *American Society of International Law Proceedings* 372; A. Bird, 'Third State Responsibility for Human Rights Violations' (2011) 21(4) *European Journal of International Law* 883. This thesis will focus primarily on the relationship between a state and individuals on its territory affected by disasters. However, the responsibilities of states regarding international cooperation and solidarity, including through the application of the Responsibility to Protect doctrine, are referenced throughout. See in particular: Section B(iii), Chapter 7 examining the conceptual framework for the ILC draft articles on the protection of persons in the event of disasters.

[48] Art 1(3), UN Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

[49] Information on the ILC's work on the protection of persons in the event of disasters is available at: <www.un.org/law/ilc/index.htm> accessed 25 September 2013.

[50] Information on the IFRC's Disaster Law programme is available at: <www.ifrc.org/en/what-we-do/disaster-law> accessed 25 September 2013.

[51] For a general overview of the development of and arguments for a "transnational law" approach, see: M. Reimann, 'From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum' (2003-2004) 22 *Penn State International Law Review* 397. For an overview of the earlier development from the "law of nations" to "international law," see: M.W. Janis, 'Jeremy Bentham and the Fashioning of "International Law"' (1984) 78 *American Journal of International Law* 405. Janis notes that Philip Jessup's crafting of the term "transnational law" is actually closer to Blackstone's expansive description of the "law of nations" than Bentham's more state-orientated term "international law," 416.

creation of binding and non-binding normative standards[52] and new human rights norms and practices, I will therefore argue that the constant flow of ideas and principles between the national, regional and international spheres regarding humanitarian responses can best be described and analysed from a transnational legal process approach.

Due to the nascent development of any legal right to humanitarian assistance, the process of creation of norms under international law and the role played by soft law sources forms a key theoretical background to my research.[53] Accordingly, the relative normativity of relevant non-legal normative standards must be critically examined to determine their influence and role in the development of binding international normative and institutional frameworks.[54] A further key conceptual and legal question running throughout my research is the boundaries and limitations of state sovereignty. Evolving conceptions of sovereignty, from the birth of the nation state and non-interference in the internal affairs of sovereign states via the Treaty of Westphalia in 1648 to the development of international human rights frameworks following the Second World War, will be traced. Theoretical approaches to sovereignty of direct relevance to my thesis include sovereignty as responsibility as developed by Francis Deng,[55] the two sovereignties concept set out by Kofi Annan,[56] and the Responsibility to Protect doctrine adopted at the 2005 UN World Summit.[57] The potential conflict between sovereignty and humanitarian access is most closely connected to arguments as to the applicability of the Responsibility to Protect doctrine, and although the ILC has identified the principle of international co-operation as the theoretical basis for their work on disasters, there has been limited discussion regarding the process by which diverse legal regimes for disaster response should be balanced and co-ordinated.

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[52] Reflecting conceptual and terminological difficulties surrounding the phrase "soft law," I use the phrase "non-binding normative standards" to refer to guidelines, recommendations and minimum standards relating to humanitarian assistance developed at operational, policy and political levels by states, humanitarian agencies and international organisations. See: Section B(i), Chapter 2; D. Cubie, 'An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?' (2011) 2 *Journal of International Humanitarian Legal Studies* 177.

[53] For critical approaches to soft law, see: J. Klabbers, 'The Undesirability of Soft Law' (1998) 67 *Nordic Journal of International Law* 381; L. Blutman, 'In the Trap of a Metaphor: International Soft Law' (2010) 59(3) *International and Comparative Law Quarterly* 605.

[54] See: P. Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413; D. Shelton, 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291.

[55] Originally in: D. Rothchild *et al, Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution Press 1996), and developed through his work as Representative to the UN Secretary-General on Internally Displaced Persons.

[56] *Two Concepts of Sovereignty*, K. Annan, The Economist, 18 September 1999. Annan's "two sovereignties" is distinct from the concept of "dual sovereignty" that may arise in a federal state between the federal government and the co-equal state governments or in a regional structure such as the European Union where certain powers are transferred from nation states to inter-governmental bodies.

[57] UNGA '2005 World Summit Outcome' (15 September 2005), A/60/L.1, para.138-140.

The first recorded instance of states providing international relief following a disaster came during the 1755 Lisbon earthquake,[58] and the legal, ethical and moral obligations arising from natural or human-made disasters were acknowledged as early as 1758 when the Swiss jurist and philosopher, Emer de Vattel wrote: "when the occasion arises, every Nation should give its aid to further the advancement of other Nations and save them from disaster and ruin, so far as it can do so without running too great a risk."[59] Intentionally or otherwise, over 240 years later the UN Committee on Economic, Social and Cultural Rights closely mirrored Vattel's argument when they concluded:

> States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities.[60]

Despite this, even today there is an extremely limited body of international law which directly deals with disasters – there is no recognised *lex specialis* for natural or human-made catastrophes. Nonetheless, the social and cultural impacts of massive natural or human-made disasters are wide ranging, and are key subjects of study for meteorologists, civil engineers and medical personnel to name just a few; while international relations, politics and development studies all play a fundamental role in the analysis and development of norms relating to humanitarian action.[61] Moreover, cross-cutting such professional and academic sources are practitioner reports and research from countless humanitarian agencies and non-governmental organisations, including operational and evaluation reports of humanitarian responses to major disasters such as the 2004 Indian Ocean Tsunami, 2008 Cyclone Nargis in Myanmar and the 2010 Haiti earthquake.[62]

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[58] J. Hutchinson, 'Disasters and the International Order: Earthquakes, Humanitarians, and the Ciraolo Project' (March 2000) 22(1) *International History Review* 1, 4.

[59] E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, text of 1758, Books I-IV, Vol. iii, 114. Andrew Hurrell has challenged the traditional view of Vattel's positivism and emphasis on state sovereignty, citing as an example Vattel's support for humanitarian interventions, see: A. Hurrell, 'Vattel: Pluralism and Its Limits', in I. Clark and I. Neumann (eds), *Classical Theories of International Relations* (St. Martin's Press 1996), in particular 242-245.

[60] UN Committee on Economic, Social and Cultural Rights, General Comment No.14, *The right to the highest attainable standard of health* (11 August 2000), para.40, E/C.12/2000/4.

[61] See for example: W. Bello, 'The Rise of the Relief-and-Reconstruction Complex' (Spring/Summer 2006) 59 *Journal of International Affairs* 281; World Bank, *Natural Hazards Unnatural Disasters: The Economics of Effective Prevention*, 2010; T. McDermott, 'The Effects of Natural Disasters on Human Capital Accumulation', Institute for International Integration Studies, Trinity College Dublin, Discussion Paper No.391, February 2012.

[62] C. Flood (Government Special Envoy), *The Tsunami: Ireland and the Recovery Effort*, December 2005; Tripartite Core Group (United Nations, ASEAN and Government of Myanmar), *Post-Nargis Joint*

Nevertheless, despite calls for greater collaboration between international law and international relations from scholar-practitioners such as Anne-Marie Slaughter,[63] Jan Klabbers has argued that international lawyers should be wary of heeding "the siren song of inter-disciplinarity, for the simple reason that it will not always and automatically enable them to come to a better understanding of international law."[64] Furthermore, Klabbers argues that one should be particularly wary of combining international law with international relations unless one takes a position on a particular version of international relations theory (eg realist, constructivist, neo-functionalist).[65] Therefore, for the purpose of this thesis, I do not take a position on international relations theory, but approach "inter-disciplinarity" through the multi-disciplinary nature of the sources of information on natural and human-made disasters.[66] Reflecting these multi-disciplinary sources, this thesis draws upon information from research institutes, such as the Overseas Development Institute and the Brookings Institute, which provide operational and policy-based recommendations through research, and academic theory, such as International Legal Process theory[67] and the New Haven School of International Law's inter-disciplinary approach to normative and policy orientated research.[68]

Assessment, July 2008; Inter-Agency Standing Committee, *Response to the Humanitarian Crisis in Haiti 6-Month Report: Achievements, Challenges and Lessons To Be Learned*, 2010.

[63] A-M. Slaughter-Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *American Journal of International Law* 205; A-M. Slaughter, A. Tulumello and S. Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 *American Journal of International Law* 367.

[64] J. Klabbers, 'The Relative Autonomy of International Law or The Forgotten Politics of Interdisciplinarity' (2004-2005) 1 *Journal of International Law and International Relations* 35, 36.

[65] ibid 37-38. For a constructivist analysis of humanitarian issues resulting from internal displacement see: H. Entwisle, 'Tracing Cascades: The Normative Development of the UN Guiding Principles on Internal Displacement' (2004-2005) 19 *Georgetown Immigration Law Journal* 369.

[66] It should be noted that Harold Koh has drawn on the constructivist approach in some of his work; for example in: Koh, 'Why Do Nations Obey International Law?' (n.41). For analysis of the relationship between international law and international relations from a transnational legal process approach, see: Koh, 'Transnational Legal Process' (n.41) 191-194. On inter-disciplinary approaches to legal research in general, see: C. McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *Law Quarterly Review* 632.

[67] See: M. O'Connell, 'New International Legal Process' (April 1999) 93(2) *American Journal of International Law* 334; Slaughter-Burley, 'International Law and International Relations Theory' (n.63) 213-214.

[68] See for example: O. Schachter, 'Myres McDougal – An Appreciation' (1971) *Denver Journal of International Law and Policy* 22; O. Schachter, 'McDougal's Jurisprudence: Utility, Influence, Controversy' (1985) 79 *American Society of International Law Proceedings* 266; O. Hathaway, 'The Continuing Influence of the New Haven School' (2007) 32 *Yale Journal of International Law* 553; H. Koh, 'Is There a "new" New Haven School of International Law?' (2007) 32 *Yale Journal of International Law* 559; H. Koh, 'Michael Reisman, Dean of the New Haven School of International Law' (2009) 34 *Yale Journal of International Law* 501. For criticism of the New Haven School, see: R. Falk, 'Casting the Spell: The New Haven School of International Law' (1995) 104(7) *Yale Law Journal* 1991, 1997, which argues that the practical application of the normative social goals and values of the original New Haven School, which include the production of wealth, enlightenment, skill, health and well-being, and affection, consistently correspond with the US government's approaches to international relations and so appear to be a justification of US governmental action, rather than an independent analysis of international law.

ii. The concepts of transnational law and transnational legal process

Philip Jessup popularised the phrase "transnational law" in 1955 when he argued: "I shall use the term 'transnational law' to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories."[69] In so doing, Jessup provided the title for a concept that had already been challenging the traditional view of international law as regulating the relations between sovereign states. Reflecting Jessup's own experience of both law and politics,[70] it is perhaps not surprising he promoted an understanding of international law which included the interactions of non-state entities, as well as a more inter-disciplinary approach to viewing the creation of rules, norms and customs.[71] Yet despite Jessup's own stature as an international lawyer, the concept and phrase "transnational law" was initially slow to take off. However, over the past 25 years Harold Koh has been a key promoter of the concept and has developed his own theory of "transnational legal process" which includes Jessup's expansive view of international law sources and influences.

a. Legal process approaches

The legal process approach was first adopted in the middle of the 20th Century by US legal scholars to help distinguish between objective law and subjective policy, and was applied to international law in 1968 through Chayes, Ehrlich and Lowenfeld's casebook, *International Legal Process: Materials for an Introductory Course*.[72] As noted by Anne-Marie Slaughter,[73] the

[69] As quoted in: C. Oliver, 'Philip C. Jessup's Continuing Contribution to International Law' (November 1962) 62(7) *Columbia Law Review* 1132, 1134-1135. See also: C. Tietje, A. Brouder and K. Nowrot (eds), 'Philip C. Jessup's *Transnational Law* Revisited on the Occasion of the 50th Anniversary of its Publication', Essays in Transnational Economic Law, No.50, February 2006, Transnational Economic Law Research Center, Martin Luther University; M. Lippold, 'Philip C. Jessup: From an activist academic to an academic activist – "A Modern Law of Nations" revisited', paper presented at European Society of International Law Research Forum, 'International Law as a Profession', Amsterdam, 24th May 2013 (copy on file with author).

[70] In addition to his role as an academic, Jessup was variously a US government official and diplomat to the newly created United Nations and subsequently a Judge on the International Court of Justice. Jessup's humanitarian credentials are evidenced from not just his involvement in drafting the UN Charter in 1945, but also from his role as Under-Secretary General of the UN Relief and Rehabilitation Agency during WWII. See: O. Schachter, 'Philip Jessup's Life and Ideas' (October 1986) 80(4) *American Journal of International Law* 878, 882.

[71] P. Zumbansen, 'Transnational Law', in J. Smits (ed), *Encyclopaedia of Comparative Law* (Edward Elgar 2006), 738-740.

[72] A. Chayes, T. Ehrlich and A. Lowenfeld, *International Legal Process: Materials for an Introductory Course* (Little, Brown 1968).

[73] Slaughter-Burley, 'International Law and International Relations Theory' (n.63) 213-214.

American legal process school was a pragmatic response to the realist challenge to the relevance of (international) law in the face of power politics. Therefore, the International Legal Process approach is not a methodology per se, but an expansion of positivism that prioritises understanding of how international law works. It concentrates on how international legal rules are created, interpreted and applied in practice, for example for governments' foreign policy purposes, rather than providing a descriptive analysis of international laws' normative content.[74] As such, international legal process is primarily concerned with the question: "How – and how far – do law, lawyers, and legal institutions operate to affect the course of international affairs?"[75]

b. Transnational legal process

Building on both Jessup's concept of transnational law and the American legal process tradition, Harold Koh has defined his theory of "transnational legal process" as:

> [T]he theory and practice of how public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.[76]

Key to Professor Koh's conception are four specific aspects, namely that transnational legal processes are non-traditional, non-statist, dynamic and normative. Koh continues by explaining that such processes transcend the traditional dichotomies between domestic and international law, and between public and private law.[77] Furthermore, the relevant actors are not just, or even primarily, nation-states, but also include non-state actors. Meanwhile, as a dynamic and normative process, transnational law transforms, mutates, and percolates up and down, from public to private and from domestic to international. Professor Koh describes the on-going process of norm percolation in the following manner:

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[74] Mary Ellen O'Connell traces the evolution of legal process theories, including the addition of normative analysis in the new international legal process approach, in: O'Connell, 'New International Legal Process' (n.67). See also: Slaughter, Tulumello and Wood, 'International Law and International Relations Theory' (n.63) 379-381.

[75] Slaughter-Burley, 'International Law and International Relations Theory' (n.63), 213. Rosalyn Higgins has similarly argued that "[i]nternational law is a process, a system of authoritative decision-making. It is not just the neutral application of rules." See: R. Higgins, *Problems and Process: International Law and How We Use it* (Oxford University Press 1995) 267.

[76] Koh, 'Transnational Legal Process' (n.41) 183-184.

[77] For a description of the blurring of distinctions between private and public international law, and international and domestic law since the end of the Second World War, see: Reimann, 'From the Law of Nations to Transnational Law' (n.51) 406-408.

> From this process of interaction, new rules of law emerge, which are interpreted, internalized, and enforced, thus beginning the process all over again. Thus, the concept embraces not just the descriptive workings of a process, but the normativity of that process. It focuses not simply upon how international interaction among transnational actors shapes law, but also on how law shapes and guides future interactions: in short, how law influences why nations obey.[78]

In other words, transnational legal process describes the process whereby international norms are created and complied with based on multiple interactions at the national, regional and international levels by a variety of actors. These interactions prompt legal interpretations which may ultimately lead to the internalisation of a new norm into either domestic, regional or international law thereby promoting obedience to the norm. Therefore, the concept of "internalisation" plays a crucial part in understanding how norms can enter into domestic law and policy, and their associated compliance and enforcement mechanisms. Koh has identified three distinct forms of internalisation, namely: "social internalisation" which occurs when a norm acquires so much public legitimacy that it gains widespread general adherence; "political internalisation" which occurs when political elites accept an international norm and advocate its adoption as a matter of government policy; and "legal internalisation" which occurs when an international norm is incorporated into the domestic legal system through the executive, legislature, or judiciary, or through a combination of all three. Koh argues that the sequencing of internalisation will vary from case to case, with social internalisation occurring before political or legal internalisation in some instances, while legal internalisation may prompt social and political internalisation in others.[79]

Recognising the on-going debate between legal scholars and international relations regarding the "real" factors that influence state behaviour,[80] this thesis is situated within the broad concept of transnational law and more specifically the concept of transnational legal process, defined as the multifarious levels of interaction and interpretation that can lead to domestic internalisation of norms either through binding law or via policies and procedures adopted by

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[78] Koh, 'Transnational Legal Process', (n.41) 184. The non-statist orientation of transnational legal process partially neutralises the criticism that the international human rights movement actually strengthens the position of a state by defining human rights in the context of the relationship between an individual and the state. See: D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004), 16.

[79] Koh, 'International Human Rights Law' (n.41) 1413-1414. See also: D. Cubie, 'Clarifying the "*Acquis Humanitaire*": A Transnational Legal Perspective on the Internalization of Humanitarian Norms', in *The International Law of Disaster Relief* (Cambridge University Press – forthcoming).

[80] For example, Oona Hathaway has criticised norm-based scholarship, such as transnational legal process, for not providing clear guidance in advance regarding which laws will or will not be internalised, and therefore does not provide sufficient predictive evidence of what states will actually do. See: O. Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' (2005) 72 *University of Chicago Law Review* 469, 482-483

regional, national or local authorities. More specifically, my thesis examines the evolving norms of humanitarian assistance in natural and human-made disasters resulting from the expanding range of binding and non-binding international disaster response laws, rules and regulations which have been developed through the on-going interactions and legal interpretations of state and non-state actors. The multiplicity of flows for ideas and principles of disaster response, from top-down international sources, to bottom-up national sources, plus "hybrid" approaches such as regional mechanisms, reflect the symbiotic relationship between the development of multiple norms and the process that leads to an identifiable international consensus of the rights and responsibilities at play in a disaster setting.[81] Indeed, transnational legal process recognises multiple flows of influence, whereby domestic law and practices can directly impact upon international understanding of relevant norms and vice versa.[82] Consequently, a wide range of traditional international law topics, such as international humanitarian law and international human rights law, are engaged in the development of consensus, in addition to the evolving range of non-binding normative standards of humanitarian action. These international laws and standards feed directly into regional and sub-regional structures, such as the European Union's civil protection mechanisms[83] and the ASEAN disaster management system,[84] and then into domestic law, policies and practices.

Of key importance to understanding how international norms of disaster response can positively impact on victims of disasters at a national level, transnational legal process aims to identify the processes for enforcement of international norms by their domestic internalisation, either through national legislation and judicial interpretation or through domestic policies and procedures. As proposed by H.L.A. Hart, most people obey rules due to their internal point of view regarding the underlying norm in question rather than as a result of coercion.[85] In the context of the delivery of humanitarian assistance to victims of natural and human-made disasters, there is an extremely limited number of cases where coercion by the international community is required or considered[86] – nevertheless few states

[81] H. Koh, 'Why Transnational Law Matters' (2005-2006) 24 *Penn State International Law Review* 745.
[82] Koh, 'Transnational Legal Process' (n.41) 184.
[83] G. Potyka and K. Beeckman, *The Regulatory Framework for Disaster Response Established within the European Union: A Focus on Humanitarian Aid and Civil Protection*, IFRC (2005); IFRC, *Analysis of Law in the EU and a Selection of Member States pertaining to Cross-Border Disaster Relief: Synthesis Report and Recommendations* (2010).
[84] IFRC, *Disasters in Asia: the Case for Legal Preparedness* (Geneva 2010).
[85] H.L.A. Hart, *The Concept of Law* (2nd ed, Clarenden Press: Oxford, 1994), 89-91, 242-243. See also: S. Perry, 'Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View' (2006-2007) 75 *Fordham Law Review* 1171.
[86] See: C. Allan and T. O'Donnell, 'An Offer You Cannot Refuse? Natural Disasters, the Politics of Aid Refusal and Potential Legal Implications' (2013) 5(1) *Amsterdam Law Forum* 36.

have thus far internalised a specific right to offer or receive humanitarian assistance into their domestic law.[87]

Therefore, in parallel with the process used to determine the structures and procedures for international disaster response operations, current debates on the legal rules for humanitarian responses to natural and human-made disasters challenge us to consider the actual and desirable status of rights-holders and duty-bearers. This prompts us to address fundamental questions such as: the desirability or otherwise of the increased juridification of disaster responses; the benefits and drawbacks of technical approaches to legal regulation of disaster response compared to rights-based approaches; and the status of any universal legal regime, including its binding or non-binding nature and the relationship between national, regional and universal provisions.

iii. Juridification in disaster settings

Jürgen Habermas examined the function of law in *The Theory of Communicative Action*, in which he defined "juridification" as "the tendency towards an increase in formal (or positive, written) law that can be observed in modern society. We can distinguish here between the expansion of law, that is the legal regulation of new, hitherto informally regulated social matters, from the increasing density of law, that is, the specialized breakdown of global statements of the legally relevant facts into more detailed statements."[88] Building on this definition, Blichner and Molander have argued that "juridification" takes place "within a legal order or a legal order in the making, be it at a national, international or supranational level. It is a process in the sense that something increases over time … The 'actors' involved, broadly speaking, are governments, legislatures, administrative actors, the judiciary, legal experts and other non-state actors including individuals as well as institutional and corporate

[87] Furthermore, few governments are adequately prepared for the possibility that they may need to request international assistance following a major disaster. Too much legislation and bureaucracy can lead to delays in the entry and delivery of humanitarian assistance, while a lack of legislation and policies can lead to poor quality and uncoordinated recovery operations. See: IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (2008) 3.

[88] J. Habermas, *The Theory of Communicative Action*, Vol.2, T. McCarthy (tr), (Polity Press 1987), 357. In an article written to mark Jürgen Habermas' 80th birthday, Seyla Benhabib argued that a process of dejuridification can occur, such as "free-growth areas" in China where labour laws are not enforced or the rendition of enemy combatants to unknown locations by the US. This dejuridification can be seen as an attempt to resist the spread of global law and to deny the "right to have rights". S. Benhabib, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty' (November 2009) 103(4) *American Political Science Review* 691, 701-702. See also: T. Giegerich, 'The *Is* and the *Ought* of International Constitutionalism: How Far Have We Come on Habermas's Road to a "Well-Considered Constitutionalization of International Law"?' (2009) 10 *German Law Journal* 31, 42.

actors."[89] However, recognising the divergent definitions given to the theory of juridification, Blichner and Molander identify five distinct dimensions to juridification, from juridification as a process through which law comes to regulate an increasing number of different activities to juridification as a process whereby conflicts increasingly are solved by or with reference to law.[90]

For the purposes of this thesis, I will use the term "juridification" to refer solely to the final dimension set out by Blichner and Molander,[91] namely the process whereby people increasingly tend to view themselves as belonging to a community of legal subjects with equal legal rights and duties, as this provides not just an understanding of how individuals in disaster settings view themselves, but also how governments and other humanitarian actors may view the people they are trying to assist. Furthermore, this reflects the broader change in status of individuals under international law from "mere objects of protection under humanitarian and human rights law to actors with their own rights (eg to petition international rights bodies) and responsibilities (eg for crimes under international law)."[92] So as one examines the potential existence of a right to humanitarian assistance, it thus becomes clear that the identification of victims of natural or human-made disasters (and those at risk of future disasters) as rights-holders or legal subjects has a direct impact on the conception of the legal responsibilities of duty-bearers. Indeed, the process whereby governments, humanitarian agencies, local communities and individuals come to view themselves as having legal rights and responsibilities in disaster settings, fits neatly into the non-traditional, non-statist, dynamic and normative model established by transnational legal process. The following section therefore sets out in more detail the specific arguments and structure of

[89] L.C. Blichner and A. Molander, *What is Juridification?*, Working Paper No.14, March 2005, Centre for European Studies, University of Oslo, 5. Available at: <https://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2005/wp05_14.pdf> accessed 25 September 2013.

[90] ibid 5: "First, constitutive juridification is a process where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system. Second, juridification is a process through which law comes to regulate an increasing number of different activities. Third, juridification is a process whereby conflicts increasingly are being solved by or with reference to law. Fourth, juridification is a process by which the legal system and the legal profession get more power as contrasted with formal authority. Finally, juridification as legal framing is the process by which people increasingly tend to think of themselves and others as legal subjects." Blichner and Molander classify these five dimensions of juridification as: juridification A, juridification B … juridification E.

[91] ibid 23-27. Blichner and Molander propose [27-30] that the five dimensions of juridification act in a dynamic and complex manner, and while the various dimensions of juridification may interact with each other there is no determinant link between them and so a change in one does not necessarily imply a change in any of the other four. Therefore, one can argue that an increased understanding of victims of disasters as legal subjects (juridification E) does not necessarily imply a direct increase in resorting to solving conflicts by reference to the law (juridification C). However, it may prompt a change to the legal regulation of disaster responses (juridification B).

[92] Reimann, 'From the Law of Nations to Transnational Law' (n.51) 404.

transnational legal processes and how these relate directly to my research questions on the existence of a right to humanitarian assistance following natural and human-made disasters and the development of international legal frameworks for humanitarian responses to disasters.

iv. The application of transnational legal process to disaster response laws

By including normative questions into the legal process approach, transnational legal process provides the framework for asking what should the rights and responsibilities of various actors be pre- and post- a major natural or human-made disaster. This contrasts with the more positivist approach of traditional international legal process which would primarily focus on what the rights and responsibilities of actors are in disaster settings. So while a traditional approach to legal process can provide a detailed description of the current legal obligations and why these rules are in place,[93] utilising the concept of transnational legal process takes this description to the next level by adding analysis of the multiple on-going processes that influence both national and international rules while at the same time examining the normative content of what the rules should do, not just what they actually are.[94]

Louis Henkin famously observed over 30 years ago: "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"[95] and one would hope this were so in the case of severe suffering caused by major natural or human-made catastrophes. Yet Harold Koh subsequently challenged the rationale behind the initial question asked by Henkin when he refined the focus of analysis from "How do nations behave" to "Why do nations obey?"[96] In so doing, he developed five distinct answers to the

[93] See: O'Connell, 'New International Legal Process' (n.67) 339. It should be noted that New International Legal Process, as described by Professor O'Connell, recognises the evolving nature of norms and does provide for "dynamic decision-making in light of contemporary norms," 346.

[94] While New International Legal Process goes beyond a bald description of existing legal rules and processes to include value-based judgements on the normative content of international law, transnational legal process explains how this evolution takes place through the multiple flow of ideas and principles between national and international legal systems and highlights the wide range of actors that influence the interpretation of contemporary norms. Harold Koh strongly built on the American legal process approach to legal reasoning in his work on transnational legal processes, and crucially has highlighted the normative element required to answer the questions "What is law for?" and "What is the relationship between law and society?". See in particular: Koh, 'Why do Nations Obey' (n.41).

[95] L. Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edn, Columbia University Press 1979) 47.

[96] Koh, 'Why do Nations Obey' (n.41). See also: Hathaway, 'Between Power and Principle' (n.80) who questions whether empirical evidence actually corresponds with norm-based theories of compliance with international treaties, and questions what makes certain states more likely than others to comply with international treaties and why certain rules will be internalised and others not, 481-483.

question he posed; namely, that nations obey international law for reasons of: power, self-interest or rational choice; liberal explanations based on rule-legitimacy[97] or political identity;[98] communitarian explanations;[99] and legal process explanations.[100] By focusing on the question why nations obey international law, Koh refined the legal process explanations into two streams: at the state-to-state level which he designates as "horizontal" or "international legal process," and at the international-to-national level which he designates as "vertical" or "transnational legal process explanations."[101]

While horizontal state-to-state relationships remain a key component of international relationships, the diversity of actors in disaster preparation and response and the importance of norm internalisation necessitates a focus on the multifarious vertical relationships in existence. Therefore, through an examination of the evolving right to humanitarian assistance following natural and human-made disasters, this thesis will argue that these vertical transnational legal process explanations best describe the process of crystallisation of new rules of international human rights law. Yet this begs the question, in the absence of a written universal binding text: at what point does the internalisation of a right to humanitarian assistance by a range of states and non-state actors lead to the creation of a

[97] Rule legitimacy refers to the "compliance pull" that nations feel towards rules that appear legitimate from their perspective while at the same time the rule's legitimacy has "the power to pull toward compliance those who cannot be compelled": T. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990), 24-25. Thomas Franck, a leading proponent of rule-legitimacy theory, responded to Koh's arguments in: T. Franck, 'Dr Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh's Optimism' (1998-1999) 35 *Houston Law Review* 683, although Franck's arguments against the internalisation of transnational norms at the domestic level rely solely on the permeability of international law in American legal culture, rather than a broader critique of transnational legal process as a whole. Coincidentally, although inadvertently, Franck created a link to disaster response through the title of his paper. Dr Pangloss is one of the main protagonists in Voltaire's 1759 satire on optimism, *Candide: or The Optimist*, and a key event in the novelette occurs when Candide and his mentor, Dr Pangloss, witness first-hand the destruction caused by the 1755 Lisbon earthquake.

[98] Starting from Immanuel Kant's observation that liberal democracies do not go to war with each other, political identity explanations are premised on the importance of liberal democracy in ensuring compliance with international rules. See: A-M. Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503; A-M. Slaughter, 'A Liberal Theory of International Law' (April 2000) 94 *American Society of International Law Proceedings* 240; and following rejoinder: J. Alvarez, 'Interliberal Law: Comment' (April 2000) 94 *American Society of International Law Proceedings* 249. Richard Keohane challenged Koh's assertion that the internalisation of transnational norms takes place irrespective of the political system of the country involved. Keohane questioned whether illiberal states actually have the same internal pressures or processes in place to ensure internalisation, compared to civil society engagement in liberal democracies. See: R. Keohane, 'Commentary: When Does International Law Come Home?' (1998-1999) 35 *Houston Law Review* 699, 709-710.

[99] Communitarianism views "international society" as a norm-governed relationship whose members accept they have at least limited responsibilities towards one another and society as a whole, as reflected in international diplomacy and international law. See: C. Brown and K. Ainley, *Understanding International Relations* (4th edn, Palgrave Macmillan 2009), 50-51.

[100] See: Koh, 'International Human Rights Law' (n.41) 1401-1408; Koh, 'Why do Nations Obey' (n.41).

[101] Koh, 'International Human Rights Law' (n.41) 1401.

new rule of customary international law? Additionally, it follows that if a customary international right to humanitarian assistance exists as a result of internalisation, is there a need for the international community to explicitly codify such a right in the interests of legal clarity and mutual accountability between states and non-state actors? To date, a large number of non-state actors have socially internalised a right to humanitarian assistance, for example through their adherence to the Sphere Standards and/or the RCRC Code of Conduct which both explicitly include assertions of the right to humanitarian assistance.[102] Even so, such assertions of the right explicitly recognise that it is not formulated in the same terms under international law, and while such texts may aim to reflect international law, they are primarily premised on the non-binding concept of humanity.[103] Furthermore, only a small minority of states have expressly supported the existence of a right to humanitarian assistance in non-armed conflict settings,[104] and the academic commentary on the topic is divided.[105]

Therefore to analyse the existence of a right to offer or receive humanitarian assistance in disaster settings, one has to separate out the arguments into two strands. The first line of argument posits that a right to humanitarian assistance already exists in international law, namely through provisions within the international humanitarian law of armed conflict, international human rights law, and international refugee and displaced persons law.[106] So despite the lack of explicit references to a right to humanitarian assistance in disaster settings, the international community should simply recognise the pre-existence of such a right in existing international law. Alternatively, a second strand of argument suggests that while the right to humanitarian assistance does not currently exist in international law, there is the

[102] As of July 2013, 515 NGOs have formally signed the Red Cross Red Crescent Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief. The list of signatories is available at: <www.ifrc.org/Global/Publications/disasters/code-of-conduct/codeconduct_signatories.pdf> accessed 25 September 2013. Meanwhile, over 400 NGOs from more than 80 countries provided input for the 2011 revision of the Sphere Project's *Humanitarian Charter and Minimum Standards in Humanitarian Response*, April 2011. See: L. McDougal and J. Beard, 'Revisiting Sphere: new standards of service delivery for new trends in protracted displacement' (2011) 35(1) *Disasters* 87, 90.

[103] *Sphere Handbook*, ibid 20-21.

[104] For a summary of states' views on the right to humanitarian assistance, see: Official Records of the General Assembly, Sixty-fourth Session, Report of the International Law Commission, *Supplement No.10* (A/64/10), Chapter IX, para.241-246; *Secretariat Memorandum on the Protection of Persons in the Event of Disasters*, 60th Session of the ILC (11 December 2007, A/CN.4/590), 20-24.

[105] For example: Y. Dinstein, 'The legal consequences of infringing upon the right to humanitarian assistance', paper presented at the International Colloquium on the Right to Humanitarian Assistance, Paris, 25-27 January 1995; Fisher, 'The Right to Humanitarian Assistance' (n.18).

[106] Fisher, ibid 51-52.

potential for the creation of such a right or that such a right may already be in the process of crystallisation.[107]

While recognising the different factual situations of humanitarian crises caused by armed conflict or forced displacement settings, and natural and human-made disasters, a specific analysis and focus on the internationally binding legal provisions regarding a right to humanitarian assistance during armed conflicts or displacement provides an important comparison and reference point for discussion of the emergence of a right to humanitarian assistance in disaster settings. By examining the humanitarian motivations and desire to ensure a minimum standard of material support for civilians in times of armed conflict or displacement, one can better understand the rationale provided by states and humanitarian agencies for more consistent standards for humanitarian responses to disasters. Such examination can also help to identify gaps and potential legal difficulties that may arise in the development of a specific right to humanitarian assistance in natural and human-made disasters.[108] Furthermore, the 2004 Indian Ocean Tsunami severely affected regions in both Aceh Province in Indonesia and north-east Sri Lanka that were actively engaged in armed conflicts. Likewise, armed conflict existed in northern Pakistan during the 2010 floods, while the Haiti earthquake in 2010 struck areas where post-conflict capacity building and reconstruction activities were on-going. Therefore, it is not unusual for humanitarian actors to simultaneously navigate both peacetime and conflict related humanitarian needs. The need for increased understanding and connection between the existing bodies of international law regulating such responses is therefore evident, and reflects the blurring boundaries between previously distinct bodies of international law.[109]

In addition to developing a rights-based approach and the recognition or creation of new international human rights, transnational legal process can also be used to describe the mechanisms whereby operational rules and procedures are developed at the international level which provoke an interactive flow of ideas and principles across regional, sub-regional and national disaster response structures and policies. In other words, through mechanisms such as the International Law Commission, ASEAN and the Red Cross Movement, international interactions between states and humanitarian actors may create both regional

[107] Dinstein, 'Right to Humanitarian Assistance' (n.105) para.3.
[108] For full discussion of the existing international legal requirements regarding the provision of humanitarian assistance set out in the international humanitarian law of armed conflict, refugee and displaced persons law, and international criminal law, see: Section B, Chapter 4.
[109] For discussion of the increasing interconnection between different branches of international law, see: Reimann, 'From the Law of Nations to Transnational Law' (n.51) 406-408.

and universal legal frameworks for international responses to major disasters which require external humanitarian assistance. As this process is still evolving, it is not yet clear whether or not the end result of the ILC draft articles on the protection of persons in the event of disasters will be a binding universal international treaty-based framework, for example comparable to the Geneva Conventions for situations of armed conflict. However, international interactions are directly affected by legal interpretations at the national, regional and international levels and may result in the domestic internalisation of norms and practices. The current debates, discussions and decisions on operational and normative aspects of humanitarian response are enriching our understanding of the on-going progress and challenges of developing international legal frameworks to provide assistance to those affected by natural and human-made disasters. Applying a transnational legal process approach thus provides an important analytical tool for understanding the dynamics of disaster laws by emphasising how assorted legal regimes for disaster response can work in collaboration to promote a climate of legal certainty and mutual accountability for all humanitarian actors.

D. Chapter Outlines

The following section will briefly outline the progression of this thesis, which commences with a theoretical overview of the creation and elaboration of norms in international law, followed by a description of the evolution of international legal responses to natural and human-made disasters culminating in the proposed *acquis humanitaire* encompassing a broad range of binding and non-binding sources of law and practice in times of humanitarian crises. It then progresses onto the specific question of the existence of a right to humanitarian assistance, before analysing the existing provisions of international human rights law. Finally, the thesis examines the codification and progressive development of international law regarding the protection of persons in the event of disasters, in particular the current work of the International Law Commission, and the potential role to be played by various UN human rights mechanisms. The thesis then concludes by setting out the progress and challenges that exist for the emerging international legal framework for humanitarian responses to natural and human-made disasters.

Specifically, **Chapter 2: Creation and Elaboration of Norms in International Law** develops the theoretical basis of this thesis, from the perspective of transnational legal process, by

examining the creation and development of new rights and norms in international law. Underpinning this are the conceptual approaches to issues such as normative hierarchies in international law, the role of "soft law" or non-binding normative standards, and the limitations on state sovereignty including the concept of humanitarian interventions and the Responsibility to Protect doctrine.

Chapter 3: The Evolution of International Legal Responses to Disasters then proceeds to elaborate the basis of the humanitarian imperative to alleviate the suffering of civilians wherever it may be found, and the fundamental principles of humanitarian action. The conceptual underpinnings required for any international legal framework for humanitarian responses to disasters are outlined, followed by discussion and analysis of previous attempts to codify and regulate international disaster operations.

Despite a dearth of explicit international legal provisions on rights and responsibilities applicable following natural or human-made disasters, international law is not silent on issues of direct relevance to the provision of humanitarian assistance. Therefore, **Chapter 4: Towards an *Acquis Humanitaire*** introduces the concept of an *acquis humanitaire* by tracing the boundaries of humanitarian responses to disasters through analysis of the term "humanitarian assistance" and fundamental challenges raised by the concept of humanitarian interventions. This is complemented by an examination of existing international legal provisions of direct relevance to disasters, from binding rights to assistance for civilian populations in times of war via the international humanitarian law of armed conflict, to criminal responsibility for the wilful denial of humanitarian assistance and binding and non-binding obligations set out in refugee and displaced persons law. Drawing on these positive law sources, the Chapter concludes by addressing the potential for crystallisation of a "right to humanitarian assistance" in international law.

Building on Chapter 4's analysis of positive law sources, **Chapter 5: The Right to Humanitarian Assistance: *lex lata* or *lex ferenda*?** addresses a central question of the thesis, namely what status (if any) does the right to humanitarian assistance currently hold in international law? In so doing, this Chapter commences by defining what is meant by a "right to humanitarian assistance" before examining potential sources of a right to humanitarian assistance in binding international law, non-binding normative standards and customary international law. The Chapter concludes with an initial determination regarding the legal status of a right to humanitarian assistance.

While this initial assessment argues against the existence of a binding universal right to humanitarian assistance, international human rights law already encompasses a range of rights and responsibilities that are equally applicable in times of disaster. Therefore, **Chapter 6: Applying Human Rights Norms in Disaster Settings** examines the broad body of international human rights law to determine which rights are of direct relevance in a disaster, and the implementation of rights-based approaches and accountability under international human rights law in disaster settings. The Chapter then examines the implications of the increasing juridification of disasters for individuals and states, before concluding with a determination of whether or not one can argue that a composite right to humanitarian assistance exists based on existing human rights law.

Following the initial assessment in Chapter 5 regarding the status of a right to humanitarian assistance following natural and human-made disasters, and subsequent analysis in Chapter 6 of binding international rights and responsibilities in disaster settings via international human rights law, **Chapter 7: Emerging International Legal Frameworks for Humanitarian Responses to Disasters** examines the codification and progressive development of international law, in particular by analysing the on-going work of the International Law Commission on the protection of persons in the event of disasters. Fundamental issues underpinning the development of an international legal framework for humanitarian responses to disasters are then discussed, before the Chapter presents a series of proposals for more systemic oversight of human rights in disasters, and concludes with a summary of the progress made towards and challenges facing the emerging international legal framework.

Finally, through my **Conclusions** I will provide answers to the three questions this thesis aims to address. My assessment that there is currently no general binding right to humanitarian assistance following natural and human-made disasters does not preclude the existence of specific rights and responsibilities for a variety of actors in humanitarian crises, such as the right of civilians in times of war to receive certain humanitarian assistance or the right of humanitarian actors to offer their services to states affected by natural and human-made disasters. Similarly, although a general right to humanitarian assistance is not currently part of binding international law, the potential exists for the crystallisation of such a right through the increasing awareness and focus on the legal implications of major disasters for all actors, not least the victims of such catastrophes. So while the work of the International Law Commission is unlikely to produce a text that explicitly affirms a right to humanitarian assistance, it is noteworthy that the legal ramifications of major disasters are currently being

examined in detail by the body charged with the codification and progressive development of international law, reflecting the importance placed by states and non-state actors on improving the delivery and receipt of humanitarian assistance. Simultaneously, the increasing awareness of the human rights implications of disasters requires both states and international institutions to provide more systematic and focused mechanisms to ensure the promotion and respect of human rights in disaster settings. The thesis concludes by arguing that as these various initiatives are on-going, transnational legal process provides the best method of analysing the evolution of a right to humanitarian assistance and international legal frameworks for humanitarian responses to disasters, and can be used to promote the internalisation of rights in disaster settings through domestic law and policy, in conjunction with the development of regional and global legal frameworks for humanitarian response and disaster risk reduction.

Chapter 2

Creation and Elaboration of Norms in International Law

> *Count up the results of 50 years of human rights mechanisms, 30 years of multibillion-dollar development programmes and endless high-level rhetoric, and the global impact is quite underwhelming … This is a failure of implementation on a scale which shames us all.*
>
> Mary Robinson, 1997[1]

Building on centuries of religious, philosophical and legal thought, the past 60 years has seen the formal creation, elaboration and enforcement of a wide range of human rights. Some may argue that the onward march of human rights and liberty is a foregone conclusion. As proclaimed in the preamble of the Universal Declaration of Human Rights: "the inherent dignity and … equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[2] Yet globally, the mechanisms, frameworks and implementation of internationally binding rights have often been sporadic, ad hoc and more honoured in the breach than the observance. As noted by Mary Robinson, there is no lack of human rights mechanisms, but all too often a lack of implementation of existing rights. If this is the case, is there an on-going requirement to recognise new or novel human rights to ensure that all potential harms are proscribed, or alternatively should efforts focus on existing well-established rights and mechanisms to ensure that they work in new or novel situations? As a counterpart to Mary Robinson's belief in the need to reinforce the implementation of human rights mechanisms, David Kennedy highlights the risk that the human rights movement defines itself as a form of emancipation: "what seem like improvements in the field's ability to respond to things outside itself may only be improvements in the field's ability to respond to its own internal divisions and contradictions."[3] So would the explicit recognition of a "right to humanitarian assistance"

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[1] M. Robinson, 'Realizing Human Rights: Take hold of it boldly and duly…', UN High Commissioner for Human Rights Romanes Lecture 1997, Oxford University, 11 November 1997.

[2] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), Preamble.

[3] D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004), 23-24. Kennedy uses the example of the right to development which he argues was born "less in response to global poverty than in response to an internal political conflict within the elite about the

help improve the situation of people caught up in major natural or human-made disasters, or is the creation of such a human right an example of the international legal and humanitarian elite redefining the problem of disasters into rights-based language to fit into the prevailing international consensus of how such problems should be described?

It is not possible within the confines of this thesis to examine in detail the development and conceptual basis for international human rights in general.[4] However, as I will argue that a general right to humanitarian assistance following natural or human-made disasters does not currently exist in positive international law, it is necessary to understand the processes that can lead to the creation of new human rights, and the connected concerns regarding the proliferation or inflation of human rights. Furthermore, it is important to distinguish between technical and operational frameworks to facilitate the delivery of humanitarian assistance, and a rights-based approach which posits that individuals or groups affected by natural or human-made disasters have specific rights of direct relevance in the context of a disaster.[5]

As the international framework surrounding the provision of humanitarian assistance[6] and the protection of persons[7] following natural and human-made disasters contains few

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legitimate balance of concerns on the institutional agenda and to an effort by some more marginal members of that elite to express their political interest in the only available language. The move from a world of 'rights' to 'remedies' and then to 'basic needs' and on to 'transnational enforcement' reflect[s] less a changing set of problems in the world than a changing set of attitudes among international legal elites about the value of legal formalism," 24.

[4] Amongst the voluminous writing by lawyers and political scientists on the topic, see: H. Lauterpacht, 'The Law of Nations, the Law of Nature and the Rights of Man' (1943) 29 *Transactions of the Grotius Society: Problems of Peace and War, Papers Read before the Society in the Year 1943* 1; R. Bilder, 'Rethinking International Human Rights: Some Basic Questions' (1969) *Wisconsin Law Review* 171; U. Baxi, 'Too Many, or Too Few, Human Rights?' (2001) 1 *Human Rights Law Review* 1; O. Hathaway, 'Do Human Rights Treaties Make a Difference?' (2001-2002) 111 *Yale Law Journal* 1935; M. Robinson, 'Making Human Rights Matter: Eleanor Roosevelt's Time Has Come' (2003) 16 *Harvard Human Rights Journal* 1; C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655; H. Koh, 'Repairing Our Human Rights Reputation' (2009) 31 *Western New England Law Review* 11.

[5] For analysis of the broad range of human rights potentially applicable in disasters, see: E. Harper, *International Law and Standards Applicable in Natural Disaster Situations*, International Development Law Organization (2009).

[6] "Humanitarian assistance" is not currently defined in any major humanitarian or human rights law instrument. The Organisation for Economic Co-operation and Development (OECD) defines humanitarian assistance as that: "designed to save lives, alleviate suffering and maintain and protect human dignity during and in the aftermath of emergencies … Humanitarian aid includes: disaster prevention and preparedness; the provision of shelter, food, water and sanitation, health services and other items of assistance for the benefit of affected people and to facilitate the return to normal lives and livelihoods; measures to promote and protect the safety, welfare and dignity of civilians and those no longer taking part in hostilities and rehabilitation, reconstruction and transition assistance while the emergency situation persists." See: <www.oecd.org/document/19/0,3746,en_21571361_39494699_39503763_1_1_1_1,00.html#H> accessed 25 September 2013. See also: Section A(i), Chapter 4.

explicitly binding normative obligations, but a wealth of non-binding resolutions, guidelines and minimum standards, the argument I will advance over the course of this thesis is that the fundamental difference between a "non-binding normative standard"[8] and a "human right" is the existence of a legally binding obligation on the part of the duty-bearer, over the exhortative nature of a normative standard. As Seyla Benhabib has argued, "[b]asic human rights, although they are based on the moral principle of the communicative freedom of the person, are also legal rights, i.e. rights that require embodiment and instantiation in a specific legal framework."[9] In spite of this, the creation of national and international legal and regulatory frameworks to improve the efficiency of humanitarian responses to major disasters does not necessarily imply the creation of new human rights. As noted by Peter Macalister-Smith in 1985:

> There is considerable merit in the legal approach based on relatively detailed technical rules, because progress depends ultimately on the success of practical measures. At the same time, a comprehensive framework of principles for humanitarian assistance would usefully supplement the technical measures which have already been formulated in some detail.[10]

On the basis of this understanding, key questions that need to be asked are: how does a non-binding normative standard become a binding legal norm or "right," and what forms of legal framework are required?[11] As described in the previous Chapter, I will argue that transnational interactions, interpretation and internalisation both within a state and between transnational actors provides the best description of the legal process that allows such transformations to take place. Therefore, for a right to humanitarian assistance to exist[12] we

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[7] "Protection" encompasses all activities aimed at obtaining full respect for the rights of individuals in accordance with the letter and spirit of international human rights, refugee and humanitarian law. Protection activities can be: *responsive*, ie aiming to prevent or stop violations; *remedial*, ie aiming to provide redress for past violations; or *environment-building*, ie aiming to create legal and institutional frameworks, capacity and awareness to promote respect for human rights and prevent future violations. See: Inter-Agency Standing Committee, *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*, Brookings-Bern Project on Internal Displacement (January 2011), 5.

[8] As explained in Section B(i) below, the term "non-binding normative standards" (as opposed to "soft law") refers to the range of guidelines, recommendations and minimum standards relating to humanitarian assistance developed at operational, policy and political levels by states, humanitarian agencies and international organisations.

[9] S. Benhabib, 'Is There a Human Right to Democracy? Beyond Interventionism and Indifference', in C. Corradetti (ed), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, (Springer 2012), 206.

[10] P. Macalister-Smith, 'Disaster Relief: Reflections on the Role of International Law' (1985) *Heidelberg Journal of International Law* 25, 41-42.

[11] For discussion of normative hierarchies in international law and the relative normativity of non-binding sources, see Section B(ii) and (iii) below.

[12] Chapter 5 examines the content and form of a right (or rights) to humanitarian assistance, for example the difference between an individual's right to request and receive assistance and an organisation's right to

must come to the stage where a process of interactions and interpretations between and within states has led to the internalisation of the right into both domestic and international legal frameworks. I will argue that we have not yet reached this stage at the global level in regards to a specific right to humanitarian assistance following natural or human-made disasters. So while there have been a range of authoritative statements from academics, humanitarian agencies and some governments, plus examples of state practice (for example at a regional level in Africa via the Kampala Convention,[13] or thematically via the Geneva Conventions[14] and the international humanitarian law of armed conflict), we cannot yet say that the moral and ethical obligation to provide assistance to people facing severe hardship as a result of such disasters has passed into the realm of general international law or the corpus of international human rights law.

Nevertheless, as set out further in Chapter 4, I propose that the broad range of existing law and practice relating to the prevention and response to humanitarian crises, both in times of armed conflict and natural disaster, can be classified as an *acquis humanitaire*. Indeed, such an *acquis humanitaire* incorporates the pre-existing body of international human rights law which applies in a disaster setting. As examined in Chapter 6, there are a range of rights, including the rights to life, health, and an adequate standard of living, of direct relevance for people affected by disasters. So individuals or groups may have rights claims under well-established human rights norms. Yet, as with all human rights, the domestic application of international human rights obligations often trails states' willingness to sign up to human rights obligations on the international stage.[15] I will therefore now briefly examine the creation and enforcement of rights under international law, before examining the specific role played by

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offer assistance, and the concomitant duty on a state to provide and facilitate humanitarian assistance to those in need.

[13] African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention") (adopted 22 October 2009, entered into force 6 December 2012). The list of countries which have signed, ratified or acceded to the Kampala Convention as of 17 June 2013 is available at: <http://www.au.int/en/sites/default/files/Convention%20on%20IDPs%20-%20displaced....pdf> accessed 25 September 2013.

[14] In particular, Geneva Convention IV relative to the Protection of Civilian Persons in Times of War (adopted 12 August 1949, entered into force 21 October 1950) 973 UNTS 286; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 4; Protocol II Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 610.

[15] H. Koh, 'Review Essay: Why do Nations Obey International Law?' (June 1997) 106(8) *Yale Law Journal* 2599; A-M. Slaughter, A. Tulumello and S. Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (July 1998) 92(3) *American Journal of International Law* 367-397; Hathaway, 'Do Human Rights Treaties Make a Difference?' (n.4); O. Hathaway, 'Making Human Rights Treaties Work: Global Legal Information and Human Rights in the 21st Century' (2003) 31 *International Journal of Legal Information* 312.

non-binding normative standards and normative hierarchies in international law in the context of the global system for responding to major natural and human-made disasters. I will then briefly examine the evolution of limitations on state sovereignty resulting from international law and human rights norms.

A. Creation and Enforcement of Rights under International Law

i. Determining what constitutes a "human right"

As noted by Richard Bilder in 1969: "The issue of definition [of what constitutes a right] is not trivial. For what we think human rights really are will inevitably influence not only our judgment as to which types of claims to recognize as human rights, but also our expectations and programs for implementation and compliance with these standards."[16] Bilder also makes a fundamental point: "[t]o assert that a particular social claim is a human right is to vest it emotionally and morally with an especially high order of legitimacy."[17] It is therefore unsurprising that the definition of what constitutes a "human right" is a highly contested field, subject to frequent concerns regarding rights proliferation and inflation.[18] One can start with the basic premise set out in the preamble of the Universal Declaration of Human Rights (UDHR) that the "advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."[19] Yet the unity achieved in the immediate aftermath of the Second World War dissolved into the polarisation of the Cold War. It took a further 18 years before the other two key components of the International Bill of Rights, the International Covenant on Civil and Political Rights (ICCPR)[20] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[21] were finalised.[22] While the split into two separate

[16] Bilder, 'Rethinking International Human Rights' (n.4) 174.
[17] ibid.
[18] See for example: 'The Danger of Human Rights Proliferation: When Defending Liberty, Less Is More', J. Mchangama and G. Verdirame, *Foreign Affairs Journal*, 24 July 2013, available at: <www.foreignaffairs.com/articles/139598/jacob-mchangama-and-guglielmo-verdirame/the-danger-of-human-rights-proliferation> accessed 25 September 2013.
[19] UDHR (n.2) Preamble.
[20] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[21] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
[22] See generally: UNHCHR, Fact Sheet No.2 (Rev.1), *The International Bill of Human Rights*, last updated 16 January 2013. Available at: <www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> accessed 25 September 2013.

documents has a logical basis and was necessary in the face of Cold War politics,[23] the resulting impact on the universality of human rights as an indivisible body of rights that all peoples around the world can claim remains to this day. Indeed, this split has a fundamental impact on the question of the existence or otherwise of a right to humanitarian assistance, as the progressive realisation of the ICESCR has traditionally been seen to present fewer opportunities for active enforcement than breaches of civil and political rights.[24] Nevertheless, Seyla Benhabib has argued that public law documents such as the UDHR and the international human rights covenants are more than just treaties between states. Benhabib advances the view that such documents are constituent elements of a global civil society, whereby "individuals are rights-bearing not only in virtue of their citizenship within states but in virtue of their humanity as well."[25]

However, despite the well-established rights set out in these global public law documents, any attempt to enumerate a complete list of human rights faces the immediate problem of where to draw the line.[26] Benhabib attempts to solve this problem by arguing that the concept of the right to self-governance exercised through proper legal and political channels underpins all human rights, as it is not possible to implement international human rights norms in exactly the same manner in each country.[27] Hence there is a need for each body politic to define its own interpretation of international norms, as long as the population of the state has the right to representative self-governance.[28] So while states remain the principal public actors with responsibility for human rights, by accepting international human rights

[23] For analysis of the ideological neutrality of the ICESCR from a Cold War perspective, see: P. Alston and G. Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156. See also: M. Dennis and D. Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?' (2004) 98 *American Journal of International Law* 462, who argue that the rights and obligations contained in the ICESCR were never intended to be susceptible to judicial or quasi-judicial determination and so the division between the ICCPR and the ICESCR remains justified.

[24] For an overview of recent attempts to establish an individual complaints mechanism in the ICESCR via an Optional Protocol, see: M. Scheinin, 'The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform – Without Amending the Existing Treaties' (2006) 6 *Human Rights Law Review* 131. For analysis of the text of the Optional Protocol adopted in December 2010, see: A. Vandenbogaerde and W. Vandenhole, 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An *Ex Ante* Assessment of its Effectiveness in Light of the Drafting Process' (2010) 10(2) *Human Rights Law Review* 207.

[25] Benhabib, 'Is There a Human Right to Democracy?' (n.9) 209.

[26] For discussion of the "overproduction" of human rights, see: U. Baxi, 'Voices of Suffering and the Future of Human Rights' (1998) 8 *Transnational Law and Contemporary Problems* 125, in particular 139-141. See also Section B(i), Chapter 6.

[27] Benhabib, 'Is There a Human Right to Democracy?' (n.9) 207.

[28] See also: McCrudden, 'Human Dignity' (n.4) who argues an analogous point in regard to the application of the concept of human dignity as a basis for domestic judicial interpretations of international human rights norms.

norms a state also has to accept criticisms and demands from cross-border and transnational actors and groups which, Benhabib argues, are the principal agents of spreading legal respect for, compliance with, and monitoring of human rights.[29] The focus on a right to self-governance may provide an attractive overarching theory to explain and acknowledge the differential treatment of international human rights norms at the domestic level, but arguably representative self-governance is not always a determinant of the effective implementation of human rights, at least in the context of humanitarian responses to major disasters.[30] The 2008 Chinese Sichuan earthquake provides a good example of a state that does not permit a large-level of representative democracy, yet undertook an effective humanitarian response to meet people's needs following a massive earthquake that killed over 87,000 people and displaced up to 15 million people.[31] While there have been justifiable criticisms of the Chinese authorities' response,[32] comparison with the limited and delayed reaction of the ruling junta in Myanmar to the devastation caused by Cyclone Nargis which hit the Irrawaddy Delta only 10 days prior is striking.[33] Although Myanmar was clearly not a liberal democracy at the time of Cyclone Nargis, the practical and operational challenges of responding to a major disaster had already been starkly highlighted by Hurricane Katrina in 2005 where decisions on how to respond by the US authorities contributed to the severe physical, mental and financial impact the storm had on particularly vulnerable residents of New Orleans.[34]

Upendra Baxi has meanwhile highlighted the dangers of human rights inflation and overproduction, and has argued against the international bureaucratisation of human rights

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[29] Benhabib, 'Is There a Human Right to Democracy?' (n.9) 210.

[30] See also Anne-Marie Slaughter's argument that liberal democracies are more likely to interact via law rather than politics: A-M. Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *American Journal of International Law* 205; A-M. Slaughter, 'A Liberal Theory of International Law' (April 2000) 94 *American Society of International Law Proceedings* 240; and following response by J. Alvarez. For criticism of Slaughter's approach, see: H. Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181, 201-203.

[31] See: IFRC, *Emergency Appeal Final Report, China: Sichuan earthquake*, International Federation of Red Cross and Red Crescent Societies, 30 April 2012; B. Hoyer, 'Lessons from the Sichuan earthquake' (June 2009) 43 *Humanitarian Exchange Magazine* 14.

[32] Especially surrounding the collapse of numerous schools and high number of children killed, see: *China jails earthquake activist*, Associated Press Beijing, 23 November 2009, available at: <www.guardian.co.uk/world/2009/nov/23/huang-qi-jailed-sichuan-quake> accessed 25 September 2013; *China jails investigator into Sichuan earthquake schools*, T. Branigan, The Guardian, 9 February 2010, available at: <www.guardian.co.uk/world/2010/feb/09/china-eathquake-schools-activist-jailed> accessed 25 September 2013.

[33] See: 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' (2009-2010) 38 *Denver Journal of International Law and Policy* 227.

[34] See: S. Sirkin, 'The Debacle of Hurricane Katrina: A Human Rights Response' (2006) 30 *The Fletcher Forum of World Affairs* 223; M. Medina, 'Confronting the Rights Deficit at Home: Is the Nation Prepared in the Aftermath of Katrina? Confronting the Myth of Efficiency' (2006-2007) 43 *California Western Law Review* 9.

regimes at the expense of those actually exposed to human rights violations.[35] Professor Baxi's scepticism towards human rights mechanisms leads him to identify two fundamental questions. First he asks whether all human needs have to be translated into the language of human rights. He then proceeds to query the assumption that a rights-based regime is the principal mechanism for arranging human well-being and the assumed orthodoxy of converting needs into rights.[36] This potential conflict between needs-based and rights-based approaches has been acknowledged within the humanitarian community for decades. The Red Cross Movement was established in the middle of the 19th Century, well before the modern conception of human rights had come into being.[37] The "humanitarian imperative" now claimed by the Red Cross Movement and many other humanitarian agencies declares there is an obligation to provide assistance to civilians, wherever and whenever it is needed.[38] Yet whether this imperative is based on a moral and ethical response to the needs of individuals or because people have a legal right to assistance has sharply divided both academics and practitioners. Considering humanitarian agencies and donor governments only have a set amount of funding available at any particular time, it is not possible for humanitarian assistance to meet all the needs of millions of people globally facing the effects of war, displacement or natural disaster. So the priority given to different emergencies influences the amount of support and assistance different populations receive. As noted by Beat Schweizer, Deputy Director-General of the ICRC: "humanitarian organizations are constrained by the funds made available to them and are therefore subject to the political considerations of donor governments."[39] As a result, different humanitarian emergencies can receive vastly different priorities which has a direct impact on the level of assistance that affected states and humanitarian agencies can provide to individuals.

So a defining moment in the recent history of humanitarianism and humanitarian organisations occurred in 1971 when Bernard Kouchner left the Red Cross Movement

[35] Baxi, 'Too Many, or Too Few, Human Rights' (n.4) 1-2. See also: Baxi, 'Voices of Suffering' (n.26).
[36] ibid 5-6. Rolling back on his cynicism, Professor Baxi concludes by stating that it will be a "sad moment in the future history of human rights when the production of belief in the overproduction of human rights becomes universal," 9.
[37] David Rieff has argued that the 1867 Geneva Convention which stemmed from the work of Henri Dunant and the fledgling Red Cross Movement represented a far less radical departure from previous forms of "colonial humanitarianism." The increased lethality of weapons at the time meant that western (colonial) powers had a real interest in reducing the impact of wars on their own troops, rather than an explicit concern for the suffering of individuals caused by war. D. Rieff, *A Bed for the Night: Humanitarianism in Crisis* (Vintage 2002), 68-70.
[38] B. Schweizer, 'Moral dilemmas for humanitarianism in the era of "humanitarian" military interventions' (September 2004) 86(855) *International Review of the Red Cross* 547, 548-549. For more on the humanitarian imperative, see: Section A(i)(a), Chapter 3.
[39] ibid 551. For discussion of customary international law and state practice regarding a right to humanitarian assistance, see: Section B(iv), Chapter 5.

following the Biafra conflict to form Médecins Sans Frontières (MSF). In the face of alleged genocide, Kouchner felt that the ICRC was repeating its mistakes of the Second World War when it withheld information regarding the Nazi concentration camps.[40] Kouchner's insistence of a *droit d'ingérence*, or a right to intervene, has variously been described as either a right to humanitarian assistance or alternatively as a right to forcible military humanitarian intervention.[41] But Kouchner and the so-called "French doctors" are seen as a distinct group within the humanitarian NGO world, and this highlights the multiplicity of approaches taken by different humanitarian actors who may be acting out of religious beliefs, human rights-based principles, or more traditional views of "charity."[42] For example, in 2004 the French NGO Groupe URD (Urgence, Réhabilitation, Developpement) argued strongly against the rights-based approach set out in the Sphere Project's *Humanitarian Charter and Minimum Standards in Humanitarian Response*.[43] They questioned the link between fundamental legal rights and operational minimum standards in the Handbook, arguing that it is hard to identify how technical standards contribute to ensuring rights are respected, particularly considering the lack of clarity concerning the rights referred to in the Humanitarian Charter.[44] Some of these concerns may have been resolved in the 2011 edition, which attempts to strengthen the ties between the rights-based approach of the Humanitarian Charter with the Handbook's technical standards, but the fact remains that the Sphere Handbook itself acknowledges that the rights proclaimed are not formulated in such terms in

[40] The fact it was subsequently confirmed that no genocide took place in Biafra raised questions as to the wisdom of the stance taken by Kouchner and NGOs such as Oxfam. See: Rieff, *A Bed for the Night* (n.37) 81-86.

[41] See: Y. Beigbeder, *The role and status of international humanitarian volunteers and organizations: The right and duty to humanitarian assistance* (Martinus Nijhoff 1991), 380-384. As the French Foreign Minister during the 2008 Cyclone Nargis disaster, Kouchner was one of the strongest proponents of the applicability of the Responsibility to Protect doctrine in natural disasters when a government's inaction could be held to amount to a crime against humanity. See: J. Wong, 'Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism' (2009-2010) 84(2) *Tulane Law Review* 219, 221, 244-245; T. Jackson, 'Bullets for Beans: Humanitarian Intervention and the Responsibility to Protect in Natural Disasters' (2010) 59 *Naval Law Review* 1, 2.

[42] For description of the different traditions and approaches of humanitarian agencies, see: J. Tong, 'Questionable Accountability: MSF and Sphere in 2003' (2004) 28(2) *Disasters* 176. For an historical account of the changing views of charity and humanitarianism, see: Rieff, *A Bed for the Night* (n.37) 57-89.

[43] C. Dufour *et al*, 'Rights, Standards and Quality in a Complex Humanitarian Space: Is Sphere the Right Tool?' (2004) 28(2) *Disasters* 124. Part of the broader re-evaluation of humanitarian agencies in the aftermath of Rwanda, Somalia and Yugoslavia, the "Sphere Handbook" provided the first comprehensive set of standards and indicators for the provision of humanitarian assistance. First published in 2000, the Handbook was subsequently revised and updated in 2004 and 2011; the current edition has strengthened the priority given to humanitarian and protection principles. The Handbook contains four interconnected sections: the Humanitarian Charter, Protection Principles, Core Standards and Minimum Standards. For background, see: P. Walker and S. Purdin, 'Birthing Sphere' (2004) 28(2) *Disasters* 100; J. Darcy, 'Locating Responsibility: The Sphere Humanitarian Charter and Its Rationale' (2004) 28(2) *Disasters* 112.

[44] Dufour *et al*, ibid 128-129.

international law despite basing its entire conceptual approach on the recognition of a right to humanitarian assistance.[45]

The fact that 515 humanitarian agencies based in 62 countries, plus 186 national Red Cross and Red Crescent Societies, have formally signed the *Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief* which similarly contains specific reference to a right to humanitarian assistance, highlights the willingness of humanitarian organisations to claim such a right exists.[46] So it would appear that many non-governmental humanitarian agencies have translated the language of human needs and suffering into the language of rights via explicit references to a right to humanitarian assistance in texts such as the RCRC Code of Conduct and the Sphere Handbook. While such declarations may be indicative of a trend towards social internalisation of a potential right to humanitarian assistance, in and of themselves such claims do not create a binding legal right to humanitarian assistance at either the national or international level. Although, as noted by Mathias Reimann, the significant role played by NGOs in international legal processes is increasingly influencing the production and content of international law.[47]

ii. Normative stages of human rights

While it can be difficult to identify the boundaries of what should be classified as "human rights," it is possible to identify the processes which give rise to enforceable rights claims. Using a constructivist approach within international relations,[48] Martha Finnemore and

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[45] The Humanitarian Charter describes the role of humanitarian agencies in a "wider framework of roles and responsibilities … and articulates the *moral and legal basis* for the standards that follow. It is based on the belief that the provision of international humanitarian assistance and protection is not simply a charitable act or an expression of solidarity, but an obligation whose origins lie in the principle of humanity and the related humanitarian imperative" [emphasis added]. See: The Sphere Project, *2011 edition of the Sphere Handbook: What is New?*, available at: <www.sphereproject.org/silo/files/what-is-new-in-the-sphere-handbook-2011-edition-v2.pdf> accessed 25 September 2013. See also: Sphere Project, *Humanitarian Charter and Minimum Standards in Humanitarian Response*, April 2011, 21-23. For analysis of the various editions of the Sphere Handbook, see: D. Cubie, 'An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?' (2011) 2 *Journal of International Humanitarian Legal Studies* 177, 200-203.

[46] Figures as of 12 July 2013. Information from <www.ifrc.org/Global/Publications/disasters/code-of-conduct/codeconduct_signatories.pdf> accessed 25 September 2013. Hereinafter the "RCRC Code of Conduct." The figure of 515 includes large NGOs where more than one country office has signed the Code of Conduct. The total number of separate organisations that have signed the Code of Conduct is closer to 400.

[47] M. Reimann, 'From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum' (2003-2004) 22 *Penn State International Law Review* 397, 403-404.

[48] The theory of constructivism within international relations posits that all political concepts are socially constructed, as opposed to determined by nature as proposed by (neo)realists, and so can be modified and

Kathryn Sikkink developed the concept of a "norm life-cycle."[49] Finnemore and Sikkink argue there is an identifiable process whereby norms emerge, develop and then achieve international acceptance. Norm entrepreneurs develop the initial understanding of an emerging norm, which is then taken up by other individuals and groups as norm sponsors who work towards the internalisation of the norm at the domestic level. Agreement between a critical mass of actors around an emergent norm can then create a tipping point after which agreement on the norm becomes widespread.[50] Similarly, Harold Koh has argued that the key agents in transnational legal processes include transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, law-declaring fora, and bureaucratic compliance procedures.[51] There is additional overlap between Koh's transnational legal process and the norm life-cycle proposed by Finnemore and Sikkink in regard to the relationship between domestic and international norms:

> [I]nternational norms must always work their influence through the filter of domestic structures and domestic norms, which can produce important variations in compliance and interpretation of these norms … what we often see is a process by which domestic "norm entrepreneurs" advocating a minority position use international norms to strengthen their position in domestic debates. In other words, there is a two-level norm game occurring in which the domestic and the international norm tables are increasingly linked.[52]

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changed through social processes. See: T. Hopf, 'The Promise of Constructivism in International Relations Theory' (Summer 1998) 23(1) *International Security* 171.

[49] Finnemore and Sikkink's article, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organizations* 887, describes the development of norms and the process of strategic social construction in which actors undertake rational strategies to reconfigure preferences, identities, or social context, 888. They argue that: "Because norms involve standards of 'appropriate' or 'proper' behavior … [w]e only know what is appropriate by reference to the judgments of a community or a society. We recognize norm-breaking behavior because it generates disapproval or stigma and norm conforming behavior either because it produces praise, or, in the case of a highly internalized norm, because it is so taken for granted that it provokes no reaction whatsoever," 891-892.

[50] ibid 892-893. For analysis of the concepts of "norm life-cycles," "norm entrepreneurs" and "internalisation of norms" in the context of the UN Guiding Principles on Internal Displacement (one of the key international texts to explicitly refer to a right to humanitarian assistance), see: H. Entwisle, 'Tracing Cascades: The Normative Development of the UN Guiding Principles on Internal Displacement' (2004-2005) 19 *Georgetown Immigration Law Journal* 369.

[51] H. Koh, 'Bringing International Law Home' (1998-1999) 35 *Houston Law Review* 623. Koh acted as Assistant Secretary of State for Democracy, Human Rights and Labor under the Clinton administration and as Legal Advisor to the Obama administration, and notes that his own role has changed from a private transnational norm entrepreneur to a governmental norm sponsor, which reflects the dynamic nature of the development of transnational norms and the fluidity of role individuals may play in the development of new rights and norms. See: H. Koh, 'How is International Human Rights Law Enforced?' (1998-1999) 74 *Indiana Law Journal* 1397, 1417; H. Koh and A. Zelinsky, 'Practicing International Law in the Obama Administration' (2009) 35(4) *Yale Journal of International Law* 4. Mary Robinson provides another example of a norm entrepreneur and sponsor who has acted in various capacities in promoting adherence to international human rights law through her roles as an academic, politician and UN official.

[52] Finnemore and Sikkink, 'Norm Dynamics and Political Change' (n.49) 893. They also argue that domestic influences are strongest during the early stages of the norm life-cycle, and such domestic influences reduce once a norm has been institutionalised at the international level. Transnational legal

If one applies the concept of a norm life-cycle to the transnational emergence, development and acceptance of a right to humanitarian assistance following natural and human-made disasters, it is clear we are currently in the middle of such a process. Norms regarding the protection and assistance required by combatants and then civilian populations in times of war emerged in the second half of the 19th Century, and were subsequently developed in the aftermaths of the two World Wars until a codified legal framework was adopted through the 1949 Geneva Conventions. Reflecting the dynamic nature of the norms, new understandings and interpretations of the rights and responsibilities of parties to an armed conflict continue to emerge, for example through the Additional Protocols to the Geneva Conventions and the increasing acceptance of the customary international law status of many provisions of international humanitarian law.[53] However, it was not until the 1980s that one could argue that a norm of humanitarian assistance in non-armed conflict settings had emerged. Stephen Marks was perhaps the first academic to discuss a potential right to humanitarian assistance in non-conflict settings, when he referred to this as one of six emerging human rights for the 1980s.[54] While recognising that a right to humanitarian assistance in armed conflict existed via the Geneva Conventions and Additional Protocols, Marks simply described the right of victims of natural disasters to international assistance as a "moral right."[55]

Subsequently, the first governmental attempt to incorporate a right to humanitarian assistance into international law came in 1988 when the French Government introduced a UN General Assembly Resolution on humanitarian assistance for victims of natural disasters.[56] Since then, a range of norm entrepreneurs and sponsors have developed and promoted a right to humanitarian assistance in non-conflict settings.[57] In a continuation of

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process, in contrast, would argue there are multiple on-going interactions between the domestic, regional and global levels even once a norm has been established.

[53] For discussion of the changing norms of military humanitarian interventions, see: M. Finnemore, 'Constructing Norms of Humanitarian Intervention', in P. Katzenstein (ed) *The Culture of National Security: Norm and Identity in World Politics* (Columbia University Press 1996).

[54] S. Marks, 'Emerging Human Rights: A New Generation for the 1980s?' (1980-1981) 33 *Rutgers Law Review* 435, 449-450. Other early academic analyses of humanitarian responses to natural and human-made disasters include: P. Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff 1985); Beigbeder, *Role and status* (n.41).

[55] Marks, ibid 450.

[56] President Mitterrand referred to a "right to humanitarian assistance" but many viewed this as an attempt to introduce the contentious concept of a "right to intervene" (*droit d'ingérence*) as developed by Bernard Kouchner. See: Beigbeder, *Role and status* (n.41) 380-384. See also: 'Law and Humanitarian Ethics' (March-April 1987) 257 *International Review of the Red Cross* 226.

[57] For example, the San Remo International Institute of Humanitarian Law XVIIth Round Table on IHL in 1992 was entitled "The Evolution of the Right to Assistance," and led to the production of a set of *Guiding Principles on the Right to Humanitarian Assistance*. The 1994 World Conference on Religion and Peace adopted the *Mohonk Criteria for Humanitarian Assistance in Complex Emergencies* which included a right to humanitarian assistance, and the 2003 Session of the Institute of International Law in Bruges concluded a

their early work to codify international disaster law through the League of Nations, the Red Cross Movement has been at the forefront of recent attempts to define and codify a right to humanitarian assistance following natural and human-made disasters.[58] Most notably via the inclusion of the right to humanitarian assistance in the 1994 RCRC Code of Conduct, and subsequent focus on international disaster response laws by the International Federation of Red Cross and Red Crescent Societies (IFRC).[59] However, one can argue that the initial attempts to formulate a right to humanitarian assistance in the 1980s and 1990s did not provide sufficient detail as to the resultant implications for rights-holders and duty-bearers should a legally binding right to humanitarian assistance be formally promulgated. Professor Marks had already identified that:

> In most cases, before there is an attempt to postulate a 'right to …' there is the development of a 'law of …' In other words, a new body of legal norms or a revision of legal thinking on a given problem provides the conceptual framework for identifying first the legal implications of the problem, then the human rights implications, and finally the reformulation of the whole problem in terms of a new human right.[60]

Therefore, despite previous attempts at codification of international disaster laws, it is notable that it was only in 2000 that the IFRC commenced a specific programme to promote the concept of International Disaster Response Laws, Rules and Regulations (IDRL) as a distinct body of law for non-conflict disasters to complement the international humanitarian law of armed conflict.[61] A detailed analysis of the concept of a right to humanitarian assistance following natural and human-made disasters and understanding of the international legal frameworks for responses to major disasters are pre-requisites in the norm life-cycle before there can be international acceptance of a universal human right to

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Resolution on Humanitarian Assistance which echoes the rights-based language of the IIHL Guiding Principles and the Mohonk Criteria. See: *Guiding Principles on the Right to Humanitarian Assistance*, International Institute of Humanitarian Law (IIHL), San Remo, Italy, April 1993; J. Ebersole, 'The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance' (February 1995) 17(1) Human Rights Quarterly 192; *Resolution on Humanitarian Assistance*, Institute of International Law, Bruges Session, September 2003, arts II.1 and II.2. For more on these early norm entrepreneurs, see: Section B(i), Chapter 5.

[58] For more on the 1927 Convention Establishing the International Relief Union and the role of the Red Cross Movement, see: Section C(i), Chapter 3.

[59] Other early norm entrepreneurs include practitioners such as Peter Walker and academics such as Rohan Hardcastle and Adrian Chua. See: P. Walker, 'Victims of natural disaster and the right to humanitarian assistance: a practitioner's view' (December 1998) 325 *International Review of the Red Cross* 611; R. Hardcastle and A. Chua, 'Humanitarian assistance: towards a right of access to victims of natural disasters' (December 1998) 325 *International Review of the Red Cross* 589.

[60] Marks, 'Emerging Human Rights' (n.54) 442.

[61] The IFRC now simply refer to their "Disaster Law" programme, in recognition that disaster laws include actions taken both before and after a disaster occurs, not just those in "response" to a disaster. See: <www.ifrc.org/en/what-we-do/idrl/about-idrl> accessed 25 September 2013.

humanitarian assistance. In this regard, the work of the IFRC in identifying and analysing the legal implications of technical and operational aspects of major disasters[62] paved the way for the subsequent work of the International Law Commission on the protection of persons in the event of disasters and the increasing awareness of the need for legal clarity for humanitarian actions in response to disasters. As appropriate international legal frameworks are identified and developed, it should then become clear what the rights and responsibilities of the various actors in a disaster setting ought to be. Ultimately, this may lead to recognition that the concepts of human dignity and international solidarity require the promulgation of a legally binding right to humanitarian assistance.[63] Yet the content and extent of such a right are still in the process of being developed. An individual's right to request and receive humanitarian assistance can be viewed alongside an organisation's right to offer assistance to an affected state. Meanwhile, as set out in the Guiding Principles of UNGA Resolution 46/182,[64] the primary responsibility of the affected state to take care of victims of natural disasters and other emergencies on its territory requires the affected state to actively take on the role of initiation, organisation, coordination, and implementation of humanitarian assistance within its borders. Cyclone Nargis in 2008 provides the starkest example of a government not accepting this primary responsibility, which led to international condemnation, and even calls for forcible military intervention on humanitarian grounds.[65] So if one is to consider a right to humanitarian assistance as a new or emerging human right, how can individuals or groups within an affected state, ie rights-holders, demand compliance or enforcement of their rights from the state or other humanitarian actors, ie duty-bearers?

iii. Compliance with international law

One of the most persistent arguments levelled against international law, often by non-legal scholars of politics or international relations,[66] is the alleged lack of enforcement mechanisms

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[62] See for example: IFRC, *International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges* (2003); IFRC, *Law and Legal Issues in International Disaster Response: A Desk Study* (2007).

[63] For more on the concepts of human dignity and the conceptual underpinnings of the *acquis humanitaire* in the context of disasters, see: Section C(ii), Chapter 4 and Section B(ii), Chapter 6.

[64] *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, UNGA Res 46/182, 19 December 1991.

[65] See for example: C. Allan and T. O'Donnell, 'A Call to Alms?: Natural Disasters, R2P, Duties of Cooperation and Uncharted Consequences' (2012) *Journal of Conflict and Security Law* 1.

[66] For discussion of compliance and enforcement of international norms, see: S. Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?' (1999-2000) 32 *NYU Journal of International Law and Policy* 591, 654-658. Martha Finnemore responded to Ratner's article from the constructivist perspective in: M. Finnemore, 'Are Legal Norms Distinctive?' (1999-2000) 32 *NYU Journal of International Law and Policy* 699, in particular 702-703. See also: O. Hathaway, 'Between Power and Principle: An

to ensure compliance with the rules agreed at the international level. Whether the extreme end of this perspective was ever true in the political and power relations between states on the regional or global stage, it is clear that modern international law does have a direct influence on the activities of governmental and non-governmental actors. While consistent compliance with international rules and norms is unlikely to ever occur, this is no different to the patchy enforcement of domestic laws, for example traffic laws regarding speeding or wearing seatbelts.[67] Yet in any discussion of rights and international law, one has to face both philosophical and practical questions of how a rights-holder can claim a specific right, and against which duty-bearer such a claim can be made. Oona Hathaway has noted there is little empirical evidence that human rights treaties positively influence a state's human rights practices; for if human rights treaties are poorly monitored and enforced there are few incentives for signatory governments to match their rhetoric with action.[68]

Considering that many of the existing rights for material support relevant in disaster settings, such as a right to food or shelter, fall under the category of economic, social and cultural rights which states must primarily ensure through progressive realisation and which may be limited in the face of a public emergency,[69] is it realistic to expect that an individual rights-holder could take an enforceable claim against a duty-bearer over the non-delivery of humanitarian assistance or insufficient supply of material assistance? Yet if the result of a lack of humanitarian assistance is an increased risk of death or serious harm, then should such a claim be brought under a right to life heading, which produces more immediate and absolute obligations on the part of duty-bearers? Even then, who are the duty-bearers:

Integrated Theory of International Law' (2005) 72 *University of Chicago Law Review* 469, in particular 489-491.

[67] Koh, 'International Human Rights Law' (n.51) 1406-1408.

[68] Hathaway, 'Making Human Rights Treaties Work' (n.15); Hathaway, 'Do Human Rights Treaties Make a Difference?' (n.4). Using the example of the OSCE High Commissioner for National Minorities, Steven Ratner coined the phrase "norm intermediary" to define "a party, authorized by states or an international organization seeking to promote observance of a norm, who involves himself or herself in a particular compliance shortcoming of a state and seeks to induce compliance through a hands-on process of communication and persuasion with relevant decision-makers." For Ratner, a norm intermediary represents a two-way bridge between theories of enforcement of international law and those promoting compliance via mediation theory, and notes that Koh's theory of internalisation of norms is best suited to the concept of norm intermediaries. Ratner, 'Does International Law Matter?' (n.66) 668, 687-690.

[69] It is important to note that binding human rights commitments are included in a state's obligation to undertake progressive realisation of economic, social and cultural rights. For example, General Comment No.12 on the Right to Adequate Food adopted by the UN Committee on Economic, Social and Cultural Rights states: "The right to adequate food will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, *even in times of natural or other disasters*" [emphasis added], E/C.12/1999/5, para.6. For more on the implications of progressive realisation of economic, social and cultural rights, see: Chapter 6. For general discussion of derogations in times of emergency, see: S. Joseph, 'Human Rights Committee: General Comment 29' (2002) 2(1) *Human Rights Law Review* 81.

domestic governmental agencies, UN bodies, donor governments, private non-governmental organisations? For example, is it realistic to expect an internally displaced person (IDP) in a tent in Port-au-Prince to take a legal case against Trócaire as an agency funded by the Irish government to provide humanitarian assistance working through the UN Cluster co-ordination structures, in support of the Haitian government? Which jurisdiction would have competence to hear such a claim, and would the Irish government's obligations under the European Convention on Human Rights come into play or only international human rights obligations applicable in Haiti?[70]

Alternatively, rather than an individual enforceable right to receive humanitarian assistance, should the right be viewed from a group or collective perspective, albeit with weaker obligations for states to simply promote greater respect for the needs of people affected by disasters?[71] In such a case, can a mechanism be established to provide not just support to states to ensure that people affected by disasters receive sufficient assistance, but also accountability for local and national authorities via national and international monitoring systems?[72] Finally, at one more step removed from an individual perspective, is the right to humanitarian assistance actually only a right for humanitarian organisations to offer their support, ie individuals or groups have no specific right to receive assistance, but states and organisations may offer their humanitarian services to an affected state?

If a specific right to offer and/or receive humanitarian assistance is to exist in the legal sense, as opposed to the moral or ethical sense, then the question of how to ensure compliance with the binding obligations that would flow from its legal status will need to be addressed, along with the differential implications for states, humanitarian actors and individuals. For example, if a general right to offer and receive humanitarian assistance following natural and human-made disasters is agreed at the international level, one will need to examine how norm intermediaries or norm sponsors can subsequently promote this new international

[70] The Guiding Principles set out in Irish Aid's Humanitarian Relief Policy state: "Irish Aid respects and promotes the implementation of International Humanitarian Law, Refugee Law and Human Rights Law as they relate *to both the delivery and receipt* of humanitarian relief" [emphasis added]. Irish Aid, *Humanitarian Relief Policy*, May 2009, Principle II, 10. Does this mean the Irish government would support an individual's enforcement of a right to receive assistance, in addition to the broader requirement for states and/or humanitarian agencies to ensure the delivery of assistance?

[71] For discussion of different types of rights, see: P. Jones, 'Human Rights, Group Rights and Peoples' Rights' (1999) 21 *Human Rights Quarterly* 80.

[72] For discussion, see: Section D, Chapter 7; and D. Cubie and M. Hesselman, 'Monitoring and Accountability of the Human Rights Implications of Disasters: Proposals for Systemic International Oversight', currently under consideration by the *Netherlands Quarterly of Human Rights* (copy on file with authors).

norm at the domestic level.[73] The question of promoting compliance to international human rights standards, and potential methods for ensuring the monitoring of and accountability for the human rights implications of disasters, will be examined in more depth in Chapters 6 and 7.

B. Relative Normativity in International Law

i. Terminology: "soft law" and "non-binding normative standards"

The multiplicity of potential sources of information and authoritative statements found in many aspects of international law is no less prevalent in humanitarian responses to crises. The international framework surrounding the provision of humanitarian assistance in disasters contains few explicitly binding normative obligations, but a wealth of non-binding resolutions, guidelines and minimum standards. Despite moves to promote a more integrated understanding of norm creation and compliance between international lawyers and international relations scholars,[74] and areas of convergence between legal theories such as transnational legal process and IR theories such as constructivism, there remains a conceptual gap between the weight placed on "legal norms" and "non-legal norms" between the two disciplines.[75] Nevertheless, while legal positivists may emphasise the binary nature of "law/non-law" and argue that the international legal system is predicated on a normative system of identifiable legal rules enforceable in an international court or tribunal,[76] other legal

[73] Ratner has argued that a theory of compliance based on internalisation, such as Koh's theory of transnational legal process, requires attention to the particular process in which normative intermediaries engage to promote domestic observance. Ratner, 'Does International Law Matter?' (n.66) 689-690. In the context of international disaster laws, one could examine the role of norm intermediaries or sponsors such as the Red Cross Movement and the International Law Commission. The role played by actors involved in developing norms regarding internal displacement, such as Francis Deng, Walter Kälin and the Brookings Institute project on internal displacement, would also be relevant. It is outside the scope of this thesis to undertake case studies of such normative actors, but in the context of internal displacement, see: R. Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10 *Global Governance* 459; Entwisle, 'Tracing Cascades' (n.49).

[74] See: Slaughter-Burley, 'International Law and International Relations Theory' (n.30); Slaughter, Tulumello and Wood, 'International Law and International Relations Theory' (n.15).

[75] See for example: Finnemore, 'Are Legal Norms Distinctive?' (n.66).

[76] See: P. Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 414 fn.7. See also: J. Klabbers, 'The Redundancy of Soft Law' (1996) 65 *Nordic Journal of International Law* 167; J. Klabbers, 'The Undesirability of Soft Law' (1998) 67 *Nordic Journal of International Law* 381. However, even legal positivists generally accept that non-binding texts constitute important evidence of the existence of consensus among states regarding particular rules or practices, see for example: *Brownlie's Principles of International Law*, J. Crawford (ed) (8th edn, Oxford University Press 2012), 21.

academics argue for a broader understanding of the concept of a legal text.[77] Furthermore, even within a binary system, positivist legal theorists have proposed various classifications of soft law in an attempt to organise the variety of international actions that directly or indirectly influence international law.

Jean d'Aspremont differentiates between what he calls a "soft instrumentum" and a "soft negotium."[78] A *soft instrumentum* is when parties agree to use an instrument that is not a treaty or binding declaration. In other words, the form taken is not recognised as a formal source of binding legal obligations under international law as per Article 38(1) of the Charter of the International Court of Justice. In contrast, a *soft negotium* is a legally binding instrument which does not contain binding normative commitments, for example due to their vague or restricted nature.[79] While rejecting the basis or relevance of a soft instrumentum to the creation of international norms, d'Aspremont argues that parties under international law are entitled to create legally binding documents that are not comprised of normative content, ie a soft negotium. Therefore, an international legal act does not have to be normative to be legally binding on the state parties to the instrument.

László Blutman has advanced a similar point, positing a separation of soft law into two forms: (I) norms that do not appear in the form of a legal source recognised by international law but which are of some relevance; and (II) norms that appear in the form of a formal legal source recognised by international law but which are not enforceable owing to their generality, vague normative content or subjective nature.[80] Blutman focuses on the first of these two forms of soft law, and categorises this form of soft law into three groupings: i) non-binding decisions of international organisations and bodies; ii) bilateral or multilateral non-

[77] See for example: J. Charney, 'Universal International Law' (1993) 87 *American Journal of International Law* 530. For discussion of the legal effects of "non-legal norms", see: A. Nollkaemper, 'The Distinction Between Non-Legal and Legal Norms in International Affairs: an Analysis with Reference to International Policy for the Protection of the North Sea from Hazardous Substances' (1998) 13 *International Journal of Marine and Coastal Law* 353, 363-367.

[78] J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19(5) *European Journal of International Law* 1075. See also: A. D'Amato, 'Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d'Aspremont' (2009) 20(3) *European Journal of International Law* 897; J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials: A Rejoinder to Tony D'Amato' (2009) 20(3) *European Journal of International Law* 911.

[79] The Vienna Convention on the Law of Treaties defines a "treaty" as: "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 2(1)(a).

[80] L. Blutman, 'In the Trap of a Metaphor: International Soft Law' (2010) 59(3) *International and Comparative Law Quarterly* 605, 606. Blutman refers to these two forms simply as "soft law (I)" and "soft law (II)."

obligatory agreements and declarations created by states; and iii) recommendations passed by NGOs.[81]

While recognising the normative impact soft law may have on state practice through international relations, politics and sociology, Blutman argues that political, moral or technical obligations should not be confused or collated with international legal obligations. Yet he also highlights that non-legal rules may influence the actions of states to a greater extent than binding international obligations.[82] Blutman's argument holds particularly true in new areas of international law, such as the evolving legal framework for humanitarian action. As noted by Anne-Marie Slaughter:

> NGO's … face growing challenges to their accountability, to which they are responding by adopting codes of conduct on their own. These codes and norms may not seem like law at all. Yet scholars and practitioners seeking to predict actual behaviour must take them into account as empirical facts that guide action. Further … these bodies of rules may be templates for future law.[83]

In recognition of the conceptual and terminological difficulties which the phrase "soft law" creates,[84] I therefore use the term "non-binding normative standards" in this thesis to refer to the range of guidelines, recommendations and minimum standards relating to humanitarian assistance developed at operational, policy and political levels by states, humanitarian agencies and international organisations.[85] This term is intended to reflect the strongly persuasive value one must place on certain documents,[86] which cannot be classified as internationally legally binding norms in themselves; without raising the question of their enforceability from a judicial perspective. Such terminology should therefore be seen as encompassing Blutman's concept of "soft law (I)" and d'Aspremont's "*soft instrumentum*." In other words, "non-binding normative standards" refer to authoritative norm creating texts

[81] ibid 607-608.
[82] ibid 612. Compliance with norms, legal or otherwise, is likewise a key question in international relations theory. See for example: Hathaway, 'Do Human Rights Treaties Make a Difference?' (n.4); Finnemore, 'Are Legal Norms Distinctive?' (n.66).
[83] Slaughter, 'Liberal Theory of International Law' (n.30) 243-244. While Professor Slaughter does not reference the RCRC Code of Conduct for disaster relief, the assertion of a right to humanitarian assistance contained within it guides the actions of many humanitarian agencies and could become a template for future law.
[84] Blutman recognises that despite the terminological challenges, without an accepted theory that replaces the concept of "soft law" even authors arguing against the terminology or concept must fit within the classical definition and criteria of international law. Blutman, 'In the Trap of a Metaphor' (n.80) 609.
[85] For analysis and description, see: Cubie, 'Analysis of Soft Law' (n.45).
[86] Steven Ratner refers to soft law texts as "tools of persuasion" in the context of the normative intermediary role of the OCSE High Commissioner for National Minorities. See: Ratner, 'Does International Law Matter?' (n.66) 695.

and practices which are not "law" in the classical sense but which may directly influence the transnational legal process through the creation of consistent practices and consensus amongst transnational actors.

ii. Normative hierarchies in international law

a. Conceptual basis

As debates surrounding soft law exemplify, determining what constitutes "law" at an international level is a complex task, let alone establishing the exact content of subsets such as human rights norms. Weil argued strongly against the concept of soft law, and coined the phrase "relative normativity" in a pejorative sense to describe the blurring of the normative threshold between law and non-law in the international legal system.[87] By definition, such a blurring of the normative threshold entails the creation of a hierarchy of norms, whereby within the body of international law different legal obligations are ascribed a different legal weight. It is generally accepted that a relative hierarchy exists within accepted international law norms ("hard law"), for example vis-à-vis *jus cogens* norms and obligations *erga omnes*[88] and in respect to the Charter of the United Nations.[89] However, as Dinah Shelton notes: "while the concept [of *jus cogens*] is widely supported in the literature, sometimes to an abusive extent, state practice and judicial opinions have been slow to recognize or give legal effect to assertions of such norms."[90] Furthermore, even if one accepts that a hierarchy exists between legally binding norms, there is still debate regarding the relative status of various international norms within such a hierarchy.[91]

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[87] Weil, 'Towards Relative Normativity' (n.76) 415.

[88] See: D. Shelton, 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291; W. Aceves, 'Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation' (2001-2002) 25 *Hastings International and Comparative Law Review* 261.

[89] See art 103, UN Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

[90] Shelton, 'Normative Hierarchy in International Law' (n.88) 292. Shelton further argues that, in practice, the real question is securing states' compliance with obligations they have already agreed to, such as in the UN Charter or Geneva Conventions, than imposing *jus cogens* obligations on dissenting states, 304-305.

[91] For more regarding the hierarchy of norms within "hard law," see: T. Meron, 'On a Hierarchy of International Human Rights' (1986) 80 *American Journal of International Law* 1; U. Fastenrath, 'Relative Normativity in International Law' (1993) 4 *European Journal of International Law* 365; M. Koskenniemi, 'Hierarchy in International Law: A Sketch' (1997) 8 *European Journal of International Law* 566; J. Weiler and A. Paulus, 'The Structure of Change in International Law or Is there a Hierarchy of Norms in International Law?' (1997) 8 *European Journal of International Law* 545; J. Salcedo 'Reflections on the Existence of a Hierarchy of Norms in International Law' (1997) 8 *European Journal of International Law* 583.

Notwithstanding disputes regarding the existence or content of a hierarchy within accepted international legal norms; it is well recognised that resolutions and declarations by states, international organisations and other non-state actors can strongly influence state practice which, in turn, can lead to the creation of legally binding norms.[92] As a result, legal academics such as Jonathan Charney have challenged the classical view of international law and argued for an expanded view of international law-making, stressing that pronouncements of multilateral forums play an important role in the process of international norm creation.[93] As a result, outcomes of multilateral forums, such as declarations and resolutions, can advance and formalise the international law-making process. Norms can therefore become part of international law through positive support within the international community as evidenced by decisions taken at international forums, publication in written form and notice being provided to the international legal system of the rule's existence.[94] Yet even such an expanded view of the sources of international law still primarily refers to sources that emanate from the international legal system itself, such as UN General Assembly Resolutions, inter-governmental regional forums and specialised agencies of the international community. Transnational legal processes meanwhile include a broader variety of actors at both national and international levels, and it is through transnational interactions between these actors that interpretations of emerging norms occur.[95] So when examining a potential right to humanitarian assistance, one must include a wide range of texts, including guidelines and minimum standards developed by non-state actors, humanitarian organisations and influential policy-setting and research institutions.

This range of potential sources of international norms led Steven Ratner to note succinctly that "softness and hardness come in degrees."[96] Yet Martha Finnemore has questioned Ratner's conclusion that policy-makers are often unaware or actively ignore the "hardness"

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[92] As per Martha Finnemore: "Moral norms with no legal status can have powerful effects on state behavior, as work on the suffrage, anti-slavery, anti-apartheid, and early human rights movements shows." Finnemore, 'Are Legal Norms Distinctive?' (n.66) 702.

[93] Charney, 'Universal International Law' (n.77) 544: "[M]ajor developments in international law often get their start or substantial support from proposals, reports, resolutions, treaties or protocols debated in [multilateral] forums. There, representatives of states and other interested groups come together to address important international problems of mutual concern. Sometimes these efforts result in a consensus on solving the problem and express it in normative terms of general application. At other times, the potential new law is developed through the medium of international relations or the practices of specialized international institutions and at later stages is addressed in international forums. That process draws attention to the rule and helps to shape and crystallize it." Although contrast Professor Baxi's cynical take on the creation of international law via the institutions of the international community: see n.35 above and accompanying text.

[94] Charney, ibid 544-547.

[95] Koh, 'Transnational Legal Process' (n.30); Koh, 'Why do Nations Obey International Law?' (n.15).

[96] Ratner, 'Does International Law Matter?' (n.66) 653.

or "softness" of international legal norms, arguing that a preliminary question must be asked: "do legal norms … operate differently from any other kinds of norms in world politics?"[97] Finnemore notes that legal norms may be invested with authority due to a range of factors, including: a state's coercive powers; the fact that foreign policy-makers often have legal training so professional norms of the legal profession shape the weight placed on legal norms by them; and cultural factors whereby "the contemporary world is permeated by a culture that invests authority in impersonal rules, procedures, and legalities." Ultimately, Finnemore argues that debate around hard and soft law is irrelevant if legal norms do not have distinctive effects over and above other forms of norms.[98]

Nevertheless, as some "soft law" sources directly influence state practice, if follows that one must place greater weight on such sources. This suggests a hierarchy within non-law sources, in addition to the differentiation between law/non-law and the internal hierarchy within accepted international norms. For example, Walter Kälin, former Representative of the UN Secretary-General on Internally Displaced Persons, described the Guiding Principles on Internal Displacement as "hard standards even if they are still not hard law."[99] If this is the case, it is hard to deny the existence of relative normativity within the international legal system. Klabbers has described the question to be faced by international lawyers as such:

> The problem with law … is that descriptive things tend to take on normative meaning, or more accurately: descriptive categories sooner or later transform into normative categories ... [A]cademic international lawyers … training consists of transforming practice into norms; so it almost inevitably follows that whatever descriptions we come up with, tend to become normatively relevant.[100]

So arguably, international law faces an inflationary tendency whereby non-law becomes soft law, soft law becomes hard law, and certain customary and treaty norms become *jus cogens*.[101] This can be seen as a positive reflection of the progressive development of international law, if one accepts there is a benefit of legal certainty for individuals and the international community resulting from the creation of binding international legal rules.[102] However, this

[97] Finnemore, 'Are Legal Norms Distinctive?' (n.66) 701.
[98] ibid 703-705.
[99] 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, 8.
[100] Klabbers, 'The Undesirability of Soft Law' (n.76) 385.
[101] Shelton, 'Normative Hierarchy in International Law' (n.88) 322.
[102] As per Preamble, VCLT: "*Believing* that the codification and progressive development of the law of treaties … will promote the purposes of the United Nations set forth in the Charter, namely, the

can also mask the fact that non-legal actions may be complied with by states and non-state actors on the basis of political, moral or technical considerations, and not on the basis of legal rules.[103]

b. Normative hierarchies and a right to humanitarian assistance

The distinction between legal obligations which demand compliance and compliance based on non-legal considerations further complicates determining which rules or standards should be applied in the delivery of humanitarian assistance. David Fisher has argued that a right to humanitarian assistance, as a specific human right in itself, exists through binding obligations already existing upon states through international humanitarian law, human rights law, and refugee law, as well as soft law sources and consistent state and humanitarian organisation practice of providing humanitarian assistance.[104] Indeed, over the past 35 years a wide range of non-binding resolutions, guidelines and minimum standards have been developed by states, international organisations and non-governmental organisations to ostensibly improve the delivery of humanitarian assistance. So when analysing the legal status of a right to humanitarian assistance, one must question the interplay and relative importance of humanitarian obligations that states comply with for non-legal reasons, for example due to domestic or international politics, humanitarian values, international relations or self-interest, and legal obligations originating in international law.[105]

It may be that soft law relating to humanitarian assistance constitutes an important *stage* in the process of elaborating international norms,[106] as a means of supplementing existing hard law obligations or interpreting existing norms. Dinah Shelton has explained this function of soft law as: "part of an increasingly complex international system with variations in forms of instruments, means, and standards of measurement that interact intensely and frequently, with the common purpose of regulating behavior within a rule-of-law framework."[107] On this basis, non-binding normative standards relating to humanitarian assistance can be seen as a

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maintenance of international peace and security, the development of friendly relations and the achievement of cooperation among nations."

[103] See: Ratner, 'Does International Law Matter?' (n.66), in particular 620-623.

[104] D. Fisher, 'The Right to Humanitarian Assistance', in W. Kälin *et al* (eds) *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges*, ASIL and Brookings-Bern Project on Internal Displacement, Studies in Transnational Legal Policy, No.41 (2010), 48.

[105] For a detailed account of compliance theories in international law and international relations, see: Koh, 'Why do Nations Obey International Law?' (n.15).

[106] Weil, 'Towards Relative Normativity' (n.76) 417. See also: Section A(ii) above regarding the norm life-cycle as described by Finnemore and Sikkink.

[107] Shelton, 'Normative Hierarchy in International Law' (n.88) 320.

tool for state and non-state humanitarian actors to base their actions upon in the absence of binding international rules or a developed international normative framework. Yet if this is the case, how does one measure the weight to be placed on a particular non-binding source?[108] Should value be placed on the content of a document, or on the form and process of its adoption? Are there soft obligations that run parallel to soft law or can hard obligations be teased from soft law sources? By analysing key internationally authoritative texts, one can identify certain non-binding normative standards that play an essential role in the operational delivery of humanitarian assistance, albeit on the basis that these standards do not carry the weight of international law. As a result, subject to the voluntary application of these standards by humanitarian actors, their enforceability vis-á-vis the intended beneficiaries of humanitarian assistance remain limited. The implications of this for the development of an international legal framework for the protection of persons in the event of disasters and for rights-based approaches to disaster risk reduction and response will be examined in subsequent Chapters.

iii. Relative normativity of non-binding sources

Notwithstanding the lack of binding legal force behind the numerous authoritative texts on disasters and humanitarian assistance that originate outwith the legal system, non-binding normative standards can possess moral, ethical, political or persuasive value, potentially greater than that of formal legal texts.[109] Therefore, how does one ascribe a particular weight to a specific "soft law" text? As Charney has highlighted, an expanded view of norm creation in international law includes sources that emanate from the international legal system, such as deliberations and declarations of multilateral forums, as these constitute an important stage in the crystallisation of international norms.[110] But even this does not address the range of governmental, inter-governmental and non-governmental normative standards in the area of humanitarian assistance. Therefore, I propose the following expansion of Blutman's soft

[108] As noted by Henckaerts, the ICRC's project researching the Customary International Humanitarian Law of armed conflict is premised on the recognition that "resolutions are normally not binding in themselves and therefore the value accorded to any particular resolution depends on its content, its degree of acceptance and the consistency of State practice outside it." J-M. Henckaerts, 'Customary International Humanitarian Law: Taking Stock of the ICRC Study' (2010) 78 *Nordic Journal of International Law* 435, 444.
[109] For description of the "compliance pull" of international law, see: T. Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power' (January 2006) 100(1) *American Journal of International Law* 88.
[110] Charney, 'Universal International Law' (n.77) 544.

law sources[111] for non-binding normative standards relating to the provision of humanitarian assistance:

1. **Inter-governmental assertions as expressions of the views of the international community** (eg resolutions, declarations and programmes of action from international bodies such as the UN General Assembly and regional bodies such as the Council of Europe, ASEAN or the African Union).
2. **Agreements and recommendations accepted by states through diplomatic conferences and summits** (eg the *IDRL Guidelines* and *RCRC Code of Conduct* adopted at International Conferences of the Red Cross Movement, or the *Hyogo Framework for Action* adopted at the World Conference on Disaster Reduction).
3. **Guidelines and minimum standards established by specialised bodies and representatives of the UN** (eg the *Guiding Principles on Internal Displacement* developed at the request of the UN Commission on Human Rights or the IASC's *Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*[112]).
4. **Widely accepted guidelines and minimum standards developed by non-state actors** (eg the *Sphere Handbook* and the *HAP Standard*).

This categorisation does not assume a hierarchy between these four groups, and the origin of a particular text does not automatically provide it a particular status. While one could assume texts that originate from governmental or inter-governmental sources are likely to hold greater sway with the governments that helped create them, other key features for establishing the relative weight to be ascribed to a particular text need to be examined before a determination can be made.

Cross-cutting the four categories is the extent of recognition for specific standards or principles across a broad range of different states, institutions and organisations. For example, the inter-governmental IASC Operational Guidelines expressly cross-reference other non-governmental standards including the Sphere Handbook and the RCRC Code of Conduct. There is also cross-referencing between non-governmental texts, for example the

[111] Blutman, 'In the Trap of a Metaphor' (n.80).
[112] Inter-Agency Standing Committee (IASC), *Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*, Brookings-Bern Project on Internal Displacement, January 2011 (hereinafter "the IASC Operational Guidelines").

Sphere Handbook cross-references the RCRC Code of Conduct.[113] Meanwhile, state representatives often refer positively to documents produced by non-state actors, such as support given to the IDRL Guidelines in the UN General Assembly Sixth Committee.[114] Through such cross-referencing, key non-binding normative standards build upon previous documents, thereby helping to create a body of internationally authoritative standards for humanitarian assistance, which I have termed an *acquis humanitaire*.[115]

However, it is clear that the influence non-binding normative standards for humanitarian assistance have on actual state and humanitarian actors' practice can vary. The *Guiding Principles on the Right to Humanitarian Assistance*[116] developed by the Institute of International Humanitarian Law have not been expressly internalised by states; while other texts have, such as the UN Guiding Principles on Internal Displacement.[117] This may act as an additional indicator of the status texts are ascribed by humanitarian actors, and by states themselves. For non-binding normative standards to directly impact humanitarian practice, ultimately state and non-state humanitarian actors must view that they should be complied with either for legal or non-legal reasons. Interpretations that lead to such compliance at the national or international level may consequently increase the normative value to be placed on a particular text. Yet while transnational norm interpretation and internalisation allows for the development of an international consensus on the relevant legal principles and standards, applying the norm life-cycle approach means that in the absence of a binding universal legal framework compliance with emerging international norms will first depend on the domestic or regional frameworks that may be in place.

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[113] In the context of the development of international norms of protection and assistance for internally displaced persons, it has been argued that the African Union's Kampala Convention "builds on the 1998 Guiding Principles on Internal Displacement and contributes to their universal authority as well as to their evolution from soft law to hard law standards." See: S. Ojeda, 'The Kampala Convention on Internally Displaced Persons: Some International Humanitarian Law Aspects' (2010) 29(3) *Refugee Survey Quarterly* 58, 59.

[114] See for example: Statement by Ireland (Summary of 22nd UNGA Sixth Committee Meeting, 2010, A/C.6/64/SR.22, para.16).

[115] For a full description of the *acquis humanitaire*, see: Section C, Chapter 4.

[116] IIHL, *Guiding Principles* (n.57).

[117] 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. See: 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> accessed 25 September 2013.

C. Limitations on Sovereignty in International Law

The conceptual and operational development of international human rights and norms set out above has been fundamentally influenced by the changing importance placed on state sovereignty over the past 60 years. Modern views of state sovereignty, like many areas of international law, were redefined at the end of the Second World War. The horrors of war, atomic bombs and the Holocaust shocked an already stunned world into fundamental advances in international legal protections. The UDHR, ICCPR and ICESCR formed the basis for a new international Bill of Rights; while the Conventions Against Genocide,[118] Torture,[119] and Racial Discrimination[120] led to specified rights being universally applicable, irrespective of a government's formal acceptance through an international treaty. The superior status of *jus cogens* norms were given concrete expression in the Vienna Convention on the Law of Treaties,[121] while obligations *erga omnes* confirmed that a state's actions in regard to both individuals and the international community could legitimately be constrained.[122]

These chinks in the armour of the traditional view of state sovereignty, firmly grounded on the principle of non-intervention set out in Article 2(7) of the UN Charter,[123] were further prised open following the end of the Cold War. For example, the 1998 UN Guiding Principles on Internal Displacement[124] were premised on the concept of "sovereignty as responsibility," as developed by Francis Deng the first Representative to the UN Secretary-General on Internally Displaced Persons.[125] The Guiding Principles set out that national authorities have the primary duty and responsibility to provide protection and humanitarian

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[118] Convention on the Prevent and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.
[119] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
[120] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195.
[121] VCLT (n.77).
[122] See: Section B(ii)(a) above.
[123] UN Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI. Art 2(7) states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."
[124] United Nations, Commission on Human Rights, *The Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2 (1998). See also: W. Kälin, *Guiding Principles on Internal Displacement: Annotations*, ASIL and Brookings-Bern Project on Internal Displacement, Studies in Transnational Legal Policy, No.38 (2008).
[125] Deng co-authored a paper in 1996 that first set out the concept of sovereignty as responsibility. See: D. Rothchild *et al, Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution Press 1996).

assistance to internally displaced persons within their jurisdiction.[126] However, international humanitarian organisations and other appropriate actors have a corresponding right to offer humanitarian assistance and protection to IDPs.[127] Crucially, the Guiding Principles clearly state that: "Internally displaced persons have the right to request and to receive protection and humanitarian assistance from these authorities. They shall not be persecuted or punished for making such a request."[128] Furthermore, if a government is unable to provide the necessary assistance, they should not arbitrarily refuse offers of international aid.[129] Roberta Cohen, one of the key drafters of the Guiding Principles, has argued that they reflect an effort to balance state sovereignty with humanitarian imperatives;[130] while also noting that the concept of sovereignty as responsibility entails a corresponding obligation on the part of the international community "to provide humanitarian assistance and protection to IDPs when the governments concerned are unable to fulfill their responsibilities."[131]

The humanitarian crises and military interventions in Somalia, the former Yugoslavia, Rwanda, East Timor and Kosovo likewise refocused the international debate on 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.[132] Under this concept, state sovereignty co-exists with the concept of individual sovereignty drawn from the fundamental freedoms enshrined in the UN Charter and human rights treaties. Annan stressed that the conflicts and genocide of the 1990s, and 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 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. The final report in 2001 set forth the concept of "Responsibility to Protect" or R2P.[133] Simply put, R2P provides that states have the primary responsibility to protect their populations from

[126] Guiding Principles on Internal Displacement, Principle 3(1) (n.124).
[127] ibid Principle 25(2).
[128] ibid Principle 3(2).
[129] For discussion of this point, see: Kälin, *Annotations* (n.124) 117-121. See also: K. Luopajärvi, 'Is there an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?' (2003) 15(4) *International Journal of Refugee Law* 678.
[130] Cohen, 'The Guiding Principles on Internal Displacement' (n.73) 466-467.
[131] ibid 466. See also: Section B(iii)(a), Chapter 7.
[132] *Two Concepts of Sovereignty*, K. Annan, The Economist, 18 September 1999.
[133] *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, International Development Research Centre, (December 2001).

genocide, war crimes, ethnic cleansing and crimes against humanity. However, 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.[134]

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 declaration of the Responsibility to Protect doctrine.[135] This Resolution was accepted unanimously by all members of the UN, thereby confirming the revised view of the limits of state sovereignty. However, while there have been calls to apply the R2P doctrine in a range of settings, from Darfur to DR Congo to Syria, governments and the UN have been slow to expressly invoke R2P, even in cases where international action ensues. In reality, there is limited international consensus on what R2P means in practice,[136] and Luke Glanville has argued that despite the widespread political agreement that sovereignty entails responsibility, there remains a strong body of opinion and state practice against the international enforcement of sovereign responsibility during humanitarian crises in the absence of consent by the sovereignty state in question.[137] Furthermore, the belief by some states that the invocation of R2P to justify international action in Libya in 2011 was in fact a cover for regime change may well result in even more limited application of the doctrine in the foreseeable future.[138] Equally, both the UN Secretary-General and the ILC have clearly stated that the Responsibility to Protect doctrine does not apply in situations of natural disaster, and is currently limited to the international crimes of genocide, war crimes, ethnic cleansing and crimes against humanity.[139]

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[134] *Implementing the Responsibility to Protect: Report of the Secretary-General*, Ban Ki-Moon, A/63/677, January 2009.
[135] UNGA '2005 World Summit Outcome' (15 September 2005) A/60/L.1, para.138-140.
[136] This was particularly evident in the international debate around the applicability of R2P in Myanmar following Cyclone Nargis. 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.
[137] L. Glanville, 'Darfur and the Responsibilities of Sovereignty' (2011) 15(3) *International Journal of Human Rights* 462
[138] See for example: *Emergent Powers: India, Brazil, South Africa and the Responsibility to Protect*, S. Adams, Huffington Post, 20 September 2012. Available at: <www.huffingtonpost.com/simon-adams/un-india-brazil-south-africa_b_1896975.html> accessed 25 September 2013.
[139] Although the UN Secretary-General did provide a potential opening for future changes when he noted that: "The responsibility to protect applies, *until Member States decide otherwise*, only to the four specified crimes and violations" [emphasis added]. See: *Implementing the Responsibility to Protect* (n.132) para.10(b). See also: Official Records of the General Assembly, Sixty-fourth Session, Report of the International Law

This Chapter has shown there is considerable divergence of opinion both within international legal thought and across disciplines such as international law and international relations. The creation and enforcement of international norms and human rights remains a highly contested area, and determining what constitutes a "human right" from either a legal or non-legal perspective can be challenging. Yet, despite the on-going significance of state sovereignty, no one would contest that humanitarianism as a concept plays an important role in both international politics and international law. Therefore, it is necessary to now turn to the question of how international responses to disasters have evolved over the past 150 years, from the creation of the Red Cross Movement in 1859 to the modern understanding of humanitarian action and the humanitarian imperative which claims there is a "right to humanitarian assistance."

Commission, *Supplement No.10* (A/64/10), para.164. For discussion of R2P and natural disasters, see: T.R. Saechao, 'Natural Disasters and the Responsibility to Protect: from Chaos to Clarity' (2006-2007) 32 *Brookings Journal of International Law* 663; Wong, 'Reconstructing the Responsibility To Protect' (n.41); Jackson, 'Bullets for Beans' (n.41); J. Harrington, 'R2P and Natural Disasters', in W.A. Knight and F. Egerton (eds), *The Routledge Handbook of the Responsibility to Protect* (Routledge 2012); Allan and O'Donnell, 'A Call to Alms?' (n.65).

Chapter 3

The Evolution of International Legal Responses to Disasters

> *[H]umanitarianism is constantly being reshaped by the world in which it tries to mitigate suffering, and any attempt to assess the current moment must be premised on a clear-eyed view of a truly complicated past.*
>
> Michael Barnett and Thomas Weiss, 2008[1]

A. Foundations of the Humanitarian Imperative

The pessimistic view of the impact of "humanitarianism" is best captured by the journalist and author David Rieff, who has claimed that humanitarianism is, in reality, a marginal activity in the face of the horrors of war and crises. As he argues in his book, *A Bed for the Night*: "[The] reality is clear to anyone who watches the evening news. There is no letup in the horror, no shining new order in which refugees are treated properly and victims of war get shelter, medical care, and food. Better to say we have good intentions, we care, we want to help, and to persuade ourselves that our good wishes are sooner or later going to be transformed into good outcomes."[2] Having reported on some of the bloodiest conflicts of recent times, including Bosnia, Rwanda and Afghanistan, Rieff has perhaps an understandable cynicism towards humanitarian actors and international law:

> As long as the debate is restricted to one about what the laws are, and what they should be, the moral high ground is easy to hold. The law is the law, after all. But once political arguments have to be advanced and defended, things become less cut-and-dried. It is such a saving idea, the law. The problem is that taking refuge in saving ideas rarely ends up saving anyone. To negotiate the terrain between norms and facts, there is only politics.[3]

[1] M. Barnett and T. Weiss, 'Humanitarianism: A Brief History of the Present', in M. Barnett and T. Weiss (eds), *Humanitarianism in Question: Politics, Power, Ethics* (Cornell University Press 2008), 29.
[2] D. Rieff, *A Bed for the Night: Humanitarianism in Crisis* (Vintage 2002), 87.
[3] ibid 76.

However, Rieff only represents one strand of critical thinking about the scope and appropriate role of humanitarianism and humanitarian actors. Craig Calhoun has argued that Rieff aims to "pull humanitarianism back toward its root in ancient ideas of charity, urging more attention to simply and immediately alleviating suffering and less to human improvement."[4] Michael Barnett and Thomas Weiss go further and accuse Rieff of romanticising the history of humanitarianism by equating it with colonialism and imperialism, and denying how the concept and practices of humanitarianism have changed over time along with the changing face of the world.[5] Yet what is remarkable, even though political scientists, sociologists, lawyers and international relations experts have spent a considerable amount of time examining the impulses and outcomes of humanitarian action, is that most primarily focus on the concept of humanitarianism as it relates to times of war, rather than peacetime emergencies. Historically, this could potentially be understood due to an underlying fatalism as to the divine origin and uncertainty surrounding natural disasters such as earthquakes and volcanic eruptions. Yet the express recognition in 1758 by Emer de Vattel of a state's obligation to "further the advancement of other Nations and save them from disaster and ruin" highlights the long-standing awareness that even if natural phenomenon cannot be predicted, the suffering caused by such events can be mitigated afterwards.[6]

i. Conceptual bases of "humanitarianism"

a. The humanitarian imperative

The modern concept of the "humanitarian imperative" can be traced to the XXth International Conference of the Red Cross in 1965, when the Red Cross Movement adopted the seven fundamental principles of the Red Cross Red Crescent Movement.[7] The first principle adopted was that of "humanity", which states:

> The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in

[4] C. Calhoun, 'The Imperative to Reduce Suffering: Charity, Progress, and Emergencies in the Field of Humanitarian Action', in Barnett and Weiss, *Humanitarianism in Question* (n.1), 74-75.
[5] Barnett and Weiss, 'Humanitarianism: A Brief History of the Present' (n.1) 10.
[6] E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, text of 1758, Books I-IV, Vol. iii, 114.
[7] The seven fundamental principles are: humanity, impartiality, neutrality, independence, voluntary service, unity and universality. See: <www.ifrc.org/en/who-we-are/vision-and-mission/the-seven-fundamental-principles> accessed 25 September 2013.

> its international and national capacity, to prevent and alleviate human suffering *wherever it may be found*. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples. [Emphasis added]

As several of the Red Cross principles (namely voluntary service, unity and universality) relate specifically to the internal working and structure of the Red Cross Movement, the fundamental principles were quickly followed in 1969 with the operational *Principles and Rules for Red Cross Disaster Relief* which reaffirmed that: "The Red Cross in its endeavour to prevent and alleviate human suffering, considers it a fundamental duty to bring relief to all disaster victims."[8] The concept of a humanitarian imperative has since been broadly accepted by many humanitarian actors, for example the Sphere Handbook's Humanitarian Charter not only affirms the primacy of the humanitarian imperative, but argues that nothing should override the principle.[9] Yet the concept has also attracted criticism from academics, not least on the basis that it focuses on the duty of humanitarian organisations rather than the rights of those affected.[10] Furthermore, the humanitarian imperative is a moral or ethical obligation, not a binding legal one on either states or humanitarian agencies, and as a result each actor is liable to interpret the concept based on their own institutional or philosophical stance.[11] From a transnational law perspective, such interpretations are part and parcel of the on-going transnational dialogue regarding the applicable international humanitarian norms in disaster settings. Of note, UNICEF's humanitarian principles describe the humanitarian imperative in the following terms:

> Human suffering must be addressed wherever it is found, with particular attention to the most vulnerable in the population, such as children, women, the displaced and the elderly. The dignity and rights of all those in need of humanitarian assistance

[8] Principles and Rules for Red Cross Disaster Relief art 2, Resolution XXIV of the XXI[st] International Conference of the Red Cross, Istanbul, 6-13 September 1969. The Principles and Rules have subsequently been amended on five occasions, most recently in 1996. See: 'Resolutions of the 26[th] International Conference' (January-February 1996) 310 *International Review of the Red Cross* 72.

[9] The Sphere Project, *Humanitarian Charter and Minimum Standards in Humanitarian Response*, April 2011, 20.

[10] For example: H. Slim, 'Relief agencies and moral standing in war: Principles of humanity, neutrality, impartiality and solidarity' (November 1997) 7(4) *Development in Practice* 342, which argues: "Instead of the simple principle of humanity, most relief agencies have now adopted the more cumbersome (and perhaps sinister) term 'the humanitarian imperative'. This is presumably in the hope that by giving the principle of humanity an imperative gloss and making it unreservedly a moral absolute, the phrase will present humanitarianism as a non-negotiable, almost genetic and biological force," 346; H. Slim, 'Claiming a Humanitarian Imperative: NGOS and the Cultivation of Humanitarian Duty', paper presented at the Seventh Annual Conference of Webster University on *Humanitarian Values for the Twenty-First Century*, Geneva, 21-22 February 2002.

[11] For discussion of the Kantian nature of humanitarian obligations, see: Slim, 'Humanitarian Imperative', ibid 4-5.

must be respected and protected. *The humanitarian imperative implies a right to receive humanitarian assistance and a right to offer it*. [Emphasis added][12]

Considering the standing of UNICEF as one of the primary protection agencies of the United Nations, such high level acknowledgement that the humanitarian imperative entails legal obligations is likely to prompt further transnational interpretations and interactions, although whether or not this will ultimately lead to the crystallisation of a legal right to assistance, rather than simply moral or ethical responsibilities for humanitarian actors remains to be seen.[13]

b. Humanitarian principles

Although the humanitarian imperative originated from the seven Red Cross fundamental principles, by the late 1970s the need for a more universally applicable framework for humanitarian activities was recognised.[14] Therefore, work commenced on a set of humanitarian principles to ensure that assistance was provided in a manner that respected the intended beneficiaries of the assistance, while simultaneously protecting and facilitating the work of humanitarian agencies and the local and national authorities of an affected country.[15] Although initiatives such as the 1982 UNITAR Model Rules for Disaster Relief Operations[16] and 1984 draft UN Convention on Expediting the Delivery of Emergency Assistance[17] were ultimately unsuccessful in codifying an international humanitarian law for

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[12] *UNICEF's Humanitarian Principles*, July 2003, available at: <www.unicef.org/pathtraining/Documents/Session%204%20Humanitarian%20Principles/Participant%20Manual/4.2%20UNICEF%20Humanitarian%20Principles.doc> accessed 25 September 2013. The former Deputy Director-General of the ICRC has described the humanitarian imperative as "an obligation to provide unconditional assistance, wherever and whenever it is needed," while Jacqui Tong of MSF has argued that the humanitarian imperative is to "alleviate the suffering of a vulnerable population out of respect for human dignity." See: B. Schweizer, 'Moral dilemmas for humanitarianism in the era of "humanitarian" military interventions' (September 2004) 86(855) *International Review of the Red Cross* 547, 548-549; J. Tong, 'Questionable Accountability: MSF and Sphere in 2003' (2004) 28(2) *Disasters* 176, 180.

[13] See: Slim, 'Humanitarian Imperative' (n.10) which argues: "As any human rights activist or humanitarian lawyer will testify, writing rights and detailing duties is no short-cut to the realisation of those rights and the meeting of those duties. Yet, the wonderful thing about writing is that it can sometimes be the beginning of things. In writing new formal documents about humanitarian duties and responsibilities in war, NGOs may just help to bring these obligations into political existence, or at least to ensure that the perpetually fragile sense of their moral reality is kept alive for a new generation," 2-3.

[14] For further discussion of the evolution of humanitarian norms, see: Section C below.

[15] For description of the elaboration of humanitarian principles in various soft law texts, see: D. Cubie, 'An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?' (2011) 2 *Journal of International Humanitarian Legal Studies* 177, 191-200.

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

[17] A/39/267/Add.2 – E/1984/96/Add.2, 18 June 1984. See: Section C(i) below for background to the development of the International Relief Union in the 1920s and attempts at codification of international

disasters, they can be seen as the modern starting point for the body of normative resolutions, guidelines and minimum standards aimed at improving the effectiveness and co-ordination of international humanitarian assistance operations. So following the failure of the 1984 draft UN Convention, a non-binding but no less influential attempt to gain international agreement on the principles of humanitarian action took place in the UN General Assembly.

The resulting General Assembly Resolution 46/182 of 1991 on 'Strengthening of the coordination of humanitarian emergency assistance of the United Nations' contained not just technical improvements for the working of UN humanitarian operations but a set of Guiding Principles for humanitarian action.[18] The Resolution sets out that "[h]umanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality," and although the Resolution does not provide explicit definitions of the three humanitarian principles prioritised, UNOCHA has described them as:

- ***Humanity:*** Human suffering must be addressed wherever it is found, with particular attention to the most vulnerable populations such as children, women, and the elderly. The dignity and rights of all victims must be respected and protected.
- ***Neutrality:*** Humanitarian actions must be provided without engaging in hostilities or taking sides in controversies of a political, religious or ideological nature.
- ***Impartiality:*** Humanitarian actions must be carried out on the basis of need alone, giving priority to the most urgent cases of distress and making no distinctions on the basis of nationality, race, gender, religious belief, class or political opinions.[19]

Nevertheless, the on-going debate regarding the ethical and practical standing of the concepts of neutrality and impartiality, particularly in humanitarian actions in times of war, is well

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law under the League of Nations and the United Nations. For discussion of the current efforts at codification via the International Law Commission, see: Section B, Chapter 7.

[18] *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, UNGA Res 46/182, 19 December 1991, Annex, Guiding Principle 2. For analysis of the structural aspects of UNGA Res 46/182, see: Section C(iii)(a) below. For general background, see: E. Tsui, *Analysis of Normative Developments in Humanitarian Resolutions since the Adoption of 46/182*, independent review for UNOCHA (2009), available at: <http://saarc-sadkn.org/downloads/analysis.pdf> accessed 25 September 2013.

[19] See: *Guiding Principles for Public-Private Collaboration for Humanitarian Action*, prepared by the World Economic Forum and UNOCHA, December 2007, 1; *UNOCHA on Message: Humanitarian Principles*, April 2010, available at: <http://ochanet.unocha.org/p/Documents/OOM_HumPrinciple_English.pdf> accessed 25 September 2013. For discussion of these principles from the Red Cross perspective, see the definitions provided by the International Red Cross Movement (n.7); ICRC, *The Fundamental Principles of the Red Cross and Red Crescent* (1996), Ref: 0513, 4-5.

known.[20] Yet the applicability of humanity as the over-riding motivation and foundation for humanitarian action in both armed conflicts and disasters, as confirmed by Resolution 46/182, is widely accepted in law and practice. The International Court of Justice noted in the Nicaragua case[21] that "[t]here can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country … cannot be regarded as unlawful intervention, or as in any other way contrary to international law."[22] The Court proceeded to recall that if the provision of humanitarian assistance is to escape condemnation as internal intervention in another state, it must be limited to "the purposes hallowed in the practice of the Red Cross, namely 'to prevent and alleviate human suffering', and 'to protect life and health and to ensure respect for the human being.'" Above all, humanitarian assistance must be given without discrimination to all in need.[23] Humanitarian agencies have likewise stressed a firm commitment to these humanitarian principles, with the influential, albeit non-binding, Sphere Humanitarian Charter reaffirming the humanitarian imperative and requirement to act in accordance with the principles of humanity and impartiality. The Charter notes: "[b]y this we mean … that all possible steps should be taken to prevent or alleviate human suffering arising out of conflict or calamity, and that civilians so affected have a right to protection and assistance."[24]

The current version of the ILC draft articles on the protection of persons in the event of disasters explicitly contains the humanitarian principles of humanity, neutrality and impartiality, with the Commission noting that these are "core principles recognized as foundational to humanitarian assistance."[25] Although the Commission did not find it necessary to determine whether they were currently part of general international law, the Commentaries stress that "[t]he principle of humanity stands as the cornerstone of the

[20] For critical analysis of the academic and practitioner debate surrounding humanitarian principles, such as the conceptual split between the Red Cross Movement and the "*sans frontières*" movement, see generally: Slim, 'Relief agencies and moral standing' (n.10); N. Leader, 'The Politics of Principle: The Principles of Humanitarian Action in Practice', Overseas Development Institute, Humanitarian Policy Group Report No.2 (March 2000); D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004); Barnett and Weiss, *Humanitarianism in Question* (n.1); S. Collinson and S. Elhawary, 'Humanitarian Space: a review of trends and issues', Overseas Development Institute, Humanitarian Policy Group Report No.32, April 2012.

[21] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, 14. As early as 1949, the ICJ affirmed in the Corfu Channel case that elementary considerations of humanity were well-recognised principles of the international legal order "even more exacting in peace than in war." Corfu Channel (*United Kingdom of Great Britain and Northern Ireland v. Albania*), Merits, Judgment, ICJ Reports 1949, 4, 22.

[22] *Nicaragua v. United States of America*, ibid para.242.

[23] ibid, para.243.

[24] Sphere Handbook (n.9) 16.

[25] For adopted draft articles, see: A/CN.4/L.758, A/CN.4/L.776, A/CN.4/L.794, and A/CN.4/L.812. For analysis of the on-going work of the ILC, see: Section B, Chapter 7 below.

protection of persons in international law."[26] Furthermore, the Commission highlights that the principle of humanity is an element of both international humanitarian law and international human rights law, while also informing the development of law relating to the protection of persons in the event of disasters. In this, the ILC draws on the role that humanity plays as the foundation for actions undertaken by the Red Cross Movement to alleviate suffering. As argued by the ICRC, the principle of humanity is neither too vague nor general to form the basis of the Red Cross Movement's work as "the words used … – to prevent, to alleviate, to protect, to ensure respect – require very concrete efforts."[27]

ii. Humanitarian action in disasters

a. The concept of "humanitarian action"

While the philosophical and conceptual notions of "humanitarianism" provide a rich vein of research questions and challenges for academics; agencies working on the ground have required a more operational and programmatic approach to implementing the humanitarian imperative. Traditional views of responses to wars and disasters have been couched in the terminology of "charity," "aid," "relief" and increasingly "assistance" or "support." These terms are often used interchangeably, and to date there is no accepted legal definition of "humanitarian assistance."[28] However, from an operational perspective, humanitarian agencies have increasingly used the concept of "humanitarian action" to encompass the broad range of activities they engage in at all stages of emergency prevention, mitigation and response. So while humanitarian assistance is traditionally seen to include physical goods necessary to save and sustain life, such as food and medical supplies, the broader conception of "humanitarian action" is intended to include not just material assistance but all actions taken to ensure respect for people in disaster settings.[29] For example, the 2003 Guidelines on Good Humanitarian Donorship developed by major donor countries and the UN defines the objectives of humanitarian action as: "to save lives, alleviate suffering and maintain human dignity during and in the aftermath of man-made crises and natural disasters, as well as to

[26] For Commentaries on draft articles 1-5, see: Official Records of the General Assembly, Sixty-fifth Session, *Supplement No.10* (A/65/10), Chapter VII, pp.321-330.
[27] ICRC, *Fundamental Principles* (n.19) 3. For discussion of the universality of the concept of humanity in international humanitarian law and human rights law see: R. Coupland, 'Humanity: What is it and how does it influence international law?' (December 2001) 83(844) *International Review of the Red Cross* 969.
[28] For analysis, see: Section A(i), Chapter 4.
[29] Hugo Slim has attacked the commodification of humanitarianism and its subsequent reduction to basic packages of material help as a "serious heresy which undermines wider humanitarian values." See: Slim, 'Relief agencies and moral standing' (n.10) 345.

prevent and strengthen preparedness for the occurrence of such situations."[30] The Guidelines highlight that humanitarian action includes: "the protection of civilians and those no longer taking part in hostilities, and the provision of food, water and sanitation, shelter, health services and other items of assistance, undertaken for the benefit of affected people and to facilitate the return to normal lives and livelihoods."[31]

This operational and programmatic approach to humanitarian action can be summed up in three distinct sets of activities: risk reduction, protection and assistance. Risk reduction encompasses both preventative measures such as capacity building and vulnerability reduction, and preparedness measures by affected states, donors and local communities. Meanwhile, protection activities include those intended to provide physical protection to persons as well as the legal protection of rights. Finally, assistance activities include immediate needs such as food, shelter and medical care, and longer-term recovery needs recognising that good disaster management requires preparation for future events even while responding to a contemporaneous event. So it is not surprising that the recent IPCC report on managing disasters and extreme weather events found there was a high level of agreement amongst academics and practitioners that: "Humanitarian relief is often required when disaster risk reduction measures are absent or inadequate" and that "Post-disaster recovery and reconstruction provide an opportunity for reducing weather- and climate-related disaster risk and for improving adaptive capacity."[32]

Donor countries have readily accepted this requirement for a holistic and comprehensive approach to disaster preparedness and response,[33] not least in recognition that US$1 of preventative measures can negate the need for US$4-10 of emergency response activities.[34]

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[30] *Principles and Good Practice of Humanitarian Donorship*, as endorsed in Stockholm, 17 June 2003 at the International Meeting on Good Humanitarian Donorship, art 1.
[31] ibid art 3.
[32] *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: Summary for Policymakers*, Special Report of the Intergovernmental Panel on Climate Change (IPCC, 2012), 8.
[33] For example, both the Australian and Irish government's humanitarian policies include the Guidelines on Good Humanitarian Donorship as an annex. The Irish Humanitarian Relief Policy reflects the holistic approach, noting the importance of disaster risk reduction measures, and emphasising the need to link relief, rehabilitation and development. See: Irish Aid, *Humanitarian Relief Policy*, May 2009, 6. For analysis, see: *Integrating DRR into MAPS Partners' Programming: 2008 Thematic Research Study (With Case Study from Trócaire Central America)*, Final Report May 2009, Irish Aid.
[34] As quoted in: *Making the Case for Disaster Risk Reduction in Africa*, UN International Strategy for Disaster Reduction, UNISDR Africa-Nairobi, December 2006, 14. Similarly, in 2005 the UK Department for International Development noted that an estimated global investment of US$40 billion in disaster risk reduction would have prevented losses of US$280 billion in the 1990s (ie $1 spent for $7 savings). However, they highlighted that consistent methodologies had not been used to prepare the estimates, and so the figures were indicative only. See: *Natural Disaster and Disaster Risk Reduction Measures: A Desk Review*

So, for example, the Australian government's Humanitarian Action Policy states that humanitarian action includes: "not only protection and material assistance but also capacity building, vulnerability reduction, the promotion of disaster and emergency prevention and preparedness measures."[35] The AusAid policy also reflects the growing awareness of humanitarian agencies and donors of the importance of involving national and local authorities for humanitarian actions to be successful, and stresses the increased participation by beneficiary governments and communities in all levels of activities. This recognition of collaborative partnerships between donor and recipient countries, and between humanitarian agencies and the local communities who benefit from their actions, highlights the general move away from top-down approaches of providing charity to the poor. Furthermore, increasing intra- and inter-regional interactions between donor and recipient countries show how even the terminology of "donor" and "recipient" does not reflect the complexity and multiple flows of modern disaster response. The shift from the traditional preponderance of Western humanitarian agencies and personnel is evidenced by the Indonesian Red Cross' deployment of emergency personnel to Haiti immediately following the January 2010 earthquake,[36] and it was fellow ASEAN members China and India which provided the first assistance to Myanmar following Cyclone Nargis in 2008.[37]

b. Phases of a disaster

While it makes sense both operationally and from a rights-based perspective to ensure a holistic response to the threats that communities may face, accepting a broader and longer timeframe for "humanitarian" activities opens up the prospect of increased difficulties for the legal regulation of humanitarian responses to major natural and human-made disasters. As set out in the diagram below, there are four distinct phases of a disaster that may require a specific framework for activities and legal regulation: pre-disaster prevention and preparedness; immediate responses to the disaster itself; post disaster recovery and

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of Costs and Benefits, draft Final Report, 8 December 2005, Department for International Development (DFID) and Environmental Resources Management, 5. The Irish Minister of State with responsibility for Trade and Development, Joe Costello, has similarly noted that every US$7 spent on responding to natural disasters could be offset by US$1 spent on preparedness and early warning. See: J. Costello, 'Joining the dots: Ireland's approach to Disaster Risk Reduction and Linking Relief, Recovery and Development' (May 2012) 15 *VOICE Out Loud Newsletter* 14.

[35] AusAid, *Humanitarian Action Policy*, January 2005, 1.

[36] *Indonesia's Red Cross sends team to Haiti*, J.M. Sidik, Antara News, 17 March 2010, available at: <www.antaranews.com/en/news/1268809240/indonesias-red-cross-sends-team-to-haiti> accessed 25 September 2013.

[37] *His master's voice*, M. Jacques, The Guardian, 15 May 2008, available at: <www.guardian.co.uk/commentisfree/2008/may/15/hismastersvoice1> accessed 25 September 2013.

rehabilitation; and the linking of "disaster activities" to longer-term recovery and developmental activities. These phases can be viewed as a "disaster cycle,"[38] as a fundamental aspect of longer-term recovery and development activities are the inclusion of disaster risk reduction and mitigation activities in collaboration with the communities facing the highest risks from natural hazards.

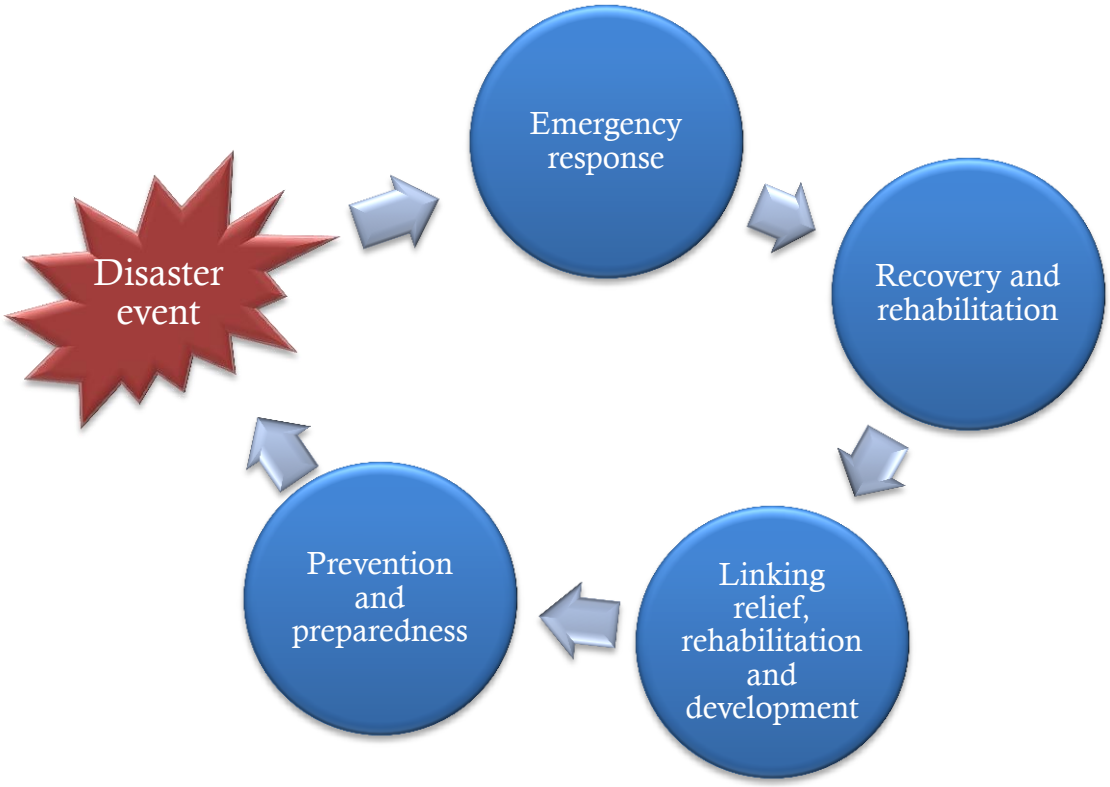

Figure 3.1: Disaster cycle

Indeed, under the Hyogo Framework for Action states are called upon to "[i]ncorporate disaster risk reduction measures into post-disaster recovery and rehabilitation processes and use opportunities during the recovery phase to develop capacities that reduce disaster risk in the long term, including through the sharing of expertise, knowledge and lessons learned."[39] Meanwhile, the Guiding Principles of UNGA Resolution 46/182 note that "the international community should adequately assist developing countries in strengthening their capacity in disaster prevention and mitigation, both at the national and regional levels" and that in order

[38] Adapted from work on disaster cycles undertaken by Daniel Farber of UC Berkeley. See for example: D. Farber, 'Legal Scholarship, The Disaster Cycle, and the Fukushima Accident' (2012) 23(1) *Duke Environmental Law and Policy Forum* 1.
[39] UNISDR, *Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters*, as adopted at the World Conference on Disaster Reduction, 18-22 January 2005, Kobe, Hyogo, Japan (A/CONF.206/6), section III(B)(4)(ii)(h), 11.

to reduce the impact of disasters "there should be increased awareness of the need for establishing disaster mitigation strategies, particularly in disaster-prone countries."[40]

Overall, our understanding of large-scale disasters has advanced remarkably over recent decades, including the predictability of hazards in specific geographical areas or particular vulnerabilities of individuals or communities that must be addressed for effective prevention, mitigation or response activities.[41] As a natural event such as an earthquake or flooding only becomes a disaster when it negatively impacts human life, livelihoods or property, a broadly accepted description of a "disaster" is a natural hazard plus vulnerability.[42] Such an approach is intended to highlight that people are impacted differently by the same event, and recognises the differential vulnerabilities within and between populations to diverse natural hazards. For example, the exceptionally large-scale earthquake to hit Japan in March 2011 led to fewer casualties than relatively smaller earthquakes in Haiti and Chile due to Japan's "famed emergency preparedness and construction standards."[43] So one can predict that states with strong internal procedures and mechanisms will generally deal more effectively with disaster situations than those whose infrastructure and state apparatus are more easily overwhelmed.[44] This in turn highlights the importance of internalisation of humanitarian norms and good practices into domestic legal systems. Nevertheless, the complexity of including all stages of pre- and post-disaster activities within an international legal framework for regulating humanitarian actions was highlighted by the ILC Special Rapporteur in his Preliminary Report on the protection of persons in the event of disasters:

> The importance of a coherent framework in terms of rights and obligations becomes apparent when considering the wide range of specific issues to which providing disaster assistance gives rise through successive phases, not only of disaster response

[40] UNGA Res 46/182 (n.18) Annex: Guiding Principles, art II(13) and (14).
[41] C. Gould, 'The Right to Housing Recovery After Natural Disasters' (2009) 22 *Harvard Human Rights Journal* 169, 180-181: "Our understanding is improving regarding the extent to which human action is present in the precipitation or mitigation of natural disasters. To the individual who loses her home, the distinction may be of little immediate interest, but it is a significant factor in evaluating liability and in shaping a theory of natural disasters that, in turn, will influence the development of a human rights framework."
[42] T. Cannon, 'Reducing People's Vulnerability to Natural Hazards: Communities and Resilience', United Nations University, World Institute for Development Economic Research, Research Paper No.2008/34, April 2008, 2; Internal Displacement Monitoring Centre (IDMC), *Global Estimates 2012: People displaced by disasters*, May 2013, 10.
[43] B. Concannon and B. Lindstrom, 'Cheaper, Better, Longer Lasting: a Right-Based Approach to Disaster Response in Haiti' (2011) 25(3) *Emory International Law Review* 1145, 1167.
[44] For discussion of the challenges faced by local and national authorities, see: J. Telford, 'Disaster Recovery: an International Humanitarian Challenge?', in P. Daly *et al* (eds), *From the Ground Up: Perspectives on Post-Tsunami and Post-Conflict Aceh* (Institute of Southeast Asian Studies 2012).

but also pre-disaster and post-disaster: prevention and mitigation on the one hand, and rehabilitation on the other.[45]

If one takes each of these phases in turn, it is clear that the legal complexities of disasters are multifarious, and often touch on much broader legal questions. Starting with the ***pre-disaster stage***: is there a Responsibility to Prevent disasters (similar to that proposed by Anne-Marie Slaughter and Lee Feinstein in the context of armed conflicts[46]); and what role, if any, does a state's duty to prevent transboundary damage from hazardous activities play? For example, who is liable for transboundary harm resulting from radiation released by the Fukushima Nuclear Disaster of March 2011, which the Japanese government concluded was a human-made disaster rather than purely the result of a natural event?[47] Disaster risk reduction is playing an increasingly fundamental role in the overall humanitarian response to the impacts of natural and human-made disasters, and was included for the first time in the 2011 edition of the Sphere Handbook as a cross-cutting theme of humanitarian responses.[48] Yet the relationship between international legal texts and frameworks for disaster risk reduction, such as the Hyogo Framework for Action,[49] and the evolving frameworks for response activities after a disaster has occurred, such as the ILC draft articles on the Protection of Persons in the Event of Disasters, has not been adequately established. So even though disaster preparedness has increasingly received attention by states and other humanitarian actors, the linkages between disaster prevention, preparedness, response and longer-term recovery still need to be fully examined.[50] As noted at a major international conference organised by the

[45] E. Valencia-Ospina, *Preliminary Report*, 8 May 2008, A/CN.4/598, 20. See also: Council Regulation (EC) No.1257/96 of 20 June 1996 concerning humanitarian aid (OJ L.163/6) which similarly emphasises that humanitarian assistance must cover the full duration of a crisis and its aftermath, Preamble.

[46] L. Feinstein and A-M. Slaughter, 'Duty to Prevent' (January-February 2004) 83(1) *Foreign Affairs* 136. In the European context, the European Court of Human Rights has twice found that failing to take feasible measures that would have prevented or mitigated the consequences of foreseeable disasters amounts to a violation of the right to life and therefore incurs the responsibility of the state under international law. See: ECHR, *Öneryildiz v. Turkey*, Application 48939/99, judgment of 30 November 2004; ECHR, *Budayeva and others v. Russia*, Applications 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, judgment of 20 March 2008. See also: W. Kälin and C.H. Dale, 'Disaster risk mitigation – why human rights matter' (October 2008) 31 *Forced Migration Review* 38.

[47] See: The National Diet of Japan, *The official report of The Fukushima Nuclear Accident Independent Investigation Commission*, Executive Summary, July 2012: "[T]he Fukushima Daiichi Nuclear Plant [was not] prepared to respond to a severe accident. In spite of the fact that TEPCO and the regulators were aware of the risk from such natural disasters, neither had taken steps to put preventive measures in place. It was this lack of preparation that led to the severity of this accident," 26.

[48] Sphere Handbook (n.9) 14.

[49] Hyogo Framework for Action (n.39).

[50] See for example: *Addendum to Protection of Persons in the Event of Disasters*, Memorandum by the Secretariat, International Law Commission, 11 February 2008, A/CN.4/590/Add.1: "As the importance of disaster prevention, mitigation and risk reduction is increasingly recognized, the notion of termination is developing accordingly. The traditional model in which a state of disaster comes to a definite conclusion is being replaced by one in which an emergency response phase gives way to a rehabilitation period followed by an ongoing development phase," para.248.

Norwegian government in 2011: "Traditional barriers between the humanitarian and development fields – be they institutional, funding-related or conceptual – should not be allowed to stifle the action, innovation and change needed to alleviate suffering and strengthen resilience."[51]

Moving on to the ***immediate response phase***, a key question is: what is the relationship between state sovereignty and individual or group rights, and when should one take precedence over the other? Furthermore, what role can or should the international community play in disaster response? In particular, is there a responsibility to protect the victims of natural and human-made disasters comparable to the Responsibility to Protect civilian populations from the mass atrocities of genocide, war crimes, crimes against humanity and ethnic cleansing, even against the wishes of an affected state?[52] Indeed, can the denial of humanitarian assistance in the face of massive human suffering following a natural disaster in itself amount to a crime against humanity?[53] Meanwhile, in a ***post-disaster setting***, at what point do "humanitarian" activities stop and longer-term development projects start? The ILC Special Rapporteur's Preliminary Report described "development" as "support to and implementation of autonomous development policies."[54] While this highlights the need for the national and local communities to determine their own development priorities, it does not draw a clear line between "humanitarian" and "development" activities. For example, does refurbishing a hospital damaged by a natural disaster to a higher level of specification than previously amount to a humanitarian response or the development of the local medical services? Finally, what responsibility does the international community have in assisting countries to ensure their own developmental policies are implemented, and does this responsibility differ from the international community's responsibility in the face of humanitarian emergencies?[55] Considering the fundamental questions which the application

[51] M. Wahlström (UN Special Representative of the Secretary-General for Disaster Risk Reduction), Chairperson's Summary, *Nansen Conference on Climate Change and Displacement in the 21st Century*, Oslo, 6-7 June 2011, para.17.

[52] For conflicting views, see: E. Luck, 'Environmental Emergencies and the Responsibility to Protect: A Bridge Too Far?' (2009) 103 *American Society of International Law Proceedings* 32; T.R. Saechao, 'Natural Disasters and the Responsibility to Protect: From Chaos to Clarity' (2006-2007) 32 *Brookings Journal of International Law* 663.

[53] See: D. Cubie, 'Is the Wilful Denial of Humanitarian Assistance in Natural or Human-Made Disasters a Crime Against Humanity?' (Summer 2012) *ASIL Accountability Newsletter*.

[54] Valencia-Ospina, *Preliminary Report* (n.45) para.58.

[55] As noted by Oscar Schachter nearly 40 years ago: "it has become clearer that the needs of the poor countries must be perceived in terms of the large mass of disadvantaged individuals and communities, and that these needs involve social and cultural factors – and often political arrangements – which are not easily changed by external aid." O. Schachter, 'The Evolving International Law of Development' (1976) 15 *Columbia Journal of Transnational Law* 1, 12. Meanwhile, Hugo Slim has argued strongly for the recognition of the similarity of rights-based approaches within humanitarian and development discourses. See: H. Slim,

of humanitarian principles entails, it is pertinent to now examine some of the conceptual challenges which will underpin any international legal framework for disasters.

B. Conceptual Considerations for International Legal Frameworks for Disasters

i. Sovereignty and human rights

The evolving nature of the concept of "sovereignty" described in the previous Chapter has a direct and fundamental impact on the provision of humanitarian assistance, especially when one is evaluating the existence or otherwise of a right to humanitarian assistance. The weakening of the traditional view of state sovereignty[56] and introduction of limitations on the actions of sovereign states reflects the increasing prominence placed on individual human rights in the international legal system. Nevertheless, Article 2(7) of the UN Charter clearly establishes the concept of non-intervention in the internal affairs of sovereign states, and stresses that nothing contained in the Charter authorises the UN to intervene in matters essentially within the domestic jurisdiction of states.[57] The requirement of state consent for international humanitarian operations, whether undertaken by the UN, inter-governmental or non-governmental agencies, has been reaffirmed in numerous binding and non-binding documents.[58] So despite on-going debates over military humanitarian interventions and the evolving Responsibility to Protect doctrine, it follows that the delivery of humanitarian

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'Dissolving the difference between humanitarianism and development: the mixing of a rights-based solution' (August 2000) 10(3-4) *Development in Practice* 491.

[56] Luke Glanville has argued that "it was the right to wage (just) war rather than the right of non-intervention that was initially conceived by rulers and theorists to be an essential attribute of sovereignty, and the supposed 'traditional' non-interventionist ideal type of sovereignty … would only be firmly constructed by the society of states for the first time in the twentieth century." See: L. Glanville, 'The Myth of "Traditional" Sovereignty' (2013) 57 *International Studies Quarterly* 79, 81.

[57] This was subsequently confirmed in 1970 through the *Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, UNGA Res 2625(XXV), 24 October 1970.

[58] See for example: UNGA Res 46/182 (n.18) Annex: Guiding Principles, art I(3): "The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country"; Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (adopted 18 June 1998, entered into force 8 January 2005) 2296 UNTS 5: "No telecommunication assistance shall be provided pursuant to this Convention without the consent of the requesting State Party," art 4(5).

assistance to peoples affected by disasters must be viewed in light of the continuing fundamental role of state sovereignty.[59]

As a result, argument continues to revolve around the respective weight that should be ascribed to limitations on state sovereignty contrasted with individual and group rights as developed by international humanitarian law, human rights law, and refugee and displaced persons law. During emergency relief operations, this debate centres on a right of access. While it has been argued that certain global issues, including natural disaster prevention and post-disaster aid, should be subject to a global legal domain headed by a world parliament,[60] such a paradigm shift in the conceptual understanding and application of state sovereignty is most unlikely to occur in the foreseeable future, and so is outside the scope of this thesis. Nevertheless, if in international law state sovereignty takes precedence over human rights, then a state can lawfully deny humanitarian agencies access to the victims of a disaster.[61] As stated by the ILC: "The principles of sovereignty and non-intervention contain two important corollaries: that disaster relief carried out by assisting actors is subject to the consent of the receiving State and that the receiving State has the primary responsibility for the protection of persons on its territory or subject to its jurisdiction or control during a disaster."[62] However, if a state's actions are constrained by a narrower understanding of sovereignty and non-intervention, then the international community can argue there is a right of access to protect individual or group rights irrespective of the wishes of the affected state.[63]

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[59] It has been argued that the affirmation of the 168 signatory states to the Hyogo Framework for Action that: "States have the primary responsibility to protect the people and property on their territory from hazards" represented a significant breakthrough in the acceptance of the concept of sovereignty as responsibility. See: S. Davies, 'Is There an International Duty to Protect Persons in the Event of an Epidemic?' (Spring 2010) III(2) *Global Health Governance*, 11. While the change of wording from "responsibility to take care of the victims" as per UNGA Res 46/182 to "responsibility to protect the people" is marked, the subsequent exclusion of situations of natural and human-made disasters from the concept of the Responsibility to Protect reduces the practical impact of the Hyogo Framework wording.

[60] R. Domingo, 'Gauis, Vattel and the New Global Law Paradigm' (2011) 22(3) *European Journal of International Law* 627, 644-646.

[61] See: C. Allan and T. O'Donnell, 'A Call to Alms?: Natural Disasters, R2P, Duties of Cooperation and Uncharted Consequences' (2012) *Journal of Conflict and Security Law* 1.

[62] Memorandum by the Secretariat, *Protection of persons in the event of disasters*, International Law Commission, 60th Session, 11 December 2007, A/CN.4/590, Summary, p.2, and generally para.20-24.

[63] R. Hardcastle and A. Chua, 'Humanitarian assistance: towards a right of access to victims of natural disasters' (December 1998) 325 *International Review of the Red Cross* 589, 601-602. See also: K. Luopajärvi, 'Is there an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?' (2003) 15(4) *International Journal of Refugee Law* 678.

ii. Contrasting approaches: Technical and operational versus rights-based

From an analysis of international legal rules and operational practices, two distinct approaches to the regulation of international disaster responses can be identified. A technical and operational approach aims to minimise potential legal barriers to the efficient delivery of aid, such as national regulations on import duties for humanitarian goods and work visas for international humanitarian staff. An example of such an approach are the 1982 UNITAR Model Rules for Disaster Relief Operations[64] which provide template agreements for states focused on the practical and logistical aspects of relief operations. Similarly, the IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance,[65] national Model Act[66] and draft national Model Emergency Decree[67] are aimed at state authorities to assist them in developing their national legal preparedness for disasters. Practitioners and academics have long been aware of the need for legal rules to balance technical approaches with humanitarian principles and international cooperation. Writing in 1985, Peter Macalister-Smith highlighted:

> There is considerable merit in the legal approach based on relatively detailed technical rules, because progress depends ultimately on the success of practical measures. At the same time, a comprehensive framework of principles for humanitarian assistance would usefully supplement the technical measures which have already been formulated in some detail. More broadly, it is appropriate to examine how to develop the foundations for international humanitarian co-operation contained in Art. 1(3) of the UN Charter. The requirement for firm foundations as well as guiding principles for humanitarian action is more than ever necessary in a period of greatly increased humanitarian needs.[68]

Alternatively, rights-based approaches focus on the entitlement of victims to a certain level of assistance in disaster settings married with accountability mechanisms establishing

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[64] el Baradei, *Model Rules* (n.16).

[65] IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (2008), 4-5. Hereinafter "the IDRL Guidelines."

[66] The IFRC worked in conjunction with UNOCHA and the Inter-Parliamentary Union on detailed legislative guidance for Governments to draft a *Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*. A pilot version was presented at the 31st International Conference of the Red Cross Red Crescent Movement in November 2011, and the final version was published in March 2013. For information and the text of the draft Model Act, see: <www.ifrc.org/en/what-we-do/idrl/model-act-on-idrl> accessed 25 September 2013.

[67] The IFRC and UNOCHA are currently developing a draft national Model Emergency Decree for situations where a clear legal framework is not in place before the onset of a large-scale disaster, or where the adoption of more comprehensive legislation is not practicable. For information and the text of the consultation version of the draft Emergency Decree, see <www.ifrc.org/what-we-do/idrl/draft-model-emergency-decree> accessed 25 September 2013.

[68] P. Macalister-Smith, 'Disaster Relief: Reflections on the Role of International Law' (1985) *Heidelberg Journal of International Law* 25, 41-42.

measurable and enforceable obligations.[69] As noted by Susannah Sirkin following Hurricane Katrina: "a human rights analysis … differs from a humanitarian analysis in that it should lead us to look at the unacceptability of [vulnerabilities of particular minorities to natural disasters] in the first place. Such an analysis emphasizes and addresses how respect for the rights of all can reduce, minimize, and in many cases eradicate such vulnerabilities."[70] Even within a rights-based approach to humanitarian action, one can identify two distinct strands. First of all, one can argue that existing international human rights provisions are applicable in a disaster setting, and therefore must be fully taken into consideration by the affected state and other humanitarian actors.[71] The second strand contends that drawing from binding international human rights standards such as the rights to life,[72] health and medical services,[73] and an adequate standard of living,[74] a distinct "right to humanitarian assistance" exists which is applicable in both armed conflict and disaster settings. An example of this approach comes from the 1994 Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief[75] which commences with a statement of the humanitarian imperative: "The right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries. As members of the international community, we recognise our obligation to provide humanitarian assistance wherever it is needed." This quote highlights the additional dimensions to any "right to humanitarian assistance," which can be further split into a right of states and humanitarian actors to offer their services to an affected state (sometimes called

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[69] *Towards Freedom from Fear and Want: Human Rights in the Post-2015 Agenda*, Thematic Think Piece, Office of the High Commissioner for Human Rights, May 2012, produced for the UN System Task Team on the Post-2015 UN Development Agenda, 6-7.

[70] S. Sirkin, 'The Debacle of Hurricane Katrina: A Human Rights Response' (2006) 30 *The Fletcher Forum of World Affairs* 223, 225.

[71] This approach was taken in the International Development Law Organization's manual on the international law and standards applicable in disasters. See: E. Harper, *International Law and Standards Applicable in Natural Disaster Situations*, International Development Law Organization (2009), which provides a detailed examination of the range of human rights applicable in disaster settings, but does not provide any analysis of a specific "right to humanitarian assistance." The manual simply notes that although a right to humanitarian assistance is not mentioned in treaty-law, soft law contains numerous references to such a right, 43.

[72] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 3; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6.

[73] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 12.

[74] ibid art 11; UDHR (n.72) art 25; Convention on the Elimination of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 14.

[75] See also: D. Fisher, 'The Right to Humanitarian Assistance', in W. Kälin *et al* (eds) *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges*, ASIL and Brookings-Bern Project on Internal Displacement, Studies in Transnational Legal Policy, No.41 (2010) 51-52, who contends that international human rights law, customary law and soft law instruments, such as the Code of Conduct, confirm the existence of a right to humanitarian assistance.

the "right of initiative") and an individual's right to request and receive humanitarian assistance. Reflecting its key focus on impartiality and neutrality, and role as auxiliaries to a state's emergency services in both times of war and disaster, the Red Cross Movement has taken a pragmatic approach to disaster response. While the conceptual underpinning of their work is based on the humanitarian imperative as evidenced by the RCRC Code of Conduct, the Red Cross Movement's prioritisation of international disaster response laws has aimed primarily to improve the technical and operational facilitation, co-ordination and regulation of disaster responses.[76]

During debates in the ILC on the protection of persons in the event of disasters, Ian Brownlie described the first approach as a "problem-based approach," giving examples of early warning systems and stockpiling of food stuffs as appropriate areas for international regulation, rather than adding to the existing body of international humanitarian, human rights and refugee law. While such a description was supported by several members of the ILC, the Special Rapporteur highlighted that problem-based or technical approaches need not be in conflict with rights-based approaches. The two approaches simply highlight different perspectives or emphasis.[77] One can visualise these divergent but connected approaches thus:

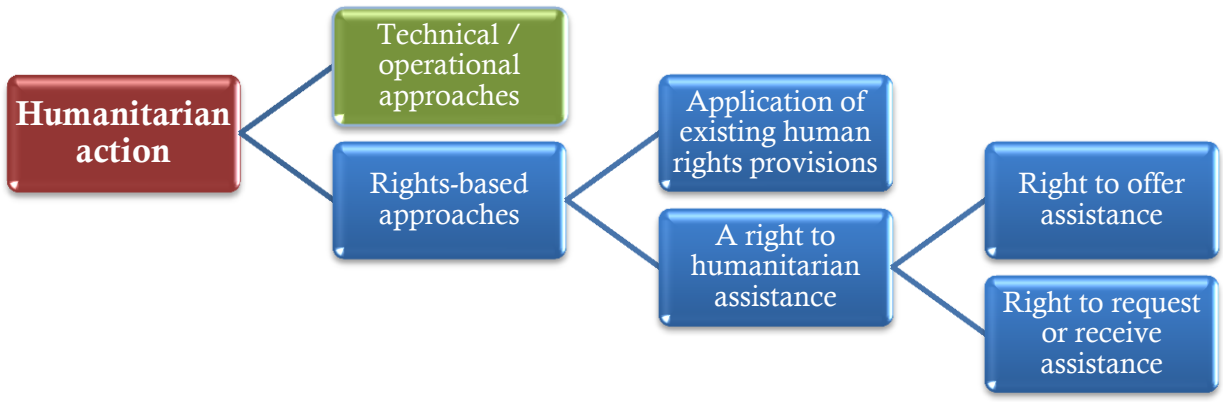

Figure 3.2: Approaches to humanitarian action

Although one can identify these two specific approaches to humanitarian action, in reality there is overlap between the categories in specific legal texts, for example UN General

[76] See: IFRC, *Disaster Law Programme Summary Plan 2013*, available at: <www.ifrc.org/PageFiles/53419/Disaster%20Law%20Prog%20Summary%20Plan%202013.pdf> accessed 25 September 2013.

[77] Provisional Summary Record of 2979th ILC Meeting, A/CN.4/SR.2979, 16 July 2008, para.11-15. For discussion of technical issues under consideration by the ILC, including access of relief personnel and supplies, see: E. Valencia-Ospina, *Fifth Report*, 9 April 2012, A/CN.4/652, para.93-116.

Assembly Resolutions such as Resolution 2816 (XXVI)[78] and Resolution 46/182[79] have elaborated fundamental humanitarian principles but also contain specific technical arrangements for funding and co-ordination mechanisms.[80]

iii. Binding and non-binding forms of rules

It can be argued that "soft law" does not create internationally binding obligations on states but inter-disciplinary non-binding normative standards exist which directly influence the actions of state and non-state actors. Furthermore, such non-binding normative standards can be categorised into a relative hierarchy, based on the weight and importance attached to them by humanitarian actors.[81] In an evolving area of international law, such as the legal regulation of humanitarian assistance, clearly identifiable non-binding normative standards are likely to be pre-requisites to the progressive development and domestic internalisation of international humanitarian norms. Nevertheless, the form taken by international texts does not preclude such non-binding documents exerting considerable authority in their own right, at times greater than the authority wielded by binding international law. An example is the non-binding UN Guiding Principles on Internal Displacement,[82] which have gained considerable authority and recognition by both states and non-state actors, as noted by Walter Kälin, former Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons.[83] Francis Deng, one of the key drafters of the Guiding Principles, has argued that this wide-spread acceptance by states results from the text representing a restatement of existing international law, rather than creating new rights for internally displaced persons.[84] Therefore, as set out in Chapter 2, it is clear that the

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[78] *Assistance in Cases of Natural Disaster and other Disaster Situations*, UNGA Res 2816 (XXVI), 10 January 1972.
[79] UNGA Res 46/182 (n.18).
[80] Nick Leader has classified these two aspects of international texts as: "General Statements of Principle" and "Detailed Statements of Performance Standards." See: N. Leader, 'Codes of Conduct: Who Needs Them?' (March 1999) 13 *Humanitarian Exchange Magazine*.
[81] See: Cubie, 'Analysis of Soft Law' (n.15); and Section B, Chapter 2.
[82] United Nations, Commission on Human Rights, *The Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2 (1998).
[83] W. Kälin, *Guiding Principles on Internal Displacement: Annotations*, ASIL and Brookings-Bern Project on Internal Displacement, Studies in Transnational Legal Policy, No.38 Revised Edition (2008), at *vii* (Preface). See also: R. Cohen, 'Reconciling R2P with IDP Protection' (March 2010) Brookings-LSE Project on Internal Displacement, 8. Available at: <www.brookings.edu/articles/2010/0325_internal_displacement_cohen.aspx> accessed 25 September 2013.
[84] As quoted in: R. Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10 *Global Governance* 459, 473-474. See also: H. Entwisle, 'Tracing Cascades: The Normative Development of the UN Guiding Principles on Internal Displacement' (2004-2005) 19 *Georgetown Immigration Law Journal* 369, 384.

development of an international legal framework for the provision of humanitarian assistance following natural or human-made disasters, and the potential existence of a right to humanitarian assistance, needs to be examined with an understanding of both binding and non-binding texts. However, before examining the current state of play in international law, it is illuminating to look back in history to understand previous attempts at codification of international disaster laws, and reasons why such attempts ultimately did not lead to the development of a more comprehensive international legal framework for humanitarian action in times of crises.

C. Codification and Regulation of International Disaster Operations (1927 – 2010)

The legal issues raised by large-scale national and international responses to natural and human-made disasters have been recognised for over 100 years, and were first tackled in the process that led to the establishment of the International Relief Union (IRU) in 1927.[85] While the IRU was not ultimately successful in its objectives, the desirability and potential for international regulation of disaster responses did not disappear. More recent attempts at codification include the 1982 UNITAR Model Rules for Disaster Relief Operations,[86] and the 1984 draft UN Convention on Expediting the Delivery of Emergency Assistance.[87] Simultaneously, a range of structural frameworks and operational innovations have been established over the past 50 years to improve the funding and efficiency of humanitarian operations. So it is instructive to review such historical attempts of legal codification and regulation of international disaster responses to determine why many were not fully realised, and the points of success, or contention, from the regimes developed.

i. The League of Nations and the International Relief Union

From the establishment of the Red Cross Movement in 1863, to the support provided to civilians by the Commission for Relief in Belgium (CRB) during the First World War and the UN Relief and Rehabilitation Administration (UNRRA) during the Second World War, a

[85] Convention Establishing an International Relief Union (adopted 12 July 1927, entered into force 27 December 1932) 135 LNTS 247. For a historical account see: P. Macalister-Smith, 'The International Relief Union: Reflections on the Convention Establishing an International Relief Union of July 12, 1927' (1986) 54 *Tijdschrift voor Rechtsgeschiedenis* 363.
[86] el Baradei, *Model Rules* (n.16).
[87] Convention on Expediting the Delivery of Emergency Assistance (n.17).

range of important initiatives for the codification and coordination of international humanitarian responses had already taken place before the formal establishment of the United Nations in 1945.[88] Indeed, while modern international humanitarian law stems from the 1864 Geneva Convention for the Amelioration of the Conditions of the Wounded in Armies in the Field, the regulation of international disaster responses can also be traced to this era.[89] The founder of the Red Cross Movement, Henry Dunant, advocated an active role for national Red Cross Societies in both times of war and peace;[90] and an early resolution of the Red Cross Movement stated:

> To provide assistance and relief in disasters which may afflict peoples during peacetime is a condition of the vigorous development of [national Red Cross] Societies, and a useful preparation for their wartime work. Relief Societies should therefore, in peacetime, devote themselves to humanitarian work corresponding to their wartime duties, namely … to giving relief in case of public calamity which, like war, demands immediate and organised assistance.[91]

The appreciation of the need to codify international law around the provision of relief to civilians caught up in peacetime calamities can be traced to 1908 and the powerful earthquake which hit Messina in Italy causing tens of thousands of deaths.[92] But the plans that were developed by Senator Giovanni Ciraolo, President of the Italian Red Cross, to establish an international mechanism of disaster insurance and mutual assistance for victims of natural disasters were overtaken by the outbreak of the First World War. Subsequently, in 1921 Senator Ciraolo reintroduced the proposal at the Tenth International Conference of the Red Cross Movement, resulting in a recommendation to the signatories of the 1864 Geneva Convention for a treaty extending the peacetime activities of the Red Cross, in particular during natural disasters.[93] However, following internal tensions between the International Committee of the Red Cross and the newly established League of Red Cross Societies, the proposal was transferred from the Red Cross Movement into the League of Nations system,

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[88] P. Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff 1985), 10-14.

[89] The first record of international governmental assistance following a disaster comes from the 1755 Lisbon earthquake. See: J. Hutchinson, 'Disasters and the International Order I: Earthquakes, Humanitarians, and the Ciraolo Project' (March 2000) 22(1) *International History Review* 1, 4.

[90] In 1862, Dunant wrote: "These [national] Societies could also render great services, by their permanent existence, in times of epidemics, or of disasters such as floods, fires or other natural catastrophes." Quoted in: IFRC, *90 Years of Improving the Lives of the Most Vulnerable*, IFRC (2009), 3.

[91] Resolution 3, 2nd International Red Cross Conference, Berlin, 1869, as quoted in: M. Hoffman, 'What is the Scope of International Disaster Response Law', in IFRC, *International Disaster Response Laws, Principles and Practice: reflections, prospects and challenges* (2003), fn 1.

[92] For an illuminating comparison of the American response to the 1906 San Francisco earthquake and the Italian response to the 1908 Messina earthquake, see: Hutchinson, 'The Ciraolo Project' (n.89) 10-14.

[93] For background and analysis of the political manoeuvring and infighting within the Red Cross Movement resulting from the proposal see: ibid.

ultimately leading to the conclusion of the 1927 Convention Establishing an International Relief Union.[94] Notwithstanding bitter divisions over the project within the Red Cross Movement and between states, Senator Ciraolo's proposal was exceptional in many ways, not least because the proposed framework represented one of the first attempts to identify individuals as subjects in international law. By focusing on victims of disasters, rather than simply state relationships, the plans for international codification of disaster responses was also an attempt to codify a government's responsibilities towards its own citizens.[95] However, after six years of political manoeuvres and a diplomatic conference attended by representatives of 43 states, the end result was not quite so revolutionary.

The 1927 Convention Establishing an International Relief Union contained both the overarching aims and principles of the IRU, as well as the IRU's Statute establishing its organisation and functions. The IRU's four objectives were set out in Article 2: in the event of a disaster to furnish to the suffering population first aid and to assemble funds, resources and assistance of all kinds; to coordinate efforts made by relief organisations; to encourage the study of preventive measures against disasters; and to induce all peoples to render mutual international assistance. In other words, the IRU was intended to be an operative relief agency in certain disaster settings, whereby it would provide direct assistance to those in need. It would also act as a coordination body, both for the delivery of relief assistance during disasters and the scientific study and understanding of prevention methods. Finally, the IRU was also expected to act as a fundraising organisation encouraging international cooperation in disaster settings.

Such a broad base of tasks would have been challenging to fulfil, even if the IRU had not been hampered by a lack of support and funds from the start. The financial structure of the IRU was based on an initial fund, which comprised of contributions by each signatory to the Convention. The IRU was then expected to fund its activities through voluntary grants made by Governments, private contributions, donations and bequests. The Convention would not

[94] For background and analysis of the IRU, see: MacAlister-Smith, 'The IRU' (n.85); J. Hutchinson, 'Disasters and the International Order II: The International Relief Union' (June 2001) 23(2) *International History Review* 253. For discussion of the role of the ICRC during this period, see: D. Palmieri, 'An institution standing the test of time? A review of 150 years of the history of the International Committee of the Red Cross' (Spring 2013) 95(889) *International Review of the Red Cross* 1, 7-9.

[95] Hutchinson, 'The Ciraolo Project' (n.89) 25. Even the evolving international humanitarian law of armed conflict at that time was primarily focused on ameliorating the suffering of soldiers resulting from their service in a state army. See: S. Wills, 'The Legal Characterization of the Armed Conflicts in Afghanistan and Iraq: Implications for Protection' (2011) 58(2) *Netherlands International Law Review* 173, 180: "Breach of the laws of war … was not treated as a violation of that individual's rights but a breach of the obligations due to the enemy state."

come into force until two-thirds of the initial fund of 625,000 Swiss francs had been contributed by at least 12 signatory states. This delayed its entry into force until December 1932, which coincided with the deterioration of political relations and economic conditions within Europe, which in turn restricted the available funds for the IRU. The IRU faced financial problems for the duration of its existence, and was further paralysed by political constraints and administrative confusion, meaning it was unable to provide any meaningful assistance to victims of natural disasters.[96] Indeed, the financial structures put in place for the IRU ensured that countries which wished to prioritise bilateral assistance, such as the United States, could easily bypass the IRU.[97]

The IRU was further impeded by the lack of universal ratification by states.[98] A total of 29 states ratified the Convention, and a further nine states became signatories but did not ultimately ratify the Convention, while reservations limited its applicability. For example, the UK did not extend the application of the Convention to its overseas colonies or territories, many of which faced far greater risks of disaster than the UK itself. Indeed, reflecting the British government's long-standing reservations to Senator Ciraolo's proposal,[99] the UK was the first country to pull out of the Convention in 1948 on the establishment of the UN, and a further 11 signatories had withdrawn by 1964.

As a result, the IRU only undertook active participation in relief operations on two occasions between 1932 and 1967 when it was formally wound down. The first following the 1934 Ossina earthquake, but even then the IRU's direct assistance was declined by the Indian government, so the IRU channelled some limited funding through the Indian Red Cross. Then in 1938, the IRU provided funds following an earthquake in Baluchistan in Pakistan. A suggestion from the British government, supported by the IRU Executive Committee, to

[96] Hutchinson, ibid 2. It should be noted that the IRU was an independent, international organisation, not an agency of the League of Nations.
[97] Hutchinson, 'The IRU' (n.94) 268.
[98] The United States of America did not sign the Convention, and the American Red Cross was vigorously opposed to it. Other Red Cross National Societies, such as the French and Swedish Red Cross, were also worried that their own national disaster activities, and resulting goodwill and donations, might be undermined by an international organisation. See: Hutchinson, 'The Ciraolo Project' (n.89) 23, 28-32.
[99] One of the scathing critiques made by the UK delegation before the 1927 diplomatic conference stated that draft article 2(7), which encouraged the study of preventive measures against disasters, "must not lead to the setting up of a laboratory for preparing pills against earthquakes." As quoted in Hutchinson, 'The IRU' (n.94) 284.

provide relief during the Spanish Civil War provoked controversy within the IRU membership and was ultimately rejected.[100]

Despite these challenges, one of the successes of the IRU was its role in advancing scientific knowledge and analysis of research on natural disasters. It is easy to forget that our knowledge of the geological and meteorological conditions that give rise to natural disasters has advanced considerably over the past 80 years. Howard of Penrith, while reviewing *The Study of Natural Catastrophes* for the Geographical Journal in 1931, noted it was "curious and interesting … no serious earthquakes seem to have taken place during the period mentioned either in Corsica or Sardinia, although these islands are so near the area principally affected."[101] Understanding of plate tectonics, and how their movement leads to earthquakes, was not fully developed until the 1960s.[102] The review concludes: "It is impossible to give even a cursory glance at these volumes without being struck by the evident advantages in store for humanity generally, if the study of the origins of all such calamities in different countries, their cure, their prevention, and the most suitable measures to attenuate their consequences, were to become the subject of serious international cooperation and coordination."[103] On the winding down of the IRU in 1967, the UN agreed to the transfer of competencies regarding the research and study of natural disasters to the UN Education, Scientific and Cultural Organisation (UNESCO).[104]

Providing a focal point to advance and systemise knowledge and understanding around natural disasters may be the greatest achievement of the IRU, even if its ambitious aims of international regulation and operational activities were not realistic at the time. John Hutchinson has argued that the failure of the IRU was inevitable as a result of the intransigence of certain states, the conflicts within the Red Cross Movement, and the vague and limiting provisions and financial mechanisms provided for in the 1927 Convention.[105] Nevertheless, by recognising the importance of international cooperation, mutual assistance and coordination in response to large-scale disasters, the IRU provided the foundation for

[100] ibid 292-295. Tensions within the Red Cross Movement also came to the fore, since the International Committee of the Red Cross was already operating relief activities in Spain, and did not want the IRU or League of Red Cross Societies to duplicate their efforts.
[101] Howard of Penrith, 'The Study of Natural Catastrophes: Review' (November 1931) 78(5) *Geographical Journal* 457, 459.
[102] *Plate Tectonics: The Rocky History of an Idea*, available at: <www.ucmp.berkeley.edu/geology/techist.html> accessed 25 September 2013.
[103] Howard of Penrith (n.101) 460.
[104] Macalister-Smith, 'The IRU' (n.85) 372.
[105] Hutchinson, 'The IRU' (n.94) 295-298.

future measures for disaster response. Key topics of contemporary importance that the IRU attempted to address include: a focus on the needs of individuals, while recognising the importance of consent from the affected state; the need for statements of humanitarian principles alongside technical and operational rules; the role and involvement of non-governmental organisations, albeit that the 1927 Convention had a strong bias towards the Red Cross Movement to the exclusion of other organisations; and the importance of understanding the causes and impacts of disasters and implementing disaster risk reduction and prevention measures in advance of disasters occurring.

ii. Attempts at codification under the United Nations

While the IRU was not authorised to act in armed conflict settings, the success of the UN Relief and Rehabilitation Administration (UNRRA) during the Second World War in ensuring effective delivery of supplies to civilian populations fed directly into the emerging United Nations system. UNICEF, the UN Children's Fund, received residual funds of US$34 million from UNRRA at the end of the War, while the Food and Agriculture Organisation and World Health Organisation inherited the functional responsibilities of UNRRA in their respective domains.[106] Like the IRU before it, UNRRA had highlighted the importance of international cooperation to facilitate the mobilisation of resources to alleviate suffering of civilian populations.

Yet while the establishment of the UN and its specialised agencies provided specific outlets for global issues and vulnerable groups such as refugees (UNHCR), children (UNICEF), and health (WHO), attempts to revive the IRU in the late 1940s and 1950s were unsuccessful.[107] Furthermore, despite the extensive codification of international law at the end of the Second World War in the areas of armed conflict, refugee protection and human rights, the international community did not attempt to reconstruct a set of binding international rules for application during peacetime natural and human-made disasters.

Indeed, notwithstanding an on-going focus on humanitarian issues within the UN system, including by the specialised agencies and General Assembly,[108] there were no further

[106] Macalister-Smith, *International Humanitarian Assistance* (n.88) 10-14.
[107] Macalister-Smith, 'The IRU' (n.85) 371-372.
[108] The General Assembly has produced countless resolutions on humanitarian issues, in particular Resolutions entitled: *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, most recently UNGA Res 67/87, 26 March 2013; *Safety and Security of Humanitarian Personnel and*

attempts to codify international law surrounding humanitarian responses to disasters until the 1980s. This partly reflected Cold War tensions, and the resultant insistence on non-interference in the internal affairs of states. Nevertheless, with the winding down of the IRU in 1967, and in recognition of the need for mechanisms within the UN for disaster relief, Resolution 2816 (XXVI) of 1972[109] established the Office of the UN Disaster Relief Co-ordinator (UNDRO) with a broad mandate to lead the UN operational response to natural and other disasters.[110] The period from 1972 also saw recognition by disaster-prone states, donors and humanitarian agencies of the need for dedicated focal points and units responsible for disaster preparedness, response and prevention activities.[111]

Building on Resolution 2816 (XXVI) and the 1977 ECOSOC recommendation on Measures to Expedite International Relief,[112] in 1982 the UN Institute for Training and Research (UNITAR) developed a series of Model Rules for Disaster Relief Operations.[113] The primary focus was on technical and operational aspects of international disaster responses to "overcome some of the legal restrictions and bureaucratic impediments which are often major obstacles to the success of a relief operation."[114] UNITAR examined four options when developing the Model Rules: the first was a multilateral convention on disaster relief assistance, next was the conclusion of regional or sub-regional agreements on disaster relief, third was a stand-by agreement to be concluded on a bilateral basis in anticipation of a disaster, and finally the option of model rules for bilateral agreements which states and humanitarian agencies could incorporate into situation-specific agreements. Taking into account the political and legal realities of the time, UNITAR concluded that model rules

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Protection of United Nations Personnel, most recently UNGA Res 67/85, 21 March 2013; *International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, from Relief to Development*, most recently UNGA Res 67/231, 9 April 2013.

[109] UNGA Res 2816 (XXVI) (n.78). Resolution 2816 (XXVI) followed a request by the General Assembly to the Secretary-General in 1970 for a report on the implementation of interim arrangements put in place in 1965 authorising the Secretary-General to utilise UN funds for emergency aid following natural disasters (*Assistance in Cases of Natural Disaster*, UNGA Res 2034 (XX), 7 December 1965).

[110] For discussion of the structural frameworks established by Resolution 2816 (XXVI), see: Section C(iii)(a) below.

[111] R. Kent, 'Reflecting upon a Decade of Disasters: The Evolving Response of the International Community' (Autumn 1983) 59(4) *International Affairs* 693, 698-699.

[112] *Measures to Expedite International Relief*, ECOSOC Res 2102 (LXIII) of 3 August 1977 called on governments, inter-governmental agencies and non-governmental organisations to adopt appropriate legislative, administrative or operational measures to remove obstacles and expedite international relief assistance to the victims of disasters.

[113] el Baradei, *Model Rules* (n.16). The UNITAR study followed the development of a Draft Model Agreement Concerning Humanitarian Relief Operations by the International Law Association in 1980. Their model was similarly intended as a basis for agreements between receiving states and assisting states or organisations, and addressed technical issues such as the initiation of relief, entry of relief personnel and goods, taxation of relief, currency exchange, and the obligation of relief providers to abide by national law. See: IFRC, *Law and Legal Issues in International Disaster Response: A Desk Study* (2007) 62.

[114] el Baradei, ibid.

were the most practical and feasible.[115] In fact, three separate Model Rules were developed covering assistance between an assisting state and a receiving state; between an assisting organisation and a receiving state; and between an assisting state or organisation or a receiving state and a transit state. The issues covered by the Model Rules reflect the practicalities of international relief operations, with specific rules outlining the requirements for customs duties, transportation, communications and visa requirements.

For the UN Disaster Relief Co-ordinator, the drafting of a multilateral convention on disaster relief was a logical extension to these moves towards greater coordination and operational efficiencies within the humanitarian relief sector. Therefore, relying on the 1977 ECOSOC Resolution which called on UNDRO to "promot[e] measures designed to remove obstacles and to expedite international relief assistance," the Disaster Relief Co-ordinator took the initiative to develop a draft Convention on Expediting the Delivery of Emergency Assistance.[116] Following a report by Jiri Toman, UNDRO convened an informal group of experts to draft the convention. Writing immediately after the development of the 1984 draft Convention, Peter Macalister-Smith reviewed the possibilities of codification: "An advantage of the approach based on a multilateral convention is found in the potentially universal and uniform nature of the results intended to be achieved. On the other hand, it can be feared that in practice the problems resulting from reservations and non-universal acceptance of a multilateral relief convention might even increase the difficulties faced by those involved in humanitarian actions."[117]

Such fears were premature though. While there was some initial support for the draft Convention from governmental delegations in the General Assembly,[118] it faced serious criticism from a group of non-governmental organisations, including some of the largest humanitarian NGOs such as Caritas International, Oxfam and the Red Cross Movement. These NGOs jointly wrote to UNDRO expressing their concern about their exclusion from the consultation and drafting process, as well as the substantive content of the draft Convention, in particular the state-centric approach adopted, which meant the text neither mentioned the victims of disasters themselves nor non-state agencies active in humanitarian responses. Furthermore, they highlighted that an excessive invocation of state sovereignty

[115] Y. Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations: The Right and Duty to Humanitarian Assistance* (Martinus Nijhoff 1991), 375-377.
[116] ibid 377-379.
[117] Macalister-Smith, *International Humanitarian Assistance* (n.88) 159-160.
[118] ibid 159.

could paralyse humanitarian actions, particularly as the prevailing international climate did not favour the conclusion of a multilateral convention and could ultimately reinforce the obstacles caused by national sovereignty.[119] Government representatives then also raised reservations on the draft Convention in the Economic and Social Council in July 1984, with the German Democratic Republic (GDR) arguing that existing bilateral and multilateral arrangements were sufficient to improve the effectiveness of relief. Reflecting Cold War tensions of the time, the GDR also warned that "certain states" should cease using emergency relief as a coercive measure.[120] While the draft Convention was subsequently referred to the UN General Assembly Sixth Committee, these state reservations, coupled with the lack of support from major humanitarian actors, sounded the death knell for this second attempt at codification of international disaster laws.

Nevertheless, although the UNITAR Model Rules were not widely used in practice, and the draft Convention was ultimately not acceptable to either states or humanitarian actors, these initiatives prompted the emergence of a body of normative texts aimed at improving the effectiveness and co-ordination of international humanitarian assistance operations. Since the mid-1980s, and in particular following the humanitarian crises in the former Yugoslavia, Rwanda and Somalia in the early 1990s, a range of non-binding resolutions, guidelines and minimum standards have been developed by inter-governmental and non-governmental agencies. Most notable are the RCRC Code of Conduct, UN Guiding Principles on Internal Displacement, Sphere Project's Humanitarian Charter and Minimum Standards in Disaster Response, IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance,[121] and the IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters.

Within the UN, General Assembly Resolution 46/182 of 1991 on the Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, adopted only a few years after the failed draft Convention, systematically developed the international framework for humanitarian assistance.[122] Drawing on Resolution 2816 (XXVI) and mindful of the criticisms of NGOs at the purely technical approach of the draft Convention,

[119] Beigbeder, *Role and Status* (n.115) 378.
[120] IFRC, *Desk Study* (n.113) 27-28.
[121] The Guidelines are aimed at state authorities to assist them in developing their domestic legal preparedness for disasters, and provide a practical approach to legal issues in disaster relief. As such, they resemble the technical and operational approach of the UNITAR Model Rules and ILA Draft Model Agreement Concerning Humanitarian Relief Operations.
[122] Tsui, *Analysis of Normative Developments* (n.18) 6.

Resolution 46/182 elaborated a series of Guiding Principles covering the rationale and modalities for the provision of humanitarian assistance by UN agencies, while also revising and strengthening the UN system for disaster response co-ordination and funding of emergency appeals. The first three Guiding Principles state:

1. Humanitarian assistance is of cardinal importance for the victims of natural disasters and other emergencies.
2. Humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality.
3. The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country.

Resolution 46/182 therefore presented a clear blueprint for understanding the conceptual and practical boundaries for the provision of humanitarian assistance. Yet its primary focus was on operational responses to disasters by the UN, rather than enunciating the rights of individuals affected by disasters.[123] Nevertheless, the Guiding Principles represented an advancement of the international framework for disaster response by recognising the need to balance fundamental principles of humanitarian action with practical operational rules, and by including measures on disaster risk reduction, preparedness, relief operations and follow-on developmental activities. At the same time, by reaffirming a state's primary responsibility to provide assistance, the Resolution reflected the concerns of states regarding unregulated actions by humanitarian agencies while also ensuring that the UN and its specialised agencies continued to play a central role in relief operations.

iii. Structuring and coordinating humanitarian relief operations

a. International frameworks for humanitarian operations

In addition to attempts to codify substantive international law, considerable effort has also been made over the past 50 years to develop and refine international mechanisms and structures for disaster prevention and response. Within the UN system, the first General

[123] For discussion of the operational framework established by Resolution 46/182, see: Section C(iii)(a) below.

Assembly Resolution relating to universal responses to natural disasters was adopted in 1965[124] and highlighted the need for greater international coordination of disaster relief. Initially, the focus was on promoting the provision of assistance by donor states, but as the capacity of UN specialised agencies developed they became increasingly involved in operational activities. This prompted the establishment of coordination mechanisms between UN agencies, and between donor and recipient states.[125] Yet by 1987 humanitarian responses in armed conflicts and complex emergencies were considered to be "pluralism run riot."[126] The emergence of numerous large NGOs engaged in humanitarian operations, particularly in the past 25 years, has further highlighted the need for clarified roles and responsibilities.

At a regional level, neighbouring states have developed a network of bilateral and multilateral agreements on disaster response, particularly through civil defence mechanisms.[127] It is not possible for this thesis to examine the range of regional and sub-regional approaches taken to disaster responses,[128] which encompass both responses to disasters within a region and regional approaches to providing external humanitarian assistance.[129] Nonetheless, although the global regulation and coordination of humanitarian assistance is only part of the broader network of transnational legal and non-legal obligations influencing states' and humanitarian actors' responses to disasters, the consistent focus of the UN General Assembly on humanitarian assistance, particularly following natural and human-made disasters, highlights the importance placed by states on the effective delivery of aid at the global level.[130] Two key General Assembly Resolutions in particular have

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[124] *Assistance in Cases of Natural Disaster*, UNGA Res 2034 (XX), 7 December 1965.
[125] IFRC, *Desk Study* (n.113) 52-53.
[126] Victor Palmieri, former US Assistant Secretary of State, as quoted in: R. Kent, *Anatomy of Disaster Relief: The International Network in Action* (Pinter: London, 1987), 173.
[127] IFRC, *Desk Study* (n.113) 62-79.
[128] However, for discussion of the implications of universal or regional approaches to codification of disaster laws, see: Section C(iii), Chapter 7. For analysis of the internalisation of humanitarian norms in the United Kingdom, see: D. Cubie, 'Clarifying the "*Acquis Humanitaire*": A Transnational Legal Perspective on the Internalization of Humanitarian Norms', in *The International Law of Disaster Relief* (Cambridge University Press – forthcoming).
[129] For example, within the European Union the Community Civil Protection Mechanism facilitates civil protection assistance in major emergencies within the EU, while the European Consensus on Humanitarian Aid and European Community Humanitarian Office (ECHO) regulate and coordinate external humanitarian assistance provided by the EU and member states. In 2010, the internal civil protection activities of the EU were incorporated into the ECHO structures providing the EU's existing external humanitarian assistance activities. See: 2007/779/EC, Euratom: *Council Decision of 8 November 2007 establishing a Community Civil Protection Mechanism (recast)* OJ L314, 1 December 2007, 9; Communication from the Commission to the Council and the European Parliament – *EU strategy for supporting disaster risk reduction in developing countries* {SEC(2009)217, 218, 220}/COM/2009/0084 final.
[130] For an overview of relevant resolutions, see: A. Katoch, 'International Natural Disaster Response and the United Nations', in IFRC, *International Disaster Response Laws, Principles and Practice: reflections, prospects and challenges* (2003), 47-60.

developed the operational modalities and institutional frameworks for humanitarian operations: Resolution 2816 (XXVI) from 1972[131] and Resolution 46/182 of 1991.[132]

Following the closure of the International Relief Union in 1967, and in recognition of the need for on-going mechanisms within the UN system for disaster relief, Resolution 2816 (XXVI) established the Office of the UN Disaster Relief Co-ordinator (UNDRO) with a broad mandate to lead UN responses to natural and other disasters. Working in co-operation with governments of affected states, the Disaster Relief Co-ordinator had the power to mobilise, direct and co-ordinate relief activities of inter-governmental and non-governmental humanitarian agencies following a request for assistance from a stricken state. The Disaster Relief Co-ordinator was also authorised to receive contributions to UN disaster relief operations and assist governments of affected countries to assess and prioritise relief needs. The Resolution further invited potential recipient governments to establish disaster contingency plans, appoint national disaster relief co-ordinators, establish stockpiles of emergency supplies, provide training, and improve national disaster warning systems. Crucially, this was the first UN Resolution to urge governments to consider the domestic legal arrangements required to facilitate the receipt of aid, and expressly highlighted the need for overflight and landing rights, and privileges and immunities for humanitarian staff.[133]

The changing international context following the end of the Cold War prompted a renewed focus on the provision of humanitarian assistance. Significantly, Resolution 46/182 systematically developed the international operational framework for humanitarian assistance, by focusing on disaster risk reduction, preparedness, relief operations and follow-on developmental activities.[134] While stressing a state's primary responsibility to provide assistance, the central role of the UN and its specialised agencies in relief operations was secured by establishing the Department of Humanitarian Affairs in place of the Office of Disaster Relief Co-ordinator, with the Emergency Relief Co-ordinator now designated at the level of UN Under-Secretary General. To improve cooperation and coordination between humanitarian agencies, an Inter-Agency Standing Committee (IASC) was established, comprised of UN agencies, the international Red Cross Movement, International

[131] UNGA Res 2816 (XXVI) (n.78).
[132] UNGA Res 46/182 (n.18).
[133] For background to UNGA Res 2816 (XXVI) and UNDRO, see: Macalister-Smith, *International Humanitarian Assistance* (n.88) 132-141. Following the UN reform process in 1997, the Office of the Disaster Relief Co-ordinator was merged with other UN bodies responsible for complex emergencies to create the Office for the Co-ordination of Humanitarian Affairs (UNOCHA).
[134] Tsui, *Analysis of Normative Developments* (n.18) 6.

Organization for Migration and other relevant NGOs. To facilitate consistent and predicable funding streams, Resolution 46/182 provided improved funding mechanisms through the establishment of the Central Emergency Revolving Fund[135] and Consolidated Appeals Progress.

When considering the normative value to place on these General Assembly Resolutions, one must note that General Assembly resolutions and recommendations generally have no binding force.[136] Yet the structural mechanisms established by Resolutions 2816 (XXVI) and 46/182 have since provided the basis for UN and international responses to natural and human-made disasters, in a way that the International Relief Union never did. Moreover, while the Guiding Principles of Resolution 46/182 are not legally binding, it has been argued that a key component of the framework established is their applicability on all actors involved in humanitarian assistance.[137] Additionally, the normative and human-rights based approach of Resolution 46/182 directly influenced the IASC and its operational guidelines on human rights and natural disasters.[138] Yet these UN frameworks are but one form of transnational cooperation and coordination. In addition to regional and sub-regional disaster response approaches, other international structures have recently been developed out with the UN structures, such as the civil defence and protection mechanisms established by the Framework Convention on Civil Defence Assistance.[139] Furthermore, the exponential growth in the number of actors involved in humanitarian responses over the past 25 years has led to a fundamental need to ensure more effective coordination between the various state, non-governmental and private organisations active in humanitarian crises.

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[135] The CERF was strengthened and renamed the Central Emergency Response Fund in August 2006. In December 2006, Jan Egeland, then UN Under-Secretary General for Humanitarian Affairs and Emergency Relief Co-ordinator, noted the Irish government's commitment to the CERF. Available at: <www.dfa.ie/home/index.aspx?id=25114> accessed 25 September 2013.

[136] For early examinations of UNGA Resolutions, see: F. Blaine Sloan, 'The Binding Force of a "Recommendation" of the General Assembly of the United Nations' (1948) 25 *British Yearbook of International Law* 3; D. Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations' (1955-1956) 32 *British Yearbook of International Law* 97. See also: F. Blaine Sloan, 'General Assembly Resolutions Revisited (Forty Years Later)' (1988) 59 *British Yearbook of International Law* 39.

[137] Tsui, *Analysis of Normative Developments* (n.18) 13.

[138] See: IASC, *Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*, Brookings-Bern Project on Internal Displacement, January 2011.

[139] Framework Convention on Civil Defence Assistance, International Civil Defence Association (adopted 22 May 2000, entered into force 23 September 2001) 2172 UNTS 213.

b. Coordination of international humanitarian responses

So despite the key role that Resolution 46/182 played in advancing the international framework for humanitarian assistance, the complex armed conflicts of the early 1990s far outweighed the ability of the UN to provide effective humanitarian coordination. Consequently, following the UN reform process in 1997, the Department of Humanitarian Affairs was merged with other UN bodies responsible for complex emergencies to create the Office for the Co-ordination of Humanitarian Affairs (UNOCHA) with a mandate to coordinate humanitarian responses, policy development and humanitarian advocacy.[140]

Meanwhile, the extent of devastation across 13 countries resulting 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 degree of destruction in Aceh Province of Indonesia and eastern and southern Sri Lanka, severely stretched the emergency response capacities of most humanitarian agencies.[141] This prompted Jan Egeland, then UN Emergency Relief Co-ordinator, to commission an independent review of the global humanitarian system. The Humanitarian Response Review (HRR) commenced in February 2005 to determine: "the preparedness of international humanitarian organizations to predict crises, prevent them, mitigate their impact on vulnerable populations and respond effectively to their needs."[142] The key innovation arising from the HRR was the "cluster approach", whereby UN and non-UN humanitarian agencies come together in sectoral clusters (such as Food, Logistics and Protection) under a designated lead agency to plan and coordinate operational responses in disaster settings.

The initial implementation of the cluster approach following the Pakistan earthquake of October 2005 did not provide a promising start for the new system. While the Indian Ocean Tsunami had highlighted the need for improved coordination between humanitarian actors, the roll-out of the new cluster approach was marked by confusion over roles, and limited

[140] Tsui, *Analysis of Normative Developments* (n.18), 7-12. Arguably, this downgraded the UN humanitarian response capacities, as a "Department" ranks higher than an "Office" within the UN system. See: Rieff, *A Bed for the Night* (n.1) 251-252.
[141] For analysis, see: J. Telford and J. Cosgrave, 'The international humanitarian system and the 2004 Indian Ocean earthquake and tsunamis' (2007) 31(1) *Disasters* 1; Fidler, 'Disaster Relief' (n.61); Telford, 'Disaster Recovery' (n.44).
[142] *Humanitarian Response Review*, UNOCHA, August 2005, 8.

information sharing or involvement of local actors.[143] However, as the international humanitarian community has gained experience of operating within the cluster approach, and following increased coordination between UNOCHA and the IASC, the cluster approach now represents the primary operational mechanism for inter-agency coordination and cooperation in international humanitarian responses to disasters. Some reported benefits are: coverage of humanitarian needs has generally improved; gaps in humanitarian assistance are better identified and duplications reduced; organisations assuming coordination tasks exert more predictable leadership; and partnership between UN agencies and other international humanitarian actors has become stronger.[144] Nevertheless, difficulties with the approach have also been identified, namely: clusters often exclude national and local actors, and fail to support existing coordination and response mechanisms; humanitarian principles can be threatened when lead organisations maintain close relationships with military or peacekeeping forces; poor management and facilitation can prevent clusters from reaching their full potential; and inter-cluster coordination is often ineffective with little integration of cross-cutting issues.[145] As a result, the UN Cluster system requires constant review and analysis to ensure that humanitarian actors are prepared for the next emergency,[146] and in all likelihood the main lessons learnt will only come from analysing actual responses to major disasters, such as 2004 Indian Ocean Tsunami, 2008 Cyclone Nargis, 2010 Haitian earthquake and 2011 Fukushima nuclear disaster.[147]

However, it is clear that the 20 years since the conclusion of Resolution 46/182 have seen significant advances in the international framework for large-scale responses to disasters, notwithstanding the difficulty of coordinating numerous different agencies with potentially conflicting mandates in a complex emergency. The establishment of UNOCHA and the IASC have helped promote a greater level of stability and understanding of the international mechanisms in place, thereby assisting coordination and cooperation in disaster responses.

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[143] *The Evolving UN Cluster Approach in the Aftermath of the Pakistan Earthquake: an NGO perspective*, ActionAid International, April 2006. See also: A. Stoddard *et al*, *Cluster Approach Evaluation*, November 2007 (independent report commissioned by UNOCHA).

[144] J. Steets *et al*, *Cluster Approach Evaluation 2: Synthesis Report*, April 2010, (independent report commissioned by the IASC), 8-9.

[145] ibid 9-10.

[146] See, for example, discussion of UNHCR's role and planning for responses to natural disasters in their capacity as the Lead Agency for the Global and National Protection Clusters: B. Deschamp *et al*, *Earth, Wind and Fire: A review of UNHCR's role in recent natural disasters*, UNHCR Policy Development and Evaluation Service, (June 2010).

[147] See for example: C. Flood (Government Special Envoy), *The Tsunami: Ireland and the Recovery Effort*, December 2005; Tripartite Core Group (United Nations, ASEAN and Government of Myanmar), *Post-Nargis Joint Assessment*, July 2008; Inter-Agency Standing Committee, *Response to the Humanitarian Crisis in Haiti 6-Month Report: Achievements, Challenges and Lessons To Be Learned*, 2010; Farber, 'Legal Scholarship, The Disaster Cycle, and the Fukushima Accident' (n.38).

These UN agencies have also ensured that specific issues relevant for disaster responses, as opposed to humanitarian responses in armed conflicts, are identified and examined. NGOs have also played a fundamental role in analysing and developing the understanding of both normative and operational requirements in disaster settings.[148] Yet despite the recognised importance of NGOs in disaster responses, it is noticeable that the majority of humanitarian NGOs involved in humanitarian responses continue to have limited input at the global level in the evolving international legal frameworks for disaster responses.[149]

Having now examined the evolution of humanitarian responses to disasters, from the foundations of the humanitarian imperative and the conceptual underpinning of any international legal frameworks to historical attempts to codify international law and establish institutional structures and operational coordination mechanisms, Chapter 4 proceeds to establish the existing international law specially covering humanitarian responses to major natural and human-made disasters. Through an analysis of international law provisions set out in the humanitarian law of armed conflict, human rights law, refugee and displaced persons law, and international criminal law, the following Chapter will introduce the concept of an *acquis humanitaire* as the emerging body of law and practice specifically relating to the protection of persons in times of humanitarian crisis.

[148] The development of "humanitarian logistics" as a distinct expertise and subject for research is one example of how operational requirements of humanitarian agencies have become professionalised and subjected to the rigors of research, analysis and evaluation over the past 20 years.
[149] For example, there has been minimal NGO engagement in the ILC work on the protection of persons in the event of disasters. Similarly, at the European level, the 2011 report by Caritas Europa on the European Consensus of Humanitarian Aid is one of the first analyses of this key regional text by either academics or practitioners. See: Caritas Europa, *Bridging the Gap Between Policy and Practice: The European Consensus on Humanitarian Aid and Humanitarian Principles* (October 2011).

Chapter 4

Towards an *Acquis Humanitaire*

> *International disaster relief is something of a swashbuckler's paradise. With a scattered and under-used international legal regime and scant applicable law at the national level, it is little wonder that this field has been called "the world's largest unregulated industry."*
>
> David Fisher, 2007[1]

As set out in Chapter 3, a wide range of divergent rules and mechanisms 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. Yet there is an extremely limited body of international law which directly deals with natural or human-made disasters – there is currently 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 threads of existing law, to formalize customary law or to expand and develop the law in new ways.[2]

Furthermore, there are even fewer explicit references to a "right to humanitarian assistance" either in customary international law or in legally binding texts.[3] As a result, there is no consensus on whether a right to humanitarian assistance currently exists in general

[1] D. Fisher, 'International Disaster Relief: A Growing Regulatory Dilemma' (2007) 101 *American Society of International Law Proceedings* 114, 114.
[2] IFRC, *World Disasters Report 2000*, IFRC (2000), 145.
[3] At the regional level, a specific right to humanitarian assistance can be found in the African Union's Kampala Convention. Article 5(9) states: "States Parties shall respect the right of internally displaced persons to peacefully request or seek protection and assistance, in accordance with relevant national and international laws, a right for which they shall not be persecuted, prosecuted or punished." African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention") (adopted 22 October 2009, entered into force 6 December 2012).

international law;[4] and to date there are no binding universal treaties that contain a right to humanitarian assistance following natural or human-made disasters. Neither is there a comprehensive codified body of law regulating access to and delivery of humanitarian assistance. Nevertheless, I propose that we have reached a stage in the process of our evolving understanding of humanitarian norms in times of war and disaster where one can talk of an emerging "*acquis humanitaire.*" In other words, a defined body of law and practice specifically relating to the protection of persons in times of humanitarian crisis which includes provisions in general and customary international law, as well as a broad range of non-binding sources that provide operational and normative guidance for humanitarian preparations and responses to both armed conflicts and natural or human-made disasters. As explained in the following sections, the evolution of this emerging *acquis humanitaire* is best understood through the mechanism of transnational legal processes, described by Harold Koh as being non-traditional, non-statist, dynamic and normative.[5] The multiple flows of ideas, principles and regulations between national, regional and international frameworks encapsulated by the *acquis humanitaire* presents an important mechanism for the internalisation of international and regional humanitarian norms at the domestic level, reflecting Koh's argument that transnational legal process is pivotal to our understanding of why nations obey international law.[6]

Therefore, in this Chapter I will commence by examining the various definitions of what constitutes "humanitarian assistance," and the fundamental differences between humanitarian interventions and humanitarian assistance. I will then outline prevailing international legal provisions relating to the regulation of humanitarian assistance in the international humanitarian law of armed conflict, refugee and displaced persons law, and international criminal law.[7] Finally, I will develop the concept of an *acquis humanitaire*, which underpins my subsequent examination in Chapter 5 of whether or not a right to humanitarian assistance is *lex lata* or *lex ferenda*, and analysis in Chapter 6 of the argument

[4] For conflicting views, see: Y. Dinstein, 'The Right to Humanitarian Assistance' (Autumn 2000) *Naval War College Review* 77, 77 ("In reality … there is no clear-cut right under existing international law to humanitarian assistance in peacetime, not even when natural disasters strike"); D. Fisher, 'The Right to Humanitarian Assistance', in W. Kälin *et al* (eds) *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges*, ASIL and Brookings-Bern Project on Internal Displacement, Studies in Transnational Legal Policy No.41 (2010), 51-52 ("a number of legal scholars have reached pessimistic conclusions about the existence of a general right to humanitarian assistance. However, the *Guiding Principles [on Internal Displacement]* are nevertheless justified in asserting that there is such a right, both in war and peacetime disasters").
[5] H. Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181, 184.
[6] H. Koh, 'Review Essay: Why Do Nations Obey International Law?' (1997) 106(8) *Yale Law Journal* 2599.
[7] Relevant provisions from international human rights law are likewise examined in Chapter 6.

that the components of a right to humanitarian assistance could potentially be drawn from existing international human rights law.

A. The Boundaries of "Humanitarian Assistance"

i. Defining "humanitarian assistance"

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 necessary to save and sustain life, such as food and medical supplies, it can also include the broader conception of "humanitarian action" described in Chapter 3 which comprises not just material assistance but all actions necessary to ensure respect and protection for people in disaster settings. Although the ICJ examined the principles of humanitarian assistance in the context of sovereignty and non-intervention in the Nicaragua case, they did not examine its content beyond noting the vague and circular definition contained in US legislation, 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."[8]

The two binding universal legal texts of direct relevance to the provision of humanitarian assistance,[9] namely the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations and the Framework Convention on Civil Defence Assistance, similarly provide limited guidance in determining the limits of what constitutes humanitarian assistance. Reflecting the specific aims and objectives of civil defence organisations, the Framework Convention states:

[8] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment. I.C.J. Reports 1986, 14, para.97.

[9] Other multilateral conventions, such as the UN Convention on Facilitation of International Maritime Traffic (adopted 9 April 1965, entered into force 5 March 1967) 591 UNTS 265, include provisions relating to disaster response but do not have the primary aim of regulating international humanitarian assistance. Further multilateral conventions regulate specific types of human-made disasters, such as the UN Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency (adopted 26 September 1986, entered into force 26 February 1987) 1457 UNTS 133 drawn up following the Chernobyl nuclear disaster. However, it was only during the 1990s that the need for a broader conception of legal frameworks for disaster response became apparent.

> "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.[10]

The Tampere Convention meanwhile does not define "assistance" but clarifies that "relief operations" encompass "those activities designed to reduce loss of life, human suffering and damage to property and/or the environment caused by a disaster."[11]

Other international sources have been equally reluctant to provide a detailed definition of assistance, with UNGA Resolution 46/182 simply calling on states to facilitate the work of humanitarian agencies, in particular regarding the supply of food, medicines, shelter and health care.[12] Conversely, the current text of the ILC draft articles on the protection of persons in the event of disasters defines "international cooperation" as including: "humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources."[13] Meanwhile, the European Consensus on Humanitarian Aid[14] focuses on the principles of Good Humanitarian Donorship, including coordination and accountability, rather than providing a definition of "aid." However, the non-binding IIHL Guiding Principles on a Right to Humanitarian Assistance specify that:

> 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, tracing services, religious and spiritual assistance, as well as civil defence, in conformity with the tasks defined in international humanitarian law.[15]

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[10] Framework Convention on Civil Defence Assistance, International Civil Defence Association (adopted 22 May 2000, entered into force 23 September 2001) 2172 UNTS 213, art 1(d).
[11] Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (adopted 18 June 1998, entered into force 8 January 2005) 2296 UNTS 5, art 1(12).
[12] *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, UNGA Res 46/182, 19 December 1991, Annex, Principle 6.
[13] For text of draft articles 5*bis*, 12-15, see: A/CN.4/L.812, 12 July 2012.
[14] Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission, *The European Consensus on Humanitarian Aid*, OJ C25, 30 January 2008, 1. For analysis, see: Caritas Europa, *Bridging the Gap Between Policy and Practice: The European Consensus on Humanitarian Aid and Humanitarian Principles* (October 2011).
[15] *Guiding Principles on the Right to Humanitarian Assistance*, International Institute of Humanitarian Law (IIHL), San Remo, Italy, April 1993, Principle 9.

Similarly, the UN Guiding Principles on Internal Displacement enumerate the basic minimum that competent authorities must provide to internally displaced persons (including those displaced by natural disasters) as: a) essential food and potable water; b) basic shelter and housing; c) appropriate clothing, and; d) essential medical services and sanitation.[16] Finally, the 2003 Bruges Resolution of the Institute of International Law defines humanitarian assistance as: "all acts, activities and the human and material resources for the provision of goods and services of an exclusively humanitarian character, indispensable for the survival and fulfilment of the essential needs of victims."[17]

Although such definitions 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 inter-connections between "humanitarian" actions and long-term developmental needs means that humanitarian agencies often stress a broad definition of humanitarian assistance encompassing risk reduction and preventative measures.[18] UNOCHA, as the global co-ordinating body, 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."[19] The Irish Aid Humanitarian Relief Policy meanwhile focuses on "humanitarian needs" and merges both general and specific aspects:

> 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 those no longer taking part in hostilities, the provision of food, water, sanitation services, shelter, health, protection and other forms of life saving assistance.[20]

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[16] United Nations, Commission on Human Rights, *The Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2 (1998), Principle 18(2).
[17] *Resolution on Humanitarian Assistance*, Institute of International Law, Bruges Session, September 2003, art I(1).
[18] As noted in the 2010 *HAP 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.
[19] 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 (2003), 13. The terms and definitions in the glossary are based on their common usage and understanding particularly, but not exclusively, in situations of armed conflict.
[20] Irish Aid, *Humanitarian Relief Policy*, May 2009, 7.

Meeting humanitarian needs through a proactive approach to disaster risk reduction and preventative measures was highlighted in the Hyogo Framework for Action 2005-2015, which emphasises the need for international cooperation and the financial benefits of risk assessment and early warning systems compared to the provision of post-disaster response and recovery assistance.[21] Recognising the importance of international law in this process, it notes: "In the coming years, consideration should be given to ensuring the implementation and strengthening of relevant international legal instruments related to disaster risk reduction."[22]

From an operational perspective, humanitarian assistance is understood to encompass actions at all phases of a disaster, ie prevention and preparedness, emergency response, recovery and rehabilitation, and linking relief, rehabilitation and development, in addition to the provision of more "traditional" emergency food, medical care, shelter and other relief materials.[23] 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 different disaster scenarios create. Yet the lack of a universal 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 domestic recourse to compel the authorities to provide specific forms of pre- or post-disaster support. Alternatively, international assistance operations may be delayed or refused due to concerns (legitimate or otherwise) regarding actions classified as "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 the UN

[21] UNISDR, *Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters*, as adopted at the World Conference on Disaster Reduction, 18-22 January 2005, Kobe, Hyogo, Japan (A/CONF.206/6), Priorities for Action 2005-2015, section III(b), 4-5. As the Hyogo Framework for Action was developed through the UN, the Secretary-General reports biennially on its progress, and the General Assembly has produced a series of Resolutions entitled *International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, from Relief to Development*. Most recently, UNGA Res 67/231, 9 April 2013 urged Member States to develop, update and strengthen early warning systems, disaster preparedness and risk reduction measures at all levels in accordance with the Hyogo Framework for Action, and encouraged the international community and relevant UN entities to support national efforts, art 10.

[22] *Hyogo Framework for Action*, ibid 13. Of note, the AU Kampala Convention (n.3) provides legally binding obligations on state parties to: "Devise early warning systems … in areas of potential displacement, establish and implement disaster risk reduction strategies, emergency and disaster preparedness and management measures and, where necessary, provide immediate protection and assistance to internally displaced persons," art 4(2).

[23] For discussion of the disaster cycle, see: Section A(ii)(b), Chapter 3.

World Food Programme.[24] Meanwhile, despite the Haitian government requesting US troops to assist in the 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.[25] Notwithstanding these divergent understandings of what constitutes "humanitarian assistance," international law is not entirely silent on the modalities or forms of assistance in crisis settings.

ii. Separating humanitarian intervention and humanitarian assistance

Due to the limited international legal provisions on humanitarian assistance, until recently any discussion around a specific "right to humanitarian assistance" was often subsumed within the contentious debate surrounding humanitarian interventions.[26] Indeed, a right to humanitarian assistance has been conflated with forcible humanitarian interventions.[27] Proponents of forcible humanitarian interventions argue that in addition to reducing human suffering caused directly by hostilities, military intervention can end armed conflicts and promote peace.[28] The conclusion of the Cold War coincided with a series of complex humanitarian emergencies[29] that forced the international community to critically examine the impact of military humanitarian interventions. As noted by Forsyth in 1996:

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[24] 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' (2009-2010) 38 *Denver Journal of International Law and Policy* 227, 229-231.

[25] *US troops withdrawing from Haiti*, R. Carroll, The Guardian, 8 March 2010. Available at: <www.guardian.co.uk/world/2010/mar/08/us-troops-withdraw-haiti-earthquake?INTCMP=SRCH> accessed 25 September 2013.

[26] The debate surrounding the legality and morality of intervening in other states is longstanding. John Stuart Mill noted in the 1850s: "There is much to be said for the doctrine that a nation should be willing to assist its neighbours in throwing off oppression and gaining free institutions. Much also may be said by those who maintain that one nation is incompetent to judge and act for another, and that each should be left to help itself, and seek advantage or submit to disadvantage as it can and will. But of all attitudes which a nation can take up on the subject of intervention, the meanest and worst is to profess that it interferes only when it can serve its own objects by it." J.S. Mill, 'A Few Words on Non-Intervention (1859)', in J. Robson (ed), *The Collected Works of John Stuart Mill, Volume XXI – Essays on Equality, Law, and Education* (University of Toronto Press/Routledge and Kegan Paul 1984), available at: <http://oll.libertyfund.org/title/255/21666> accessed 25 September 2013.

[27] L. Fielding, 'Taking the Next Step in the Development of New Human Rights: The Emerging Right to Humanitarian Assistance to Restore Democracy' (1994-1995) 5 *Duke Journal of Comparative and International Law* 329.

[28] In his Nobel Peace Prize acceptance speech, US President Barak Obama stated: "I believe that force can be justified on humanitarian grounds, as it was in the Balkans, or in other places that have been scarred by war. Inaction tears at our conscience and can lead to more costly intervention later. That is why all responsible nations must embrace the role that militaries with a clear mandate can play to keep the peace." Available at: <www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html> accessed 25 September 2013.

[29] A "complex emergency" is defined as: "a humanitarian crisis in a country, region, or society where there is a total or considerable breakdown of authority resulting from internal or external conflict and which requires an international response that goes beyond the mandate or capacity of any single agency and/or

> 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.[30]

Yet the treatment of the Kurds in northern Iraq by Saddam Hussein's forces at the end of the 1990-1 Gulf War prompted the UN Security Council to declare the repression of the Iraqi civilian population a threat to international peace and security.[31] While Resolution 688 did not explicitly authorise the use of force to protect civilians, the UK, US and other countries argued that international law allowed the establishment of "safe havens" and "no-fly" zones in Iraq due to the severe humanitarian need faced by Kurdish and Shi'ite populations who opposed Saddam Hussein during the war.[32] Subsequent military interventions in Somalia, Liberia, Rwanda, Haiti, the former Yugoslavia, and Timor Leste reflected post-Cold War aspirations that a new world order was possible, where the international community could intervene to protect civilian populations from gross and systematic human rights abuses.[33] Nevertheless the harsh reality of undertaking military interventions during the 1990s eroded much of the initial enthusiasm for an expansive doctrine of humanitarian intervention. Despite the introduction of the Responsibility to Protect doctrine in 2005, the issue of intervention in sovereign states for humanitarian reasons remains highly contentious.[34]

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 aimed to stop governmental or other forces subjecting a population to large-scale human rights

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the on-going UN country programme." IASC, *Civil-Military Relationship in Complex Emergencies: An IASC Reference Paper*, 28 June 2004, Part 1C: Definition of Key Terms.

[30] D. Forsythe, 'International Humanitarian Assistance: The Role of the Red Cross' (1996-1997) 3 *Buffalo Journal of International Law* 235, 239.

[31] UNSC Res 688, 5 April 1991, para.1.

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

[33] John Stuart Mill discussed international regulation of interventions in 1859, although he distinguished the regulation of international rules between "civilised nations" and "barbarians." Nevertheless, he stated: "There seems to be no little need that the whole doctrine of non-interference with foreign nations should be reconsidered ... There are few questions which more require to be taken in hand by ethical and political philosophers, with a view to establish some rule or criterion whereby the justifiableness of intervening in the affairs of other countries, and (what is sometimes fully as questionable) the justifiableness of refraining from intervention, may be brought to a definite and rational test." Mill, 'A Few Words on Non-Intervention' (n.26).

[34] 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. For counter arguments, see: F. Weissman, '"Not In Our Name": Why Médecins Sans Frontières Does Not Support the "Responsibility to Protect"' (August 2010) 29(2) *Criminal Justice Ethics* 194.

abuses. This was predominantly understood to occur in times of armed conflict, either of an international or non-international nature.[35] There was little, if any, discussion of forcible humanitarian interventions to provide humanitarian assistance in non-conflict settings until 2008 and the delayed response by the Myanmar government for the victims of Cyclone Nargis.[36] Furthermore, while there is an understandable focus on military enforcement actions, interventions by one state into the affairs of another state do not necessarily require the use of force.[37] It is therefore important to separate "humanitarian interventions" from "humanitarian assistance."

Even prior to the ending of the Cold War, the International Court of Justice examined the specific status of humanitarian assistance in the context of the US intervention into the domestic affairs of Nicaragua.[38] The case revolved around US support for the contras fighting against the Sandinista government. In its judgement, the Court separated US military support for the contras provided between 1981 and September 1984 from the subsequent non-military humanitarian assistance provided once the House of Congress banned US military support. The Court stated: "There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law."[39] The Court continued:

> An essential feature of truly humanitarian aid is that it is given "without discrimination" of any kind. In the view of the Court, if the provision of "humanitarian assistance" is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely "to prevent and alleviate human suffering", and "to protect life and health and to ensure respect for the human being"; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the contras and their dependents.[40]

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[35] See: Dinstein, 'Right to Humanitarian Assistance' (n.4); J. Dungel, 'A Right to Humanitarian Assistance in Internal Armed Conflicts Respecting Sovereignty, Neutrality and Legitimacy: Practical Proposals to Practical Problems' (May 2004) *Journal of Humanitarian Assistance*, available at: <http://sites.tufts.edu/jha/archives/838> accessed 25 September 2013.

[36] See: Ford, 'Failure to Respond' (n.24); J. Wong, 'Reconstructing the Responsibility To Protect in the Wake of Cyclones and Separatism' (2009-2010) 84 *Tulane Law Review* 219; T. Jackson, 'Bullets for Beans: Humanitarian Intervention and the Responsibility to Protect in Natural Disasters' (2010) 59 *Naval Law Review* 1.

[37] 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, available at: <www.brookings.edu/research/speeches/2008/07/21-myanmar-cohen> accessed 25 September 2013.

[38] *Nicaragua v. United States of America* (n.8) 14.

[39] ibid para.242, p.124.

[40] ibid para.243, p.125.

While representing the first international judicial pronouncement on humanitarian assistance, the Court's limited examination is unsatisfactory. First of all, the reference to providing "strictly humanitarian aid to persons or forces" is unclear. Does "forces" refer to the state military forces or does it also include forces fighting against the government? Are there any preconditions before armed opposition groups could be provided with humanitarian aid? The ICRC has often faced controversy for providing assistance to all parties to a conflict through the principle of neutrality.[41] Furthermore, despite examining state sovereignty and non-intervention from the perspective of the threat or use of force by one state against another, the Court did not clarify the implications of unilateral provision of humanitarian assistance. Following the Court's reasoning, if humanitarian assistance is to be provided without discrimination to all those in need, this requires the consent of the state authorities concerned. Yet in Nicaragua it was US government policy to support only the contras and not the Sandinista government[42] – therefore it is unlikely the US could have provided humanitarian assistance to people in need in Nicaragua without the consent of the government.[43]

Finally, it should also be noted that the Court was not examining the question of whether there was a right under international law for states or other humanitarian actors to offer humanitarian assistance or an individual right to receive humanitarian assistance. The issue before the Court was whether the actions of the USA amounted to an unlawful intervention in the domestic affairs of Nicaragua. The key point is that although the Court made clear that the provision of impartial humanitarian assistance is not an internationally wrongful act or contrary to international law in a negative perspective,[44] one cannot extrapolate from this the existence of a general right to humanitarian assistance in a positive perspective, nor can one extrapolate a positive obligation on third states to provide humanitarian assistance. Furthermore, the Court was looking at the specific question of humanitarian assistance in an

[41] For example, *Red Cross gives first aid lessons to Taliban*, J. Boone, The Guardian, 25 May 2010, available at: <www.guardian.co.uk/world/2010/may/25/red-cross-first-aid-taliban> accessed 25 September 2013.
[42] The morality of the US position can certainly be questioned – if the US was truly interested in ameliorating the humanitarian needs of the Nicaraguan people, they would have provided assistance to all sides of the conflict, not just the contras. Otherwise, the Nicaragua case simply provides an example of humanitarian assistance being used for political purposes, rather than humanitarian ones. For a severely critical analysis of the use of humanitarian assistance in Kosovo and Afghanistan, see: D. Rieff, *A Bed for the Night: Humanitarianism in Crisis* (Vintage 2002), 197-265.
[43] The ICRC *Customary International Humanitarian Law Project* Rule 55 (Access for Humanitarian Relief for Civilians in Need) states: "It is nonetheless self-evident that a humanitarian organization cannot operate without the consent of the party concerned. However, such consent must not be refused on arbitrary grounds." See: J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law: Rules and Practice* (Cambridge University Press 2005). Also available at: <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule55> accessed 25 September 2013.
[44] *Nicaragua v. United States of America* (n.8) para.242, p.124.

internal armed conflict setting, and did not engage in any discussion of the provision of humanitarian assistance in other types of humanitarian crisis.

B. Provisions on Humanitarian Assistance in International Law

As described in Chapter 3, previous attempts at codification of international responses to natural and human-made disasters have been made, most notably the 1927 Convention establishing an International Relief Union,[45] the 1982 UNITAR Model Rules for Disaster Relief Operations,[46] and the 1984 draft UN Convention on Expediting the Delivery of Emergency Assistance.[47] Despite the failure of these initiatives to produce a universal legal framework for disaster responses, international law does contain specific requirements and rules for the provision of humanitarian assistance, and useful analogies can be drawn from several branches of international law.[48] As most academic and practitioner analysis of humanitarian assistance and humanitarian interventions focuses on armed conflicts,[49] international humanitarian law and international human rights law[50] provide a key source of legal provisions regulating access to, and delivery of, humanitarian assistance. Relevant provisions can also be found in refugee and displaced persons law and international criminal law, so useful analogies and substantive provisions of the *acquis humanitaire* can be deduced from such branches of international law, reflecting the acknowledged interconnections, overlaps, and gaps between traditionally distinct aspects of international law.[51]

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[45] Convention establishing an International Relief Union (adopted 12 July 1927, entered into force 27 December 1932) 135 LNTS 247.
[46] M. el Baradei, *Model Rules for Disaster Relief Operations*, Policy and Efficacy Studies No.8, UN Institute for Training and Research (UNITAR), 1982.
[47] A/39/267/Add.2 – E/1984/96/Add.2, 18 June 1984.
[48] See for example: D. Fisher, 'Domestic regulation of international humanitarian relief in disasters and armed conflict: a comparative analysis' (June 2007) 89(866) *International Review of the Red Cross* 345.
[49] For example: R. Stoffels, 'Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps' (September 2004) 86(855) *International Review of the Red Cross* 515; A. Hehir, 'Guaranteeing the Security of the State and the Individual Through Codifying A Right of Humanitarian Intervention' (2005) 10 *University of Limerick Papers in Politics and Public Administration*; R. Barber, 'Facilitating humanitarian assistance in international humanitarian and human rights law' (June 2009) 91(874) *International Review of the Red Cross* 371.
[50] For details of the provisions in international human rights law that refer specifically to natural and human-made disasters, see: Section A, Chapter 6.
[51] See: T. Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument' (July 1983) 77(3) *American Journal of International Law* 589; R. Brett and E. Lester, 'Refugee law and international humanitarian law: parallels, lessons and looking ahead' (September 2001) 83(843) *International Review of the Red Cross* 713; S. Jaquemet, 'The cross-fertilization of international humanitarian law and international refugee law' (September 2001) 83(843) *International Review of the Red Cross* 651.

There are, however, fundamental differences between the factual situation of natural or human-made disasters and armed conflict or refugee displacement scenarios. In general, a natural or human-made disaster will comprise one key event or series of linked events (as in the Japanese earthquake of March 2011, where a powerful earthquake and tsunami created a radiological emergency at the Fukushima nuclear power plant). Accordingly, there is generally an identifiable start point to the disaster and while recovery and rehabilitation may take years, the emergency response phase of the operation (and therefore need for humanitarian assistance as opposed to longer-term rehabilitation and developmental assistance) normally only spans a period of weeks or months after the key event.[52] However, in armed conflicts the need 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 basic necessities may continue for a long period. For example the Bhutanese refugees who fled to Nepal in the early 1990s initially required emergency shelter, medical care, food, and registration services. However, more than 20 years later nearly 40,000 refugees remain in Nepal receiving on-going support and protection from the international community.[53] The following sections therefore set out the existing international legal provisions relating to humanitarian assistance, drawing on both binding international law and relevant non-binding normative standards, while remaining conscious that direct comparisons between different branches of international law are not always possible or warranted.

i. International humanitarian law of armed conflict

Considering the backdrop of the contentious philosophical, as well as legal, debate around humanitarian intervention, what does the international humanitarian law of armed conflict say about humanitarian assistance? Geneva Convention IV Relative to the Protection of Civilian Persons in Times of War[54] and Additional Protocols I[55] and II[56] provide the only

[52] 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.
[53] See: *Trapped by Inequality: Bhutanese Refugee Women in Nepal* (September 2003) Human Rights Watch; and information on the UNHCR operations in Nepal, available at: <www.unhcr.org/pages/49e487856.html> accessed 25 September 2013.
[54] Geneva Convention IV relative to the Protection of Civilian Persons in Times of War (adopted 12 August 1949, entered into force 21 October 1950) 973 UNTS 286. Hereinafter "GCIV."

universal treaty provisions explicitly recognising a right to humanitarian assistance for civilians, albeit these rights are limited in scope and only applicable in armed conflicts.[57] Under Part II of GCIV, civilian populations are entitled to a minimum level of protection against some of the consequences of war, and crucially these provisions cover all persons in a conflict zone, without adverse distinction inter alia based on race, nationality, religion or political opinion.[58] Key protections exist for hospitals and "neutral zones," while particularly vulnerable groups including the sick, wounded and elderly receive explicit protection. Nevertheless, the majority of protections relate to the conduct of hostilities by parties to the conflict, for example the requirement not to attack civilian hospitals, medical staff or medical convoys. In terms of ensuring the protection of civilians through the provision of relief supplies, Article 23 provides that the entire population in a conflict zone is only entitled to receive medical supplies and objects necessary for religious worship.[59] The provision of essential foodstuffs, clothing and tonics are limited to particularly vulnerable groups such as children under fifteen, expectant mothers and maternity cases.[60] Furthermore, Parties are only required to ensure free passage of consignments if they are satisfied the supplies will not be diverted, used for military or economic advantage, and control of the supplies by the humanitarian agency will be effective.

GCIV also places obligations on Parties which obtain control over territories as an Occupying Power. By setting out the basic necessities for sustaining life that any Occupying Power must ensure for the local civilian population, GCIV establishes an additional legal

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[55] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 4. Hereinafter "API."

[56] Protocol II Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 610. Hereinafter "APII."

[57] See: P. Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff 1985), 28-34; 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*); Dinstein, 'Right to Humanitarian Assistance' (n.4); Stoffels, 'Legal Regulation of Humanitarian Assistance' (n.49).

[58] Part II. General Protection of Populations Against Certain Consequences of War (arts 13-26).

[59] As noted by the ICRC, a deliberate distinction was made in Article 23 between various types of relief, as medical supplies and objects necessary for religious worship "cannot be a means of reinforcing the war economy and can therefore be sent to the civilian population as a whole. On the other hand, consignments which fell into the second category are only entitled to free passage when they are to be used solely by children under fifteen, expectant mothers and maternity cases. This distinction is based on military considerations. The intention is to keep a strict check on the destination of provisions which might reinforce the economic potential of the enemy if used for other purposes." ICRC, *Commentary: Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, J. Pictet (ed) (1958), 180.

[60] Y. Dinstein, 'Siege Warfare and the Starvation of Civilians', in A. Delissen and G. Tanja (eds) *Humanitarian Law of Armed Conflict: Challenges Ahead*, Essays in Honour of Frits Kalshoven (Martinus Nijhoff 1991), 148.

foundation for the provision of humanitarian assistance.[61] Notably, besides a range of provisions on food, health, children, hygiene and access to spiritual assistance, GCIV recognises that an Occupying Power must undertake these activities to the "fullest extent of the means available to it." If unable to provide sufficient support for the civilian population, Article 59 specifically requires an Occupying Power to facilitate relief schemes and consignments by other states or by impartial humanitarian organisations, such as the ICRC.[62] Articles 59-63 continue by establishing explicit rules for the operation of such relief schemes, including a ban on diversion of relief supplies from their intended recipients, a requirement to allow free passage to relief goods, to exempt relief consignments from all charges, taxes and customs duties unless necessary for the economy of the occupied territory, and a requirement to permit individual relief consignments subject to security checks on packages received. Article 63, in particular, recognises the status of non-military humanitarian organisations, such as Red Cross and Red Crescent Societies, and provides that humanitarian organisations should be entitled to undertake humanitarian activities, subject only to temporary and exceptional measures imposed for urgent reasons of security.

Further protections during international conflicts were elaborated through Additional Protocol I, including a range of measures to ensure respect and protection for civilian civil defence organisations and their personnel.[63] API also extends the range of materials Parties must provide by including clothing, bedding, shelter and other supplies necessary for the survival of civilians, plus objects necessary for religious worship, and establishes key protections for relief personnel engaged in distribution of assistance to civilians.[64] Meanwhile, mutual obligations are placed on Parties in receipt of relief consignments to assist relief personnel to the greatest extent practicable, and relief personnel are required not to exceed the terms of their mission, in particular by taking into account the security requirements of the Party in whose territory they are carrying out their duties.

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[61] Article 49 confers 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.

[62] For discussion of the role of the ICRC in providing humanitarian assistance in armed conflicts, see: D. Forsythe, 'The International Committee of the Red Cross and humanitarian assistance – a policy analysis' (October 1996) 36(314) *International Review of the Red Cross* 512.

[63] Section I, Chapter VI: Civil Defence (arts 61-67).

[64] Section II: Relief in Favour of the Civilian Population (arts 68-71).

While API builds on the protections provided for in GCIV, and extends the concept of relief activities beyond areas that would formally be considered as occupied territories, APII does not provide the same level of protection for civilians in non-international armed conflicts.[65] While providing that persons who do not take a direct part or who have ceased to take part in hostilities should be entitled to respect and humane treatment, and identifying a range of human rights protections for civilians,[66] APII only contains one article specifically on the role and content of relief actions in non-international armed conflicts.[67] Article 18 provides that relief societies, such as the Red Cross, may offer their services to the victims of the armed conflict. Furthermore, if civilians are suffering undue hardship due to a lack of essential supplies, humanitarian and impartial relief actions shall be conducted subject to the consent of the Party concerned. Yet this means that a government may refuse consent for the provision of humanitarian assistance to the victims of an internal armed conflict. In a situation where territory is controlled by an armed group within a country, the national government or another Party to the conflict could deny access to this area for humanitarian agencies, even if it was recognised there was a humanitarian need.[68] It has been argued[69] that despite this pessimistic view of the limited protections provided by APII, the prohibition of starvation as a method of warfare in both international and non-international armed conflicts means that failure to provide relief to civilians amounts to a breach of API or APII.[70] Furthermore, the Statute of the International Criminal Court classifies starvation as a method of warfare as a war crime bearing individual criminal responsibility, although only in

[65] S. Wills, 'The Legal Characterization of the Armed Conflicts in Afghanistan and Iraq: Implications for Protection' (2011) 58(2) *Netherlands International Law Review* 173, in particular 187-192 on aspects of humanitarian access and protection in non-international armed conflicts.

[66] Part II: Humane Treatment (arts 4-6) and Part IV: Civilian Population (arts 13-18).

[67] Although impartial humanitarian bodies, such as the ICRC, have a general right of initiative to offer their services to Parties in a non-international armed conflict via Common Article 3, this general right does not include a specific reference to humanitarian assistance.

[68] The ICRC Commentary to Article 70 API states that such refusals must be exceptional, and notes that the clause requiring the agreement of the Parties concerned was added during the Diplomatic Conference out of concern to protect the national sovereignty of the state receiving the relief. Nevertheless this reservation does not imply that the Parties concerned have "absolute and unlimited freedom to refuse their agreement to relief actions. A Party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones." See: ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Y. Sandoz, C. Swinarski and B. Zimmermann (eds) (Martinus Nijhoff 1987), 819-820.

[69] Dinstein, 'Right to Humanitarian Assistance' (n.4) 80.

[70] Article 54 of API prohibits the use of starvation of the civilian population in international armed conflicts, while Article 14 of APII provides a similar prohibition for non-international armed conflicts. As David Marcus has noted, until the adoption of the Additional Protocols, Article 23 of GCIV simply provided a moral obligation and not a blanket prohibition against the starvation of civilians. See: D. Marcus, 'Famine Crimes in International Law' (April 2003) 97(2) *American Journal of International Law* 245, 266-268.

situations of international armed conflicts.[71] The ICRC Commentaries to Article 54, API also note that starvation of civilians could amount to genocide if undertaken with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as per the Genocide Convention.[72] However, it is important to note that in many conflict zones, the suffering of the civilian population may be part of the military objectives of one or more of the warring parties. Understanding the dynamic involved in the premeditated denial of humanitarian assistance and active violence towards civilian populations in times of conflict is a fundamental but challenging task for any humanitarian agency.[73]

So although a key source of international law regarding the principles and modalities of humanitarian assistance for civilians, the provisions in GCIV and API are of limited application due to the restricted rights to relief supplies and activities provided for civilians and the low incidence of formal situations of occupation by foreign troops in armed conflicts.[74] Meanwhile APII provides even more limited access to humanitarian assistance for civilians in non-international armed conflicts, and such access remains subject to the consent of the Parties to the conflict. Having said this, the provisions on humanitarian assistance set out in the international law of armed conflict represent the modern source for many themes found in subsequent non-binding texts on humanitarian assistance, and were used to create individual criminal responsibility via the Statute of the ICC. Running throughout IHL is a balancing of binding responsibilities of Parties towards civilians under their control, with an acceptance that these rights can be legitimately constrained, either for military necessity, security reasons or due to insufficient resources. The provisions also recognise that material assistance alone is not sufficient to ensure the maintenance of civilian populations, and so provide for activities such as spiritual assistance and the identification and registration of separated children.

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[71] Article 8(2)(b)(xxv) of the Statute of the ICC defines a war crime as including "intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions."

[72] ICRC, *Commentaries on Additional Protocols* (n.68) 654.

[73] See: H. Slim and D. Mancini-Griffoli, *Interpreting Violence: Anti-civilian thinking and practice and how to argue against it more effectively*, Centre for Humanitarian Dialogue (2007).

[74] As highlighted by Siobhán Wills, the Afghan and Iraq conflicts started as situations of occupation in an international armed conflict when the US-led multinational forces invaded both countries, and therefore GCIV and API were applicable to the extent that the Parties to the conflict had ratified both texts. However, the establishment of national governments who invited the allied forces to remain to support the on-going fight against "militants" such as the Taliban and Al-Qaeda meant one could arguably only classify these conflicts as "occupation" for a short period of time. If this is the case, once the conflict is classified as a non-international conflict, only the provisions of APII and common Article 3 are applicable and therefore despite the on-going nature of the conflict and presence of international forces, the civilian populations in Afghanistan and Iraq had very limited rights to humanitarian assistance under IHL. See: Wills, 'Characterization of Armed Conflicts' (n.65) 192-206.

Many of these provisions have now passed into customary international law, with the ICRC Customary IHL study identifying nine key provisions that offer protection and assistance to civilians.[75] Of note, IHL enshrines the right of initiative for humanitarian agencies, particularly the Red Cross, to provide humanitarian assistance to civilian populations. This ensures that the right to offer humanitarian assistance is a clearly identifiable right under international law. Yet despite this, as noted by Stoffels: "The first conclusion that can be drawn from an analysis of implementation mechanisms established under IHL is that individuals are largely dependent on the political will of States to use the means at their disposal to ensure implementation and enforcement [of a right to humanitarian assistance]."[76] Of equal concern to humanitarian actors engaged in the delivery of humanitarian assistance in armed conflicts is the fact that:

> Whatever the law on the books might say about who can deliver assistance in what situation, and who is entitled to receive it, many warring parties in the post-Cold War world have never heard of the Geneva Conventions, are not familiar with the ICRC and the Red Cross/Red Crescent symbol, or regard civilian death and suffering as weapons for attaining their personal and political objectives.[77]

So although the international law of armed conflict contains both an organisational right to offer and an individual right to receive humanitarian assistance, these rights are limited and vary considerably between international and non-international conflicts. Furthermore, humanitarian agencies or those entitled to such assistance are likely to face considerable difficulty in seeking the enforcement of their rights in the chaotic environment of a war zone.[78]

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[75] The ICRC has updated the 2005 publication, *Customary International Humanitarian Law: Rules and Practice* (n.43), with an online database available at: <www.icrc.org/customary-ihl/eng/docs/home> accessed 25 September 2013. Rules the ICRC has identified as part of customary international law include: Rules 31 and 32 Humanitarian relief personnel and objects used for humanitarian relief operations must be respected and protected; Rule 55 Parties to the conflict must ensure the freedom of movement of authorised humanitarian relief personnel essential to the exercise of their functions, only in case of imperative military necessity may their movements be temporarily restricted; Rule 135 Children affected by armed conflict are entitled to special respect and protection.

[76] Stoffels, 'Legal Regulation of Humanitarian Assistance' (n.49) 528.

[77] Forsythe, 'The ICRC and humanitarian assistance' (n.62) 513.

[78] See: Fisher, 'Domestic Regulation' (n.48) 355-367 for details of challenges faced by humanitarian agencies in gaining access in conflict settings.

ii. International law on refugees and internally displaced persons

The other key international treaty under consideration by the UN during the drafting of Geneva Convention IV was the 1951 Convention relating to the Status of Refugees.[79] While a humanitarian instrument, the Refugee Convention does not specifically set out standards or mechanisms for the provision of humanitarian assistance to refugees. The underlying rationale to Chapter IV covering refugee welfare was that refugees should be allowed to access national welfare schemes such as rationing, housing and education in a manner no less favourably than nationals of the country of asylum. However, Macalister-Smith has argued that the rapid expansion of UNHCR programmes of material assistance to refugees in the 1950s stemmed from recognition that durable solutions to refugee problems could not be found simply by addressing protection concerns, and so UNHCR also had to engage in operational activities to provide material assistance to refugees.[80] Nevertheless, it has also been argued that the international regimes established by the Geneva Conventions and Refugee Convention do not cover the "chaotic diversity" of people fleeing complex emergencies, including "environmental" disasters, which can lead to a lack of protection and humanitarian aid.[81] Following the 2005 Humanitarian Response Review initiative, UNHCR agreed to act as Lead Agency for the Protection Cluster at the country level during both conflict and non-conflict related internal displacements. This was in recognition of the increasing incidence of displacement caused by natural disasters, and UNHCR's role as the Lead Agency for the Global Protection Cluster. It is therefore likely that UNHCR will become increasingly involved in both assistance and protection in natural disaster settings over the coming years.[82]

Parallel to the 1949 Geneva Conventions, and despite the lack of specific provisions on material assistance within the Refugee Convention and its 1967 Protocol, international refugee law was fundamental in enshrining the concept of "protection" in international law.

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[79] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137. Hereinafter "the Refugee Convention."

[80] Macalister-Smith, *International Humanitarian Assistance* (n.57) 38-45.

[81] Trócaire, *Migration*, Learning for Livelihoods Series No.2 (2007), 21. For discussion of "climate change refugees" and forced migration due to changing environmental conditions, see: J. McAdam, 'Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer' (2011) 23(1) *International Journal of Refugee Law* 2.

[82] In 2009, UNHCR commissioned research into the role it could play in natural disasters. See: B. Deschamp *et al*, *Earth, Wind and Fire: A review of UNHCR's role in recent natural disasters*, UNHCR Policy Development and Evaluation Service (June 2010). See also comments by Volker Türk, Director of the International Protection Division of UNHCR, on climate change and natural disasters in: 'IDPs and refugees in the OSCE area' (2011) 2 *Security and Human Rights* 119, 121.

By identifying specific groups of people in need of protection and assistance, such as prisoners of war or individuals facing persecution, the international humanitarian law of armed conflict and international refugee law fed directly into the emerging body of international human rights law that recognised individuals could be rights-holders with claims against national and international authorities. While Judge Tanaka was able to argue as early as 1966 that "surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*,"[83] more than 20 years later Goodwin-Gill countered by stating: "the word 'protection' has become something of a term of art, obscuring the scope of an activity that ought to be fundamentally clear."[84] Reflecting the lack of precision on what constituted "protection"; between 1996 and 2000 the ICRC convened a series of inter-agency workshops to strengthen the professional standards of protection activities.[85] These workshops resulted in an updated definition of "protection" which encompasses:

> [A]ll activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law, and refugee law. Human rights and humanitarian organisations must conduct these activities in an impartial manner (not on the basis of race, national or ethnic origin, language or gender).[86]

However, such a broad definition of protection, that can encompass building latrines to registering people to vote, has been criticised as potentially raising unrealistic expectations or cynicism on the part of affected communities, and allows governments to avoid their obligations to provide physical safety to those in need.[87] Yet arguably a non-binding international text has had the greatest impact on establishing minimum standards of assistance and protection to persons displaced by disasters. The UN Guiding Principles on Internal Displacement[88] set out 30 principles covering the life-cycle of displacement, namely:

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[83] South West Africa (*Ethiopia v. S. Africa*; *Liberia v. S. Africa*), Second Phase, Judgment, ICJ Reports 1966, 6, (Tanaka, J., diss. op.) 298.
[84] G. Goodwin-Gill, 'The Language of Protection' (1989) 1 *International Journal of Refugee Law* 6, 6.
[85] ICRC, *Professional Standards for Protection Work carried out by humanitarian and human rights actors in armed conflict and other situations of violence* (October 2009), 8.
[86] S. Giossi Caverzasio (ed), *Strengthening Protection in War: A Search for Professional Standards: Summary of Discussions among Human Rights and Humanitarian Organizations*, Workshops at the ICRC, 1996-2000, ICRC, (2001), 19.
[87] E. Ferris and C. Stark, *Incorporating Protection into Humanitarian Action: Approaches and Limits*, paper presented at IFI-UNRWA International Conference, American University of Beirut, Lebanon, 8 October 2010. Available at: <www.brookings.edu/papers/2010/1104_unrwa_ferris.aspx> accessed 25 September 2013.
[88] United Nations, Commission on Human Rights, *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2 (1998). The Guiding Principles were drafted, at the request of the Commission on Human Rights, by a group of international legal experts convened by the Representative of the UN Secretary-General on IDPs in 1996. They were subsequently revised in 2004, and have been widely welcomed and endorsed by organs of the UN including the Secretary-General, the General Assembly and

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 to the Representative of the UN Secretary-General on IDPs was to develop "an appropriate framework … for the protection of internally displaced persons," although the request was careful to avoid the term "legal" when referring to the development of this framework.[89]

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 or human-made disasters.[90] 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 state. Yet despite their recognised authority, subject to internalisation into domestic or regional law by states, the Guiding Principles remain a non-binding source for any rights to assistance for people displaced by natural or human-made disasters.[91] Nevertheless, by expressly covering victims of natural and human-made disasters, they provide a detailed and authoritative framework for the provision of assistance to people internally displaced by disasters. In the African context, the Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa follows the UN Guiding Principles and includes within its definition of "internally displaced persons" those forced to move within the borders of a country as a result of natural or human-made disasters.[92] As a result, state parties undertake a range of obligations to ensure the provision of assistance and protection to persons internally displaced by disasters, not least the right of internally displaced persons to peacefully request or seek protection and assistance as set out in Article 5(9).[93]

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the Security Council, as well as specialised UN agencies including UNHCR, UNICEF, UNOCHA and UNHCHR.

[89] 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; R. Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10 *Global Governance* 459.

[90] Guiding Principles on Internal Displacement (n.88) Introduction, para.2.

[91] For a detailed survey of the national implementation of international provisions on internal displacement, see: E. Ferris, E. Mooney and C. Stark, *From Responsibility to Response: Assessing National Approaches to Internal Displacement*, Brookings-LSE Project on Internal Displacement, November 2011, in particular 63-73.

[92] Kampala Convention (n.3) art 1(k).

[93] See also: Article 3(1)(j): "States Parties shall … ensure assistance to internally displaced persons by meeting their basic needs as well as allowing and facilitating rapid and unimpeded access by humanitarian organisations and personnel"; Article 5(4): "States Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human-made disasters, including climate change";

iii. International criminal law

a. Attacks against humanitarian personnel

Within the international humanitarian law of armed conflict, GCIV sets out the requirement of Parties to a conflict to permit the free passage of relief consignments and to guarantee their protection.[94] The protection of civilian humanitarian personnel, as opposed to humanitarian supplies, was subsequently codified by API in 1977, with Article 71(2) stating that "[relief] personnel shall be respected and protected"; although following the principle of distinction between combatants and civilians, military actors engaged in the delivery of humanitarian assistance are not covered by this clause. Reflecting the more limited provisions in IHL for non-international armed conflicts, APII does not contain similar protections for civilian humanitarian personnel; nevertheless the ICRC Customary IHL Study has found broad condemnation of attacks against humanitarian personnel in both international and non-international armed conflicts. The ICRC Study concludes that:

> In addition to the prohibition of attacks on [civilian humanitarian relief] personnel, practice indicates that harassment, intimidation and arbitrary detention of humanitarian relief personnel are prohibited … [State] practice also contains examples in which the following acts against humanitarian aid personnel have been condemned: mistreatment, physical and psychological violence, murder, beating, abduction, hostage-taking, harassment, kidnapping, illegal arrest and detention.[95]

International criminal liability for offences committed against humanitarian personnel was further strengthened through the 1998 Rome Statute of the International Criminal Court (ICC).[96] As per Article 5, the ICC has jurisdiction over war crimes, crimes against humanity, genocide and the crime of aggression. Within international criminal law, attacks against humanitarian personnel during both international and non-international armed conflicts are deemed to be war crimes, and Article 8(2) of the Rome Statute criminalises intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance, as well as intentional attacks against buildings, vehicles or

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Article 9(2)(b): "States Parties shall … provide internally displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services, and where appropriate, extend such assistance to local and host communities."

[94] GCIV (n.54) art 59.

[95] Rule 31: Humanitarian relief personnel must be respected and protected. See: Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (n.43).

[96] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS.

personnel using the distinctive emblems of the Geneva Conventions.[97] The Rome Statute also explicitly links the prohibition of starvation with the provision of relief, by determining that intentionally using starvation of civilians as a method of warfare, including wilfully impeding relief supplies provided under the Geneva Conventions, is a war crime.[98] However, this provision is limited to international armed conflicts, and no similar such provision exists for non-international armed conflicts, despite the prohibition of starvation as a method of warfare in non-international armed conflicts in Article 14 of APII.[99]

Despite these specific provisions of international criminal law and the international humanitarian law of armed conflict, attacks on humanitarian personnel remain a common threat in complex emergencies. The Aid Worker Security Database, which contains records of major incidences of violence against aid workers, documents over 3,000 incidents of serious violence against aid workers since 1997 including the deaths of 1,145 humanitarian personnel.[100] Furthermore, Egeland has noted that attacks on humanitarian personnel tripled between 2000 and 2010, and argued that governments, parties to armed conflicts and other influential actors have not done enough to reduce the threats to humanitarian personnel.[101]

b. International criminal liability for denial of humanitarian assistance

In addition to the potential criminal liability of individuals and armed groups for overt attacks on humanitarian assistance operations, one can argue that inaction in the face of a

[97] For international armed conflicts see: Article 8(2)(b)(iii) and (xxiv). For non-international armed conflicts see: Article 8(2)(e)(ii) and (iii). Indeed, the improper use of the distinctive emblems of the Geneva Conventions is in itself a war crime under Article 8(2).

[98] Article 8(2)(b)(xxv): "Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions." The ICTY examined the denial of food, medicine and other essentials in the Stakic case in the context of detainees, but not in the context of the broader civilian population. See: Judgement, *Stakic* (IT-97-24-A), Appeals Chamber, 22 March 2006.

[99] See: Dinstein, 'Right to Humanitarian Assistance' (n.4) 84; Wills, 'Characterization of Armed Conflicts' (n.65) 198-199. Further protections for certain humanitarian personnel are included in the 1994 Convention on the Safety of United Nations and Associated Personnel Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 2051 UNTS 363, although specific protection against attack is restricted to UN personnel and a limited group of associated personnel acting under an agreement with the UN. The limited nature of the protections available led to the 2005 Optional Protocol which expanded the range of associated personnel covered. See: H. Llewellyn, 'The Optional Protocol to the 1994 Convention on the Safety of United Nations and Associated Personnel' (2006) 55 *International and Comparative Law Quarterly* 718.

[100] Database available at: <https://aidworkersecurity.org/incidents> accessed 25 September 2013.

[101] J. Egeland *et al*, *To Stay and Deliver: Good practice for humanitarians in complex security environments*, UNOCHA Policy and Studies Series, 2011, viii, 1. It should be noted that the number of humanitarian personnel working in highly dangerous conflict settings has also increased dramatically in the past 20 years. See: S. Collinson and S. Elhawary, 'Humanitarian Space: a review of trends and issues', Overseas Development Institute, Humanitarian Policy Group Report No.32, April 2012, 9-10.

humanitarian crisis may also lead to international criminal liability.[102] During the negotiations for establishment of the International Criminal Court, both the Inter-Agency Standing Committee and UNHCR unsuccessfully argued that the wilful denial of humanitarian assistance in all armed conflicts should be included in the Court's jurisdiction.[103] Nevertheless while the Rome Statute did not create a specific crime of the denial of humanitarian assistance, there are a range of scenarios covering the denial of humanitarian assistance that could amount to genocide, war crimes or crimes against humanity in either conflict or non-conflict settings.[104] Furthermore, in addition to the specific wording of the Rome Statute, the ICC's Elements of Crimes[105] contain useful commentary and interpretation of actions that entail international criminal responsibility.

Although the evidential burdens would be high, the crime of genocide, as per Article 6 of the Rome Statute, includes acts committed with the intent to destroy a national, ethnic, racial or religious group through killing, causing serious bodily harm or deliberately inflicting on the group conditions of life calculated to bring about its physical destruction. The ICRC has highlighted that deliberate starvation by a state may amount to genocide.[106] Therefore, should a state be unwilling to provide life-saving humanitarian assistance to a specific group within its territory during an armed conflict or following a natural or human-made disaster, in extreme cases this could qualify as an act of genocide.[107]

Irrespective of an intent to destroy a particular group or the existence of an armed conflict, the non-provision or misappropriation of humanitarian assistance could alternatively be classified as a crime against humanity. As per Article 7 of the Rome Statute, a crime against humanity includes acts committed as part of a widespread or systematic attack against any civilian population that results in inter alia murder, extermination, torture, persecution of an identifiable group, or other inhumane acts causing great suffering or serious injury to body or to mental or physical health. Indeed, the Elements of Crimes explain that the crime against

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[102] See: D. Cubie, 'Is the Wilful Denial of Humanitarian Assistance in Natural and Human-Made Disasters a Crime Against Humanity?', *ASIL Accountability Newsletter*, Summer 2012.

[103] A/CONF.183/INF/4, 11 June 1998; and UNHCR comments, available at: <www.unhcr.org/3ae68fba3c.html> accessed 25 September 2013.

[104] C. Rottensteiner, 'The Denial of Humanitarian Assistance as a Crime under International Law' (September 1999) 835 *International Review of the Red Cross* 555.

[105] *Elements of Crimes*, Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010 (ICC publication, RC/11).

[106] ICRC, *Commentary on Additional Protocols* (n.68) 654.

[107] David Marcus has noted the international community has never called for international criminal trials for officials responsible for creating, inflicting, or prolonging famine even when such famines could be classified as genocide, and argues for codification of international law via a famine crimes convention. See: Marcus, 'Famine Crimes in International Law' (n.70).

humanity of extermination set out in Article 7(1)(b) covers inflicting conditions that destroy life including the deprivation of access to food and medicine.[108] Depending on the specific circumstances, the denial of humanitarian assistance could also fall under Article 7(1)(f) torture, Article 7(1)(h) persecution or Article 7(1)(k) other inhumane acts.

So provided it is part of a widespread or systematic policy that is considered an attack on a civilian population, the deliberate denial of humanitarian assistance and resultant suffering and potential deaths could amount to a crime against humanity under several of the headings in the Rome Statute, and as with the crime of genocide, there is no need for an explicit link to armed conflict for individual responsibility to arise.

To date, the delayed response by the Myanmar government to the suffering caused by Cyclone Nargis in 2008 provides the strongest example of a situation where the denial of humanitarian assistance potentially amounted to a crime against humanity. Several Western governments, most notably France, the UK and the US, argued that the delayed response by the national authorities was leading to an increased and unnecessary level of suffering in the affected regions.[109] However, the argument that denial of humanitarian assistance amounts to a crime against humanity then leads one to the debate surrounding the applicability of the Responsibility to Protect doctrine and the international communities' right or obligation to intervene to prevent mass atrocities. Garth Evans, one of the co-authors of the original ICISS report, has argued that:

> natural disasters, as such, are not per se ''responsibility to protect'' situations, but they can be if mass atrocity crimes are also involved. While the Burma/Myanmar reaction could have been the case here – and the issue certainly deserved close scrutiny – in the event itself it was not.[110]

Considering an estimated 130,000 people were killed by Cyclone Nargis and a further 2.4 million people affected by the disaster,[111] it is hard to see when the international community might be willing to classify the denial of humanitarian assistance following a natural or human-made disaster as a crime against humanity. Gareth Evans' view that Cyclone Nargis

[108] *Elements of Crimes* (n.105) 6.
[109] On Cyclone Nargis in general, see: Ford, 'Failure to Respond' (n.24); Wong, 'Cyclones and Separatism' (n.36); Jackson, 'Bullets for Beans' (n.36); Cohen, 'The Burma Cyclone' (n.37); C. Allan and T. O'Donnell, 'A Call to Alms?: Natural Disasters, R2P, Duties of Cooperation and Uncharted Consequences' (2012) *Journal of Conflict and Security Law* 1.
[110] G. Evans, 'The Responsibility to Protect in Environmental Emergencies' (2009) 103 *American Society of International Law Proceedings* 27, 30.
[111] IFRC, *Myanmar: Cyclone Nargis*, Operations Update No.30, 2 March 2011.

did not entail mass atrocity crimes has been challenged by several authors, who argue that the inaction of the Myanmar government amounted to a crime against humanity and therefore created individual criminal responsibility.[112] However as such a determination by the UN Security Council would explicitly lead to calls for the application of the Responsibility to Protect doctrine, and potential military intervention, it is clear that some states would be extremely reluctant to take such a step during the emergency phase of a disaster. In the immediate aftermath of a large-scale disaster it is challenging to identify the exact number of people in need, and most states will respond at least minimally to a disaster within their territory. So, as seen following Cyclone Nargis, obtaining international consensus for actions without the consent of the government concerned or contrary to their express views would be challenging. However, it is conceivable that a subsequent international criminal prosecution could be initiated if evidence came to light that a deliberate policy of denial of humanitarian assistance had occurred which fell within the remit of Article 7 of the Rome Statute.

As can be seen, a broad range of binding provisions already exist within several branches of international law relating expressly to the provision of humanitarian assistance in times of war and humanitarian crisis. Therefore, it is now necessary to examine whether or not a consistent thread can be drawn between these divergent provisions, and if so what the conceptual basis for legal responses to and obligations in humanitarian crises may be.

C. The Emerging *Acquis Humanitaire*

i. Developing a "law of ..."

In the 1980s Steven Marks noted that generally before one can postulate a 'right to …' there is the development of a 'law of …' He argued this was because "a new body of legal norms or a revision of legal thinking on a given problem provides the conceptual framework for identifying first the legal implications of the problem, then the human rights implications, and finally the reformulation of the whole problem in terms of a new human right."[113] So it is instructive to consider whether the disparate laws, rules, regulations and practice for

[112] See for example: Ford, 'Failure to Respond' (n.24); Wong, 'Cyclones and Separatism' (n.36); Cohen, 'The Burma Cyclone' (n.37).
[113] S. Marks, 'Emerging Human Rights: A New Generation for the 1980s?' (1980-1981) 33 *Rutgers Law Review* 435, 442.

responding to humanitarian crises set out above can be classified as a distinct body of law.[114] It is well recognised that "international humanitarian law" refers exclusively to the protection and support of specific groups of people within international and non-international armed conflicts, rather than all "humanitarian" crises.[115] Nevertheless the consistent focus on humanitarian assistance by the UN General Assembly, particularly following natural and human-made disasters, highlights the importance governments place on the effective delivery of aid.[116] In 2001, the International Federation of Red Cross and Red Crescent Societies (IFRC) coined the phrase "International Disaster Response Laws" or IDRL, which was quickly amended to include "Rules and Principles," in recognition of the non-binding sources of many humanitarian norms.[117] The IFRC's activities were subsequently changed to simply "Disaster Laws" to reflect the difficulty of separating the regulation of international disaster relief from domestic responses, and to move beyond emergency responses to include areas such as disaster risk reduction and regulatory barriers to post-disaster shelter.[118] Meanwhile, Eduardo Valencia-Ospina, the ILC Special Rapporteur on the protection of persons in the event of disasters, has argued that "[t]o the extent that international disaster relief law might be said to exist as an autonomous branch of international law, it owed that character to the Commission's work,"[119] and recently acknowledged the existence of "the *acquis* of the international law of disaster response."[120]

As noted in Chapter 2, Martha Finnemore and Kathryn Sikkink have argued there is an identifiable process whereby norms emerge, develop and then achieve international acceptance: norm entrepreneurs develop the initial understanding of an emerging norm,

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[114] For further discussion of the *acquis humanitaire*, and application of the concept to the internalisation of humanitarian norms into domestic legal systems, see: D. Cubie, 'Clarifying the "*Acquis Humanitaire*": A Transnational Legal Perspective on the Internalization of Humanitarian Norms', in *The International Law of Disaster Relief* (Cambridge University Press – forthcoming).

[115] While the proposed concept of an *acquis humanitaire* includes provisions of international humanitarian law relating specifically to the delivery of humanitarian assistance to civilians in times of war, the concept is used here to understand the evolving legal and policy frameworks at the international, regional and national level regarding preparations for and responses to natural and human-made disasters.

[116] A. Katoch, 'International Natural Disaster Response and the United Nations', in IFRC, *International Disaster Response Laws, Principles and Practice: reflections, prospects and challenges* (2003), 47-60.

[117] See generally: H. Fischer, *International Disaster Response Law: A Preliminary Overview and Analysis of Existing Treaty Law*, IFRC (January 2003); IFRC, *International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges* (2003); IFRC, *Law and Legal Issues in International Disaster Response: A Desk Study* (2007).

[118] See: *The IFRC's IDRL Programme is becoming the Disaster Law Programme* (2 February 2012). Available at: <www.ifrc.org/PageFiles/53419/name%20change%20announcement_FINAL%20LATEST%2002.02.2012.pdf> accessed 25 September 2013; IFRC, *Disaster Law Programme: Summary Plan 2013*, available at: <www.ifrc.org/PageFiles/53419/Disaster%20Law%20Prog%20Summary%20Plan%202013.pdf> accessed 25 September 2013.

[119] Summary of 25th UNGA Sixth Committee Meeting (2011), A/C.6/66/SR.25, para.67.

[120] E. Valencia-Ospina, *Fourth Report*, 11 May 2011, A/CN.4/643, para.97.

which is taken up by other individuals and groups as norm sponsors who work towards internalisation of the norm domestically. Agreement between a critical mass of actors around an emergent norm can then create a tipping point after which agreement (or consensus) becomes widespread.[121] The key role played by the IFRC and the broader Red Cross Movement as a norm entrepreneur and sponsor for disaster laws should not be underestimated. Their work in identifying and analysing the legal implications of technical and operational aspects of major disasters[122] paved the way for the current work of the ILC on the protection of persons in the event of disasters and the increasing awareness of the need for legal clarity for humanitarian actors in disaster settings. Notwithstanding the failure of early initiatives to produce a universal legal framework for disaster responses, as seen above general international law contains express rules for the provision of humanitarian assistance, while under customary international law civilians in times of armed conflict are entitled to certain humanitarian support.[123]

Transnational legal approaches recognise the fundamental importance of non-governmental sources in international law-making,[124] so any *acquis humanitaire* will include a wide range of non-binding texts developed by inter-governmental and non-governmental humanitarian actors, such as the 1994 RCRC Code of Conduct which elaborated the humanitarian imperative or the IFRC's more recent work providing guidance for governments in respect of their national legislation for disaster-preparedness and response via the IDRL Guidelines, national Model Act and draft national Model Emergency Decree.[125] As with other developing bodies of law, such as the evolution of international criminal law, in addition to identifying positive legal rights and obligations applicable in humanitarian crises, such binding and non-binding sources of the *acquis humanitaire* provide practical and operational guidance to humanitarian agencies. Yet considering the wide divergence of cultural, religious

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[121] M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887, in particular 892-893. For similar arguments in the context of transnational legal process, see: H. Koh, 'Bringing International Law Home' (1998-1999) 35 *Houston Law Review* 623, 646-655.

[122] For example: G. Potyka and K. Beeckman, *The Regulatory Framework for Disaster Response Established within the European Union: A Focus on Humanitarian Aid and Civil Protection*, IFRC (2005); IFRC, *Analysis of Law in the EU and a Selection of Member States pertaining to Cross-Border Disaster Relief: Synthesis Report and Recommendations*, IFRC (2010); British Institute of International and Comparative Law (BIICL), *Analysis of Law in the United Kingdom pertaining to Cross-Border Disaster Relief*, British Red Cross (June 2010).

[123] For discussion of customary humanitarian norms, see: J-M. Henckaerts, 'Customary International Humanitarian Law: Taking Stock of the ICRC Study' (2010) 78 *Nordic Journal of International Law* 435.

[124] M. Reimann, 'From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum' (2003-2004) 22 *Penn State International Law Review* 397, 403-404.

[125] As explained elsewhere in this thesis, other influential non-binding texts for state and non-state responses to humanitarian crises include the Sphere Handbook, IASC Operational Guidelines, UN Guiding Principles on Internal Displacement, and the Guiding Principles of UNGA Resolution 46/182.

and ideological backgrounds of the multitude of humanitarian actors likely to respond to a major humanitarian crisis, what is the underlying basis of such an *acquis humanitaire*?

ii. Conceptual underpinnings of the "acquis humanitaire"

The fundamental role played by the humanitarian principle of humanity at both the conceptual and operational level has already been noted,[126] and it is noteworthy that the current ILC draft articles on the protection of persons in the event of disasters uniquely include an operative article invoking human dignity. In hortatory language, the draft articles state that "[i]n responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person."[127] By recognising human dignity as the core principle that informs and underpins international human rights law, the draft articles connect the humanitarian principles set out in draft article 6 with the provisions on human rights in draft articles 7 and 8.[128] Such an approach reflects the argument advanced by Christopher McCrudden that although the concept of human dignity may be interpreted differently in domestic adjudication systems, it provides an important method for interpreting human rights.[129] In particular, McCrudden identifies the basic minimum content of human dignity across religious, cultural and judicial spectrums, and argues that the core of human dignity contains three key elements:

1. every human being possesses an intrinsic worth, merely by being human;
2. this intrinsic worth should be recognised and respected by others; and
3. the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa.[130]

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[126] See: Section A(i)(b), Chapter 3.
[127] For text of the Commentaries on draft articles 6-11, see: Official Records of the General Assembly, Sixty-sixth Session, *Supplement No.10* (A/66/10), Chapter IX, p.255.
[128] Draft article 8 states: "Persons affected by disasters are entitled to respect for their human rights." As noted by Christopher McCrudden, many judicial decisions based on human dignity view the concept not as a synonym for human rights but rather as "expressing a value unique to itself, on which human rights are built." See: C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655, 680-681.
[129] For specific discussion of the concept of human dignity in humanitarian and human rights instruments, see: ibid 667-671. See also discussion of human dignity as an "underlying principle from which all rights are said to derive" in: C. O'Mahony, 'There is no such thing as a right to dignity' (2012) 10(2) *International Journal of Constitutional Law* 551, 559; and as the "moral 'source' from which all of the basic rights derive their meaning" in: J. Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (July 2010) 41(4) *Metaphilosophy* 464, 466.
[130] McCrudden, ibid 679-680.

Despite the lack of commonality or universality exhibited in domestic judicial interpretations of the concept of human dignity, the existence of such a "minimum core" relating to the intrinsic worth of each individual ties directly into the motivation and foundations of humanitarian action: namely assisting people in times of extreme distress to ensure a certain minimum of protection and respect is accorded to them despite the challenging circumstances they find themselves in.[131] As noted in the non-binding Resolution of the Institute of International Law: "Leaving the victims of disaster without humanitarian assistance constitutes a threat to human life and an offence to human dignity and therefore a violation of fundamental human rights."[132]

The ILC's examination of humanitarian principles and the legal conception of human dignity as it relates to international human rights law provides an authoritative recognition of the desire to alleviate suffering in times of war and disaster through humanitarian action. In recognition of the operational and moral debates regarding the application of the principles of neutrality and impartiality, especially but not exclusively in times of armed conflict,[133] the principle of humanity based on the dignity and rights of all should therefore be considered as the overarching umbrella for the laws and rules of humanitarian action contained within the *acquis humanitaire*.[134] An approach focused specifically on the concept of humanity explains the underlying rationale and motivation for humanitarian rules and practice in both armed conflicts and disasters, without imposing constraints on the content or status of norms within the *acquis humanitaire*, thereby providing leeway for the development of bottom up domestic mechanisms. Furthermore, it reflects the reality of the work undertaken by many

[131] For discussion of the minimum core set out by McCrudden in reference to violations of human rights, see: P. Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (2008) 19(5) *European Journal of International Law* 931, 936-937: "with regard to the most acute and urgent human rights problems worldwide, a judicial (among other actors) reinforcement and consolidation of the content of the minimum core of human dignity is well worth pursuing, even if it is limited to the bare outlines of the three interrelated claims McCrudden identifies."

[132] *Resolution on Humanitarian Assistance* (n.17) art II.1.

[133] See: H. Slim, 'Relief agencies and moral standing in war: Principles of humanity, neutrality, impartiality and solidarity' (November 1997) 7(4) *Development in Practice* 342. For discussion of the problems of the concept of neutrality, see: N. Leader, 'The Politics of Principle: The Principles of Humanitarian Action in Practice', Overseas Development Institute, Humanitarian Policy Group Report No.2 (March 2000), 19-20. See also: Collinson and Elhawary, 'Humanitarian Space' (n.101) who note the challenges of maintaining impartiality and neutrality in armed conflict settings, arguing that: "the political nature of [the] issues [facing humanitarian agencies] demands that humanitarian space be defined and understood from the outset in essentially political terms: rather than being somehow distinct from politics, humanitarian space is essentially political," 3.

[134] For discussion of the principle of humanity as a "core humanitarian obligation", see: E. Valencia-Ospina, *Fifth Report*, 9 April 2012, A/CN.4/652, para.165-166.

humanitarian actors to alleviate suffering in both conflict and disaster settings, while recognising their divergent operational modalities.[135]

iii. Demarcating the "acquis humanitaire"

As expanded upon below, the transnational legal process of multiple interactions leading to legal interpretations of emerging and existing humanitarian norms contained within the *acquis humanitaire* ultimately helps to promote the internalisation of such norms into domestic legal and policy frameworks. As such, the *acquis humanitaire* is not intended as a constrictive description of purely positive law, but a dynamic reflection of the sources that influence state and humanitarian actors in their preparations for and responses to humanitarian crises. These various sources may overlap both in approach and content, but also reflect separate and distinct bodies of law and practice. So while the humanitarian motivations behind the *lex specialis* of the international humanitarian law of armed conflict share many similarities with those of international criminal law or disaster laws, in actual cases one must examine the specific humanitarian crisis to determine which binding or non-binding aspects of the *acquis humanitaire* are applicable.[136] Nevertheless, the principle of humanity in times of crisis underpinning the *acquis humanitaire* can be considered the common thread running throughout on-going transnational dialogues regarding existing and evolving humanitarian norms and practice.

The concept of an "*acquis*" comes originally from the institutional and legal framework established by the European Union (EU). First introduced in the Treaty on European Union,[137] the *acquis communautaire* is not defined in the core texts of the EU, although is generally held to be the "body of common rights and obligations which bind all the Member States together within the European Union."[138] The French expression "*acquis*" meaning

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[135] 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," 2.

[136] For example, as noted in Section B above, there are fundamental differences between the factual situation of natural or human-made disasters and armed conflict or refugee displacement scenarios, including the duration of required emergency assistance.

[137] *The Consolidated Version of the Treaty on European Union (TEU)*, OJ C340, 10 November 1997. Article 2 TEU provides the EU must "maintain in full the *acquis communautaire* and build on it"; while Article 3 TEU states the EU must "attain its objectives while respecting and building upon the *acquis communautaire*."

[138] As defined in 'Glossary of EU Legislation', available at: <http://europa.eu/legislation_summaries/glossary/community_acquis_en.htm> accessed 25 September 2013. Alternatively: "The *acquis* comprises all the EU's treaties and laws (directives, regulations, decisions), declarations and resolutions, international agreements and the judgments of the Court of Justice. It also

"accepted" or "established,"[139] has likewise been used by the Council of Europe to describe its normative activities in the fields of democracy, the rule of law and fundamental human rights and freedoms,[140] and is generally understood to comprise a body of laws, rules and regulations established within an institutional framework.[141] Although one cannot situate the evolving body of humanitarian norms within a single institutional framework, it is possible to identify a variety of framework documents that establish specialised institutional regimes for component parts of the *acquis humanitaire*. For example, the Rome Statute of the International Criminal Court provides the key foundation for individual criminal responsibility for internationally accepted crimes, including the deliberate targeting of humanitarian personnel and the wilful denial of humanitarian assistance, as well as international judicial structures for the prosecution of such offences.[142] Similarly, the Geneva Conventions and Additional Protocols provide the overarching framework for the legal obligations of states and combatants in times of war, including requirements to provide protection and assistance to civilians, while also reaffirming the institutional mandates of the International Committee of the Red Cross and other national relief societies.[143] One can therefore envisage that the ILC draft articles for the protection of persons in the event of disasters could become the institutional and overarching framework for humanitarian actions relating to major natural and human-made disasters, including actions undertaken pre-disaster for risk reduction, prevention and mitigation purposes[144] and those taken post-

includes action that EU governments take together in the area of Justice and Home Affairs (Freedom, Security and Justice) and the Common Foreign and Security Policy – but it excludes decisions to set up 'enhanced cooperation' arrangements." V. Miller, 'The EU's *Acquis Communautaire*', SN/IA/5944, 26 April 2011, Library of the UK House of Commons, 2. See also: A. Magen, 'The *Acquis Communautaire* as an Instrument of EU External Influence' (2007) 9(3) *European Journal of Law Reform* 361.

[139] J-B. Ormal-Grenon and N. Pomier (eds), *Oxford Hachette French Dictionary* (3rd edn, Oxford University Press 2001), 10.

[140] Council of Europe, Resolution 1290 (2002): *Future of the co-operation between European institutions*, Assembly debate, 26 June 2002 (20th Sitting).

[141] See references to the GATT *acquis* in: WTO, *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body (AB-1996-2), 14-15; and the UNCITRAL *acquis* in: A. Markel, 'American, English and Japanese Warranty Law Compared: Should the US Reconsider her Article 95 Declaration to the CISG?' (Winter 2009) 21 *Pace International Law Review* 163, 200.

[142] See: Rome Statute of the International Criminal Court (n.96), art 6 (Genocide), art 7 (Crimes Against Humanity) and art 8 (War Crimes). See also: *Elements of Crimes* (n.105); Cubie, 'Wilful Denial of Humanitarian Assistance' (n.102).

[143] The *acquis humanitaire* only comprises aspects of general and customary international humanitarian law in armed conflicts relating specifically to the provision of humanitarian assistance and protection to civilian populations so does not include rules relating to the conduct of hostilities in either international or non-international armed conflicts.

[144] For example in the context of the *Hyogo Framework for Action* (n.21).

disaster for recovery and rehabilitation. Indeed, there is a certain level of support both within the ILC and from states for the draft articles to be concluded as a Framework Convention.[145]

In another key difference to the EU's *acquis communautaire*, the proposed *acquis humanitaire* does not imply that states are obliged to incorporate into their domestic law all the provisions contained within. Rather, the *acquis humanitaire* provides a mechanism to identify the sources that form the legal and policy framework of humanitarian actions in times of crisis. For despite the *acquis humanitaire* encompassing both highly developed systems of positive international law, such as the humanitarian law of armed conflict, and evolving systems such as international disaster laws, the common thread of humanity underpins the origins of these various sources. Yet as with the concept of transnational legal process itself,[146] the aim of the *acquis humanitaire* is not just to define the sources of humanitarian rules, but to explain the normativity of the process as international interactions become internalised at the domestic level. By incorporating relevant provisions of international human rights law, including the concept of human dignity, in addition to technical regulations for the effective delivery of humanitarian assistance,[147] the *acquis humanitaire* provides an inclusive framework for promoting and respecting the rights of individuals and groups affected by humanitarian crises, while simultaneously recognising the fundamental role played by operational standards and frameworks for efficient prevention and response activities.

Supported by the work of international norm entrepreneurs and sponsors, it is undeniable that the international community is currently engaged in a process of creating and elaborating a specific body of law relating to humanitarian action in crisis settings. Interactions between transnational actors are stimulating a range of academic, judicial, practitioner and state interpretations of the applicable humanitarian norms both internationally and at the domestic level. The resultant *acquis humanitaire* contains binding obligations from existing international law sources, including judicial decisions by international tribunals such as the International Court of Justice[148] and the European Court of Human Rights,[149] as well as authoritative non-binding normative standards for

[145] Official Records of the General Assembly, Sixty-first session, *Supplement No.10* (A/61/10), Annex C, para.24; Summary of 22-25th UNGA Sixth Committee Meetings (2008), A/C.6/63/SR.22-25; and 20-22nd meetings in 2009 (A/C.6/64/SR.20-22).
[146] Koh, 'Transnational Legal Process' (n.5) 184.
[147] Such as the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (n.11).
[148] For example, *Nicaragua v. United States of America* (n.8) 14, para.242-243.
[149] For discussion of state responsibility to undertake preventative measures, see: ECHR, *Öneryildiz v. Turkey*, Application 48939/99, judgment of 30 November 2004 (methane explosion in shantytown built on

humanitarian action, such as the Sphere Handbook and RCRC Code of Conduct. Taken together, the content and sources of these various aspects of prevention and response in conflict and non-conflict settings represent an emerging body of humanitarian laws and practice: an *acquis humanitaire*.

D. Conclusion: The Potential Crystallisation of a "Right to Humanitarian Assistance"

More than 10 years ago, Yoram Dinstein noted: "It is impossible to assert, *at the present point*, that a general right to humanitarian assistance has actually crystallized in positive international law."[150] Since then, the increasing level of complexity and reach of legal provisions contained within the *acquis humanitaire* prompted the International Law Commission (ILC) to commence an examination of the issues relating to the protection of persons in the event of disasters in 2006.[151] The fact that the leading international body for the codification and progressive development of international law has determined that humanitarian responses to natural and human-made disasters requires examination indicates the level of legal and operational desire to clarify the roles and responsibilities of humanitarian actors in disaster settings, and the rights and responsibilities of states and those affected by disasters. The rich body of international law identified above highlights the range of potential sources for examination by the ILC. Nevertheless, to date there has been little discussion of a specific right to humanitarian assistance within the ILC or by states in the UN General Assembly Sixth Committee. This may be because members of the ILC and state representatives do not believe that a right to humanitarian assistance exists in international law, and are reluctant to engage in the progressive development of the law in an area that touches on fundamental aspects of state sovereignty and individual rights. Alternatively, they may feel that a technical and operational approach for the international legal framework for

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rubbish dump); ECHR, *Budayeva and others v. Russia*, Applications 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, judgment of 20 March 2008 (mudslide that destroyed a village).

[150] Dinstein, 'Right to Humanitarian Assistance' (n.4) 77 [emphasis added]. It should be noted that Professor Dinstein generally takes a legal positivist approach to international law.

[151] For analysis of the ILC's work, see: Section B, Chapter 7. For text of draft articles 1-5, see: A/CN.4/L.758, 24 July 2009. For text of the Commentaries on draft articles 1-5, see: Official Records of the General Assembly, Sixty-fifth Session, *Supplement No.10* (A/65/10), Chapter VII, p.323. For text of draft articles 6-9, see: A/CN.4/L.776, 14 July 2010. For text of draft articles 10-11, see: A/CN.4/L.794, 20 July 2011. For text of the Commentaries on draft articles 6-11, see: Official Records of the General Assembly, Sixty-sixth Session, *Supplement No.10* (A/66/10), Chapter IX, p.255. For text of draft articles 5*bis*, 12-15, see: A/CN.4/L.812, 12 July 2012.

disaster responses is preferable, or may be more acceptable to states, than a rights-based approach.[152]

The debate surrounding a "right to development" is instructive in highlighting the difference between a claimed "right" and the enforceability of international norms.[153] It has been argued that the greatest obstacle to the acceptance of a right to development by the international community is due to the dual nature of the claimed right.[154] By establishing rights between states and also within a state, objectors fear the claimed right is actually a "right to development assistance" or a "right to everything," rather than a partnership between states for their mutual progressive development. While many states, academics and practitioners claim a right to development, the 1986 UN General Assembly Declaration on a Right to Development[155] remains a non-binding instrument. As a result, nearly 30 years after its conclusion, there is still debate as to the practical effect of the UN Declaration and a requirement to base the content of the right to development on international human rights law.[156] Yet in the humanitarian context there are serious questions as to the enforcement of existing international law, let alone the creation of new rights. As noted in the 2008 European Consensus on Humanitarian Aid: "Humanitarian actors today face a number of major challenges. There has been an increasing tendency for International Law, including International Humanitarian Law, Human Rights Law and Refugee Law, to be ignored or blatantly violated."[157]

It is possible that a right to humanitarian assistance could end up in a similar position to the right to development, with non-binding international texts and practitioners proclaiming the existence of the right, but without an agreed binding legal basis and interpretation to support such claims or widespread internalisation of the right in domestic legal systems. While it is clear that many governmental representatives are equally cautious regarding a right to

[152] For discussion of rights-based approaches to humanitarian crises, see: Section A(iii), Chapter 6.
[153] See generally: S. Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?' (1999-2000) 32 *NYU Journal of International Law and Policy* 591; M. Finnemore, 'Are Legal Norms Distinctive?' (1999-2000) 32 *NYU Journal of International Law and Policy* 699; O. Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' (2005) 72 *University of Chicago Law Review* 469.
[154] F. Kirchmeier, *The Right to Development – Where do we stand? State of the debate on the Right to Development*, Friedrich-Ebert-Stiftung, Occasional Papers Series No.23, July 2006, in Preface by E. Adam. See also: A. Sitta, 'The Role of the Right to Development in the Human Rights Framework for Development', paper prepared for the Human Development and Capabilities Approach Association (copy on file with author).
[155] *Declaration on the Right to Development*, UNGA Res 41/128, 4 December 1986.
[156] For discussion, see: A. Vandenbogaerde, 'The Right to Development in International Human Rights Law: A Call for its Dissolution' (2013) 31(2) *Netherlands Quarterly of Human Rights* 187.
[157] *European Consensus* (n.14) para.3.

humanitarian assistance,[158] transnational legal processes appear to be moving international law towards a broader understanding of a right to humanitarian assistance and the elaboration of a specific *acquis humanitaire*. As humanitarian agencies, states, academics and practitioners increasingly examine the legal provisions for humanitarian assistance following natural and human-made disasters, they help define the questions and boundaries of the role that international law can play in ensuring better outcomes for persons affected by disasters. This process will help to clarify, and possibly resolve, contentious debates around the balancing of state sovereignty and individual or group rights in disaster settings, while also defining the roles and responsibilities of states and humanitarian actors. It is submitted that international law is currently in the process of creating the conditions for the future crystallisation of a universal right to humanitarian assistance in non-conflict settings. Yet if this is the case, then it would be preferable to ensure that international consensus be obtained as to the legal status and content of such a right. Otherwise, there remains the risk of fragmented understanding between national, regional and international levels regarding the legally enforceable rights and duties that exist in disaster settings.[159]

With this aim in mind, the following Chapter will examine what is meant by a "right to humanitarian assistance" and whether it is possible to identify a specific right or rights to humanitarian assistance in current international law; before Chapter 6 then takes on the task of examining international human rights law in detail to determine, irrespective of the independent existence of a right to humanitarian assistance, whether people affected by disasters can base their claims to assistance on existing human rights provisions and the attendant implications of implementing human rights law in disaster settings.

[158] For comments by states in the UNGA Sixth Committee expressing caution regarding a right to humanitarian assistance, see: UK (A/C.6/63/SR.23, para.64); Malaysia (A/C.6/63/SR.23, para.79); Iran (A/C.6/63/SR.24, para.41). For more supportive comments, see: Finland (A/C.6/63/SR.22, para.53); Austria (A/C.6/63/SR.23, para.10).

[159] For discussion of the changing nature of the international legal system as a whole, and the twin processes of integration and fragmentation, see: C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (April 2005) 54(2) *International and Comparative Law Quarterly* 279.

Chapter 5

The Right to Humanitarian Assistance: *lex lata* or *lex ferenda*?

> *As a general rule, it appears that at the present time there is no right de lege lata to render humanitarian assistance. There is only a right to offer such assistance, but its exercise is contingent on consent by the State concerned … As long as consent by the State concerned lies at the root of humanitarian assistance, one cannot speak of a genuine right to provide or receive such assistance.*
>
> Yoram Dinstein, 1995[1]

As discussed in Chapter 3, the modern development of humanitarian principles to regulate the provision of relief to civilians caught up in peacetime calamities can be traced to at least 1908 and the Italian Red Cross proposal to establish an international mechanism to assist victims of natural disasters.[2] Following the cataclysm of the First World War, the proposal was reintroduced in 1921, and included one of the first explicit references to a "right to humanitarian assistance." Senator Ciraolo, a driving force behind the 1927 Convention Establishing an International Relief Union (IRU), supported the inclusion of a clause stating: "In the event of a calamity, all peoples have an equal right to international mutual aid, without distinction according to race, nationality, or religion." Yet the inclusion of such a strong statement faced fierce opposition from governments.[3] Indeed, it was argued that the inclusion of a right to assistance would harm the overall scheme of the Convention as it would change the nature of the obligations related to the provisions of relief, whereas the Convention was intended to simply ensure the better organisation of relief.[4] As with so many

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[1] Y. Dinstein, 'The legal consequences of infringing upon the right to humanitarian assistance', paper presented at the International Colloquium on the Right to Humanitarian Assistance, Paris, 25-27 January 1995, para.3.

[2] P. Macalister-Smith, 'The International Relief Union: Reflections on the Convention Establishing an International Relief Union of July 12, 1927' (1986) 54 *Tijdschrift voor Rechtsgeschiedenis* 364, 364.

[3] J. Hutchinson, 'Disasters and the International Order II: The International Relief Union' (June 2001) 23(2) *International History Review* 253, 261-262, 275. See also: J. Hutchinson, 'Disasters and the International Order: Earthquakes, Humanitarians, and the Ciraolo Project' (March 2000) 22(1) *International History Review* 1.

[4] As argued by the Swedish representative, Paul Laurin, quoted in Hutchinson, 'The IRU', ibid 261-262. The argument put forward by Laurin in the mid-1920s against the inclusion of a specific right to humanitarian assistance substantially mirrors the contemporary debate around technical and operational approaches compared to rights-based approaches.

of Senator Ciraolo's original objectives for the IRU, the concept of enforceable rights for victims of disasters was quickly abandoned during the drafting process in favour of a more limited range of binding international obligations for disaster response activities.

Despite the extensive codification of international law in the areas of armed conflict, refugee protection and individual human rights after the Second World War, the international community did not return to the question of developing binding international rules for application during peacetime natural and human-made disasters until the late 1970s. So although one can now propose the emergence of an *acquis humanitaire* covering both armed conflict and natural disasters, as recently as 2008 the International Law Commission highlighted the difficulty of identifying *lex lata* and *lex ferenda* in its work on the protection of persons in the event of disasters due to the "amorphous state of the law relating to international disaster response."[5]

So following Chapter 4's description of the developing body of law and practice relating to humanitarian crises, I will now examine the legal status of a specific "right to humanitarian assistance" and evaluate whether Professor Dinstein's comment is still applicable today, or whether a right to humanitarian assistance following natural or human-made disasters has been created through treaty-based or customary international law. To undertake this evaluation, it is first necessary to define what is meant by a "right to humanitarian assistance," including the component elements of such a right and distinctions that must be made, such as between the right of individuals or groups to receive assistance and the right of states and humanitarian organisations to offer assistance. Furthermore, it is necessary to identify potential sources of a specific right to humanitarian assistance in international law and non-binding normative standards. The Chapter will then conclude with a determination of whether or not a specific right to humanitarian assistance is currently *lex lata* or *lex ferenda*.

A. Defining a "Right to Humanitarian Assistance"

Considering the evolving and expanding understandings of the legal implications of disaster responses, it is necessary to examine the component parts of a "right to humanitarian assistance" to determine the various rights and responsibilities under discussion. As noted in Chapter 3, and visualised in Figure 1 below, one can separate the different approaches taken

[5] E. Valencia-Ospina, *Preliminary Report*, 8 May 2008, A/CN.4/598, para.59.

to humanitarian action into technical or operational approaches, and rights-based approaches. Considering the wide ranging human rights implications of disasters, the application of existing human rights provisions to disaster settings will be the focus of Chapter 6, while this Chapter will critically examine the twin components of a specific "right to humanitarian assistance": the so-called right of initiative (or right to offer assistance) for humanitarian actors, and an individual or group's right to request or receive assistance.

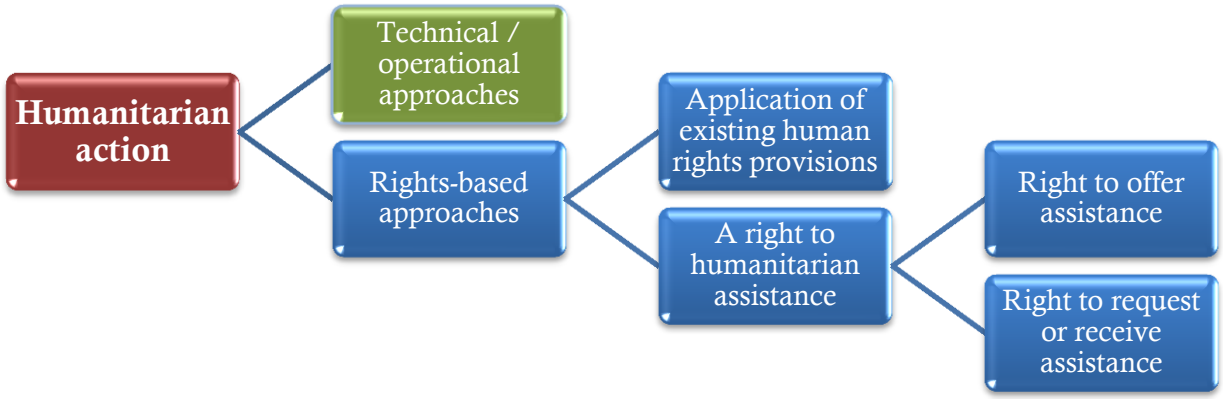

Figure 5.1: Approaches to humanitarian action

Ruth Stoffels has stressed the interconnection between the two components of a right to humanitarian assistance, noting that IHL provides humanitarian organisations "the right to offer victims the relief supplies that they need and the right for the offer of aid not to be unreasonably refused when the needs of the victims are not met in some other way. *This right should be regarded as a corollary to the right of victims to humanitarian assistance, without which it lacks a solid justificatory basis.*"[6] If the right to receive humanitarian assistance is directly linked to the right to offer humanitarian assistance in this way, then one can think of a universal "right to humanitarian assistance." However, the ILC Special Rapporteur has recognised the challenges a potential right to humanitarian assistance poses:

> In international humanitarian law [the] right [to humanitarian assistance] has been recognised as a matter of law. In disaster situations, however, it appears that no legal instruments explicitly acknowledge the existence of such a right. At most, it could be said to be implicit in international human rights law. The nature of such a right is, however, unclear. Would it be a human right or just a right of those affected by a disaster? Would it be a human right or a collective right? Against whom, if at

[6] R. Stoffels, 'Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps' (September 2004) 86(855) *International Review of the Red Cross* 515, 521 [emphasis added]. Although Stoffels notes UNSC Resolutions calling for humanitarian assistance in specific armed conflicts: "usually [make reference] to the duties of the parties to the conflict and the rights of humanitarian organizations and personnel, and not to the right of victims to humanitarian assistance," 522, fn 16.

all, would it be enforceable? After all, the criteria to determine the existence and status of a human right are subject to controversy.[7]

Yet this analysis does not sufficiently distinguish between the right of third states and humanitarian organisations to offer assistance and an individual's right to request and receive assistance. Therefore, one needs to determine the potential content of these two separate rights.

i. Individual right to request or receive humanitarian assistance

a. During armed conflicts

Yoram Dinstein argued strongly against a general individual right to humanitarian assistance in armed conflicts when he noted: "Surely, civilians do not have an absolute right to demand relief from the outside, applicable *erga omnes* (that is, vis-à-vis the entire international community) … [I]t would be absurd to contend that every state in the world is duty bound to come up, on demand, with relief aid to civilians embroiled in any armed conflict, wherever it is raging."[8] Indeed, although Geneva Convention IV expressly contains a right for individuals to request humanitarian assistance,[9] this is constrained as Contracting Parties' may respond "within the bounds set by military or security considerations" and only need to facilitate access to protected persons "as much as possible." The ICRC clearly acknowledges that military considerations are part and parcel of decisions surrounding the provision of humanitarian assistance to civilians in conflict zones.[10] Furthermore, humanitarian access in war zones is a highly contentious issue, and can present serious dangers for both humanitarian personnel and civilians.[11] Nevertheless, while the extent of a binding international legal right to humanitarian assistance remains contested, the fact remains that IHL does provide specific rights to assistance for individuals during armed conflicts.

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[7] Valencia-Ospina, *Preliminary Report* (n.5) para.54.
[8] Y. Dinstein, 'The Right to Humanitarian Assistance' (Autumn 2000) *Naval War College Review* 77, 78.
[9] Geneva Convention IV relative to the Protection of Civilian Persons in Times of War (adopted 12 August 1949, entered into force 21 October 1950) 973 UNTS 286, art 31: "Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National [Red Cross/Red Crescent] Society of the country where they may be, as well as to any organization that might assist them." See also: Section B(i), Chapter 4.
[10] ICRC, *Commentary: Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, J. Pictet (ed) (1958), 180.
[11] See: D. Cubie, 'The Denial of Humanitarian Assistance: The Case of Syria', HumanRightsinIreland, 7 March 2012, available at: <www.humanrights.ie/index.php/2012/03/07/guest-post-on-denial-of-humanitarian-assistance-in-syria> accessed 25 September 2013.

Within the context of international armed conflicts, Article 70 of Additional Protocol I (API) utilises non-discretionary language: "If the civilian population … is not adequately provided …, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction *shall* be undertaken" [emphasis added].[12] Despite this mandatory language, Article 70 then introduces specific limitations; first and foremost that humanitarian assistance must be "subject to the agreement of the Parties concerned." Additionally, the Parties have the right to prescribe technical arrangements, including search procedures, under which the passage of humanitarian supplies are permitted. Meanwhile, although Article 71 API provides that humanitarian personnel shall be respected and protected in the discharge of their functions, it also stresses that "[u]nder no circumstances may relief personnel exceed the terms of their mission … In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties."[13]

Internal armed conflicts present specific challenges for humanitarian access, yet Additional Protocol II (APII) does not contain the same level of detail regarding relief activities for civilian populations. Article 18(1) provides only that "relief societies located in the territory of the High Contracting Party … may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict."[14] While Article 18(2) once again uses mandatory language in proscribing that "[i]f the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival … relief actions for the civilian population … shall be undertaken."[15] But offers of assistance are subject to the consent of the High Contracting Party concerned. Therefore, one of the parties to an internal conflict can deny the delivery of humanitarian supplies to civilians, for example due to military necessity. Nevertheless, although Article 18 does not impose an obligation on parties to accept humanitarian aid, some form of relief action must be undertaken for civilian populations to alleviate suffering.[16] Furthermore, the provisions of

[12] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 4, art 70.
[13] ibid art 71.
[14] Protocol II Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 610, art 18(1).
[15] ibid art 18(2). See also: Stoffels, 'Legal regulation of humanitarian assistance' (n.6) 519.
[16] See also: K. Luopajärvi, 'Is there an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?' (2003) 15(4) *International Journal of Refugee Law* 678.

humane treatment set out in Common Article 3 apply in all internal armed conflicts,[17] and the ICRC has determined that the provision of humanitarian assistance to civilian populations is part of customary international law. Under Customary International Law Rule 55, the parties to a conflict must allow and facilitate the rapid and unimpeded passage of humanitarian relief for civilians in need,[18] while Rule 56 states that Parties to a conflict must ensure the freedom of movement of authorised humanitarian personnel.[19] Crucially, only in case of imperative military necessity may their movements be temporarily restricted. Nevertheless, all these provisions reflect the recognition throughout IHL that while parties to a conflict have explicit responsibilities towards civilians under their control, individual rights may be legitimately constrained, either for military necessity, security reasons or due to insufficient resources.

b. Following natural or human-made disasters

The legal obligations in place regarding an individual right to request or receive humanitarian assistance in non-conflict situations are even less well defined. There are wide divergences between state practice in different emergencies, which indicates a lack of legal compulsion felt by state and humanitarian actors in their responses.[20] While the humanitarian imperative may be based on the desire to prevent and alleviate human suffering wherever it may be found, the reality is that for a range of political, financial and practical reasons not all victims of armed conflicts or major disasters receive adequate humanitarian assistance commensurate with their needs.[21] This does not negate the possibility of an individual right to humanitarian assistance existing – many economic, social and cultural rights are based on progressive realisation rather than immediate implementation,[22] and the rights to assistance in IHL can be constrained based on financial reasons,[23] but it does present a challenge in

[17] GCIV (n.9) art 3(1): "Persons taking no active part in the hostilities … shall in all circumstances be treated humanely."
[18] The ICRC *Customary International Humanitarian Law Project* Rule 55 (Access for Humanitarian Relief for Civilians in Need). See: J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law: Rules and Practice* (Cambridge University Press 2005). Available at: <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule55> accessed 25 September 2013.
[19] ibid Rule 56 (Freedom of Movement of Humanitarian Relief Personnel). Available at: <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule56> accessed 25 September 2013.
[20] For discussion of customary international law and state practice as a source of a right to humanitarian assistance, see: Section B(iv) below.
[21] B. Schweizer, 'Moral dilemmas for humanitarianism in the era of "humanitarian" military interventions' (September 2004) 86(855) *International Review of the Red Cross* 547, 551.
[22] For discussion, see: M. Dennis and D. Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?' (2004) 98 *American Journal of International Law* 462.
[23] See for example: art 55(1) GCIV and art 69(1) API, "To the fullest extent of the means available to it…"

determining the exact content of any proposed individual right to humanitarian assistance. Nevertheless, the UN Guiding Principles on Internal Displacement clearly state:

> Internally displaced persons have the right *to request and to receive* protection and humanitarian assistance from these [national] authorities. They shall not be persecuted or punished for making such a request.[24]

Echoing Stoffels' argument, Walter Kälin's *Annotations to the Guiding Principles* state that the right to request and receive assistance is the corollary to a state's duty to protect and assist IDPs.[25] Indeed, one can argue that if a state is unable or unwilling to provide assistance to persons on its territory, it has an obligation to accept international humanitarian assistance.[26] Yet the enforceability of a request for assistance is not elaborated, and previous attempts to develop individual complaints mechanisms within humanitarian agencies or court-centred judicial procedures have not been particularly successful.[27] Even within the African Union's Kampala Convention, which specifically includes an individual's right to request and receive humanitarian assistance,[28] if a state does not have sufficient resources to provide humanitarian assistance to internally displaced persons their obligations are simply to cooperate with other states parties to seek assistance from international humanitarian organisations.[29] In the absence of explicit compliance mechanisms, an individual's "right" to assistance, either from their national authorities or from an international source, risks becoming an empty promise. So despite the authoritative non-binding force of the UN Guiding Principles and regional importance of the Kampala Convention and their potential internalisation into the domestic legal systems of specific states,[30] pending the emergence of a broad based international consensus on the implications of a binding right for individuals to

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[24] United Nations, Commission on Human Rights, *The Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2 (1998), Principle 3(2) [emphasis added].

[25] W. Kälin, *Guiding Principles on Internal Displacement: Annotations*, ASIL and Brookings-Bern Project on Internal Displacement, Studies in Transnational Legal Policy, No.38 Revised Edition (2008), 20.

[26] See: Luopajärvi, 'Obligation on States to Accept' (n.16). This argument then enters the debate surrounding the Responsibility to Protect doctrine and potential for forcible humanitarian interventions, for discussion see: Section A(ii), Chapter 4 and Section B(iii)(c), Chapter 7.

[27] See: Section A(iii), Chapter 2.

[28] African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention") (adopted 22 October 2009, entered into force 6 December 2012), art 5(9). See also: Section B(ii) below.

[29] ibid art 5(6). State parties do have additional obligations to organise, enable and facilitate international humanitarian assistance subject to their right to prescribe technical arrangements for the delivery of assistance, art 5(7). However, the Kampala Convention does not proscribe or propose an individual compliance mechanism to allow enforcement of an individual's right to assistance in art 5(9).

[30] For discussion of the evolution of a norm life-cycle as set out by Finnemore and Sikkink and adapted by Koh, see: Section A(ii), Chapter 2.

request and receive humanitarian assistance, it is hard to argue that a specific individual right to humanitarian assistance currently exists in disaster settings.

ii. Organisational right to offer humanitarian assistance

Nevertheless, one can argue that both customary and general international law already recognises a right of initiative, or the right of humanitarian actors to offer their services to affected states in certain circumstances. During armed conflicts, Common Article 3 of the Geneva Conventions provides a general provision for impartial humanitarian bodies to offer their services to the Parties to the conflict.[31] Meanwhile, Article 63 GCIV and Article 18 APII allow humanitarian organisations to conduct humanitarian activities for civilians, and Article 70(1) API highlights that "[o]ffers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts."[32] Therefore express provisions for impartial humanitarian organisations to offer humanitarian assistance, subject to certain limitations, exist in both international and internal armed conflicts. Moreover, the non-binding Guiding Principles on Internal Displacement utilise rights-based language by proposing a specific right for international humanitarian organisations and other appropriate actors in the context of internal displacement.[33] Therefore, it is noticeable that the current text of article 12 of the ILC draft articles on the Protection of Persons in the Event of Disasters distinguishes between a "right to offer" for states and inter-governmental organisations, and the weaker wording that relevant non-governmental organisations "may also offer" their services.[34]

The ILC has been keen to point out that the main focus of their work is disaster responses by states and international agencies, and acknowledge that NGOs and civil society are only included within the scope of the draft articles in a secondary manner, either as direct

[31] GCIV (n.9) art 3(2): "An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict."
[32] For more on the provisions in IHL, see: Section B(i), Chapter 4.
[33] Guiding Principles on Internal Displacement (n.24) Principle 25(2) states: "International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance."
[34] Draft article 12 (Offers of Assistance) reads: "In responding to disasters, States, the United Nations, and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State." For text of draft articles 5*bis*, 12-15, see: A/CN.4/L.812, 12 July 2012. Notably, the original draft proposed by the Special Rapporteur was entitled "Right to Offer Assistance," and did not distinguish between state and non-state actors in proposing the right to offer assistance. See: E. Valencia-Ospina, *Fourth Report*, 11 May 2011, A/CN.4/643, para.79-109 for analysis of the right to offer assistance.

beneficiaries of duties placed on states or indirectly through the domestic laws of an affected state, a third state or the state of nationality of an actor implementing the draft articles.[35] Yet non-state humanitarian actors provide the majority of humanitarian assistance, either directly or through funding received from donor governments. The reluctance of state representatives in the UN General Assembly Sixth Committee to expand a specific right of initiative to non-governmental organisations reflects the on-going focus and concerns regarding state sovereignty and non-interference in the domestic affairs of states, despite the fact that non-governmental humanitarian actors equally need legal certainty and standing commensurate to the role that they play in disaster response.[36] Nevertheless, the express inclusion of a right to offer humanitarian assistance following natural or human-made disasters in the ILC draft articles, even if restricted to state and inter-governmental organisations at present, does expand the right of initiative currently set out in the international humanitarian law of armed conflict.[37]

However, a fundamental issue for any organisation offering their assistance is whether or not an affected state has the power to refuse their offer, and on what grounds. The Annotations to the UN Guiding Principles note that a state cannot withhold their consent arbitrarily,[38] while the ICRC has noted: "It is nonetheless self-evident that a humanitarian organization cannot operate without the consent of the party concerned. However, such consent must not be refused on arbitrary grounds."[39] Additionally, the ILC draft articles propose that an affected state has a duty to seek assistance from other states and humanitarian agencies if a disaster exceeds its domestic capacities. While highlighting the requirement for such agencies to receive consent from the affected state, the draft articles similarly propose that such consent shall not be withheld arbitrarily.[40]

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[35] Draft article 1 (Scope). For text of the Commentaries on draft articles 1-5, see: Official Records of the General Assembly, Sixty-fifth Session, *Supplement No.10* (A/65/10), Chapter VII, p.323.

[36] For comments by states in the UNGA Sixth Committee expressing caution regarding an organisational right to humanitarian assistance, see: Greece (A/C.6/67/SR.19, para.57); Malaysia (A/C.6/67/SR.19, para.107); United States of America (A/C.6/67/SR.19, para.116); Iran (A/C.6/67/SR.20, para.15); Pakistan (A/C.6/67/SR.20, para.32). See also: D. Cubie, 'An Enchanted Tool? Humanitarian Assistance and the ILC Draft Articles on the Protection of Persons in the Event of Disasters' (2009-2010) IV-V *Irish Yearbook of International Law* 119, 150.

[37] See for example: GCIV (n.9) art 63; APII (n.14) art 18.

[38] Kälin, *Annotations* (n.25) 118-119.

[39] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (n.18) Rule 55.

[40] See: draft article 10 (Duty of the affected state to seek assistance) and draft article 11 (Consent of the affected state to external assistance). For text of draft articles 10-11, see: A/CN.4/L.794, 20 July 2011. For text of the Commentaries on draft articles 6-11, see: Official Records of the General Assembly, Sixty-sixth Session, *Supplement No.10* (A/66/10), Chapter IX, p.255.

The convergence of opinions across these binding and non-binding international texts strongly suggests that a right for certain organisations to offer their services to an affected state already exists in general international law. However, this right is constrained by the requirement to obtain the affected state's consent before any such assistance is provided, although the affected state cannot withhold their consent arbitrarily, as well as certain limitations on the "humanitarian" or "impartial" nature of the organisation concerned. Considering the "soft" nature of such a right, whereby state sovereignty is maintained as states may accept or reject an offer of assistance, the determination of whether an offer is being refused "arbitrarily" will be hard to make, particularly in the absence of any legal compliance mechanisms that a humanitarian agency could call upon beyond moral and political arguments to prove their good intentions for assisting victims in an affected state.[41] As noted by the Overseas Development Institute: "whatever the duties imposed by international law, it is humanitarian organisations' persuasive power and relevance on the ground that matter most in the end."[42]

So based on the above observations, one can summarise the current situation as follows. There is a limited individual right to request and receive assistance from impartial humanitarian organisations in armed conflicts, although there are no compliance mechanisms for individuals to enforce their rights to assistance in a war zone. There is not yet a comparable individual right during peace-time disasters, although non-binding global texts and regional binding texts have proposed such a right for internally displaced persons (including those displaced by natural or human-made disasters). Furthermore, there is a right for impartial humanitarian organisations to offer their services to affected states in both armed conflicts and peace-time disasters, and the affected state should not refuse such offers arbitrarily. However, the practical implications and application of such a right need to be elaborated further.

Therefore, it would seem that international law is currently in the process of developing and refining a range of individual and organisational rights to humanitarian assistance in both conflict and non-conflict settings. Yet there is limited international consensus on the boundaries and limitations of each of these rights. It follows that the current work of the ILC will play an important role in the process of interpretation of the international rights and

[41] For discussion of this point by the ILC Special Rapporteur, see: E. Valencia-Ospina, *Fourth Report*, 11 May 2011, A/CN.4/643, para.51-77.
[42] S. Collinson and S. Elhawary, 'Humanitarian Space: a review of trends and issues', Overseas Development Institute, Humanitarian Policy Group Report No.32, April 2012, 2.

responsibilities applicable in disaster settings by providing a forum for discussion between international legal experts, practitioners and government representatives. If this is the case, only once there is a certain level of consensus at the global level can one expect the internalisation of these newly construed international norms into domestic law, policy and practice. I will now develop this initial summation with specific instances of a claimed right or rights to humanitarian assistance in binding and non-binding texts, in customary international law and via state practice before making a determination as to whether or not a specific right to humanitarian assistance is *lex lata* or *lex ferenda*.

B. Sources of a "Right to Humanitarian Assistance"

i. Emergence and development of a "right to humanitarian assistance"

The potential sources of a right to humanitarian assistance range from those set out in Article 38(1) of the Charter of the International Court of Justice to non-binding normative standards that directly or indirectly influence the actions of states and humanitarian agencies in their responses to natural and human-made disasters. The relative weight to be ascribed to the various "soft law" sources, from inter-governmental assertions, agreements and recommendations accepted by states to guidelines and minimum standards established by specialised bodies and representatives of the UN and those developed by non-state actors, is debatable.[43] As a result, despite the lack of specific references in multilateral international treaties,[44] it is possible that a right to humanitarian assistance could come into existence through state practice and custom, *opinio juris* or through general principles of law.[45] As elaborated in Chapter 2, the norm life-cycle of emergence, development and ultimate international acceptance (or rejection) can be applied to the on-going evolution of a right to humanitarian assistance in disasters. Although we are not yet at the stage of international consensus or acceptance of the right, over the past 25 years a series of key questions have

[43] For discussion of the relative normativity of soft law sources of humanitarian assistance, see: Section B, Chapter 2; and D. Cubie, 'An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?' (2011) 2 *Journal of International Humanitarian Legal Studies* 177.

[44] See for example: R. Hardcastle and A. Chua, 'Humanitarian assistance: towards a right of access to victims of natural disasters' (December 1998) 325 *International Review of the Red Cross* 589, 593.

[45] Although the Preamble of the Vienna Convention on the Law of Treaties does recognise the "ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations." Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

been asked, and solutions posed, which have driven the international interpretation of the concept.

It is notable that the "right to development" has been subject to extensive debate and focus by states for nearly 30 years, in particular in the UN General Assembly,[46] under the international human rights framework. Yet examination by states of the provision of humanitarian assistance in peacetime disasters has generally been marked by a lack of rights-based language, despite the General Assembly's consistent recommendations regarding the co-ordination of UN emergency humanitarian assistance,[47] the safety and security of humanitarian personnel[48] and ensuring the transition from relief to developmental activities following natural disasters.[49] Even so, as with the right to development, the existence of a specific right to humanitarian assistance has been advanced by academics and practitioners since the 1980s[50] and is referred to in various non-binding normative standards, including texts adopted by inter-governmental processes.

One of the first attempts to incorporate a right to humanitarian assistance into international law came in 1988 when the French government introduced a UN General Assembly Resolution on humanitarian assistance to victims of natural disasters.[51] Spearheading the French initiative was Bernard Kouchner, the Secretary of State for Humanitarian Affairs. As the founder of both Médecins san Frontières (MSF) and Médecins du Monde, Kouchner had long been a proponent of the international community's right and duty to intervene in

[46] *Declaration on the Right to Development*, UNGA Res 41/128, 4 December 1986. For analysis, see: S. Marks, 'Obstacles to the Right to Development', François-Xavier Bagnoud Center for Health and Human Rights, Harvard School of Public Health, Working Paper Series No.17, 2003; L. Piron, 'The Right to Development: A Review of the Current State of the Debate for the Department for International Development', DFID, April 2002.

[47] See Resolutions entitled *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, most recently UNGA Res 67/87, 26 March 2013.

[48] See Resolutions entitled *Safety and Security of Humanitarian Personnel and Protection of United Nations Personnel*, most recently UNGA Res 67/85, 21 March 2013.

[49] See Resolutions entitled *International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, from Relief to Development*, most recently UNGA Res 67/231, 9 April 2013.

[50] For example: S. Marks, 'Emerging Human Rights: A New Generation for the 1980s?' (1980-1981) 33 *Rutgers Law Review* 435, 450-451.

[51] President Mitterrand referred to a "right to humanitarian assistance" but many viewed this as an attempt to introduce the concept of a "right to intervene" (*droit d'ingérence*) as developed by Bernard Kouchner. See: Y. Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations: The right and duty to humanitarian assistance* (Martinus Nijhoff 1991), 380-384. See also: 'Law and Humanitarian Ethics' (March-April 1987) 257 *International Review of the Red Cross* 226.

situations of humanitarian crisis, so the French proposal provoked concern amongst some states as to the potential for interference in the internal affairs of sovereign states.[52]

The resulting Resolution 43/131 avoided any references to rights, beyond recalling the UN Charter provisions to promote and encourage respect for human rights and fundamental freedoms.[53] Principle 1 reaffirmed the importance of humanitarian assistance for victims of natural disasters and similar emergency situations, while Principle 2 balanced this statement with a reaffirmation of state sovereignty and the primary role of the affected state in the initiation, co-ordination and implementation of humanitarian assistance on their territory. Beigbeder argues that this ensured the Resolution, which passed without a vote, was actually in contradiction to the original French intentions by modifying the text from recognising a right to humanitarian assistance to a reaffirmation of the primary role of states and importance of sovereignty in the provision of humanitarian assistance.[54] The subsequent reiteration of Resolution 43/131 in 1990, Resolution 45/100, strengthened Principle 1 by reaffirming the "*cardinal* importance of humanitarian assistance" but again avoided the use of rights-based language.[55]

While many governments appeared unwilling to specify that a "right to humanitarian assistance" existed,[56] the early 1990s saw the increasing use of the phrase by non-governmental actors. The San Remo International Institute of Humanitarian Law meeting in 1992 was entitled "The Evolution of the Right to Assistance"; and elaborated a set of Guiding Principles on the Right to Humanitarian Assistance which highlighted the need to "undertake new measures to render rapid and efficient assistance to human beings in cases of

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[52] Beigbeder, ibid 383. For a recent analysis by MSF of humanitarian interventions, see: F. Weissman, '"Not In Our Name": Why Médecins Sans Frontières Does Not Support the "Responsibility to Protect"' (August 2010) 29(2) *Criminal Justice Ethics* 194.

[53] *Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations*, UNGA Res 43/131, 8 December 1988. Despite this, Hehir has argued: "General Assembly Resolution 43/131, while reaffirming the commitment to sovereignty, established the right of victims of humanitarian disasters to international emergency relief." A. Hehir, 'Guaranteeing the Security of the State and the Individual Through Codifying A Right of Humanitarian Intervention' (2005) 10 *University of Limerick Papers in Politics and Public Administration*, 12.

[54] Beigbeder, *Role and Status* (n.51) 380.

[55] *Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations*, UNGA Res. 45/100, 14 December 1990 [emphasis added]. Only two Resolutions entitled "humanitarian assistance to victims of natural disasters and similar emergency situations" were produced, as the 46th GA Session saw the conclusion of the seminal Resolution 46/182 on strengthening the coordination of UN humanitarian emergency assistance.

[56] Although interestingly a right to humanitarian assistance was included in Council Regulation (EC) No.1257/96 of 20 June 1996 concerning humanitarian aid, OJ L.163/6, the Preamble of which states: "Whereas people in distress, victims of natural disasters, wars and outbreaks of fighting, or other comparable exceptional circumstances have a right to international humanitarian assistance where their own authorities prove unable to provide effective relief."

natural and technological disasters, violence and armed conflicts, including *the development of* the right to humanitarian assistance."[57] Specifically, Principle 1 states: "Every human being has the right to humanitarian assistance in order to ensure respect for the human rights to life, health, protection against cruel and degrading treatment and other human rights which are essential to survival, well-being and protection in public emergencies." Furthermore, the IIHL Guiding Principles promote operationalising the right by providing that victims have a right to request and to receive humanitarian assistance, and to participate in its practical implementation, while also proposing that professional humanitarian organisations have a right to offer their assistance.[58]

Unlike General Assembly Resolutions, while the IIHL Guiding Principles recognise that respect for state sovereignty and the principles of international solidarity and co-operation are essential components of the right to humanitarian assistance, they also propose that the right of access to victims can be invoked by qualified national and international organisations, states or other donors. Should access be denied, then agencies concerned may undertake all necessary steps to ensure access. In case of severe, prolonged and mass suffering which could be alleviated by humanitarian assistance, the Guiding Principles propose that competent UN organs and regional organisations may undertake necessary measures, including coercion, in accordance with their respective mandates. In other words, the IIHL Guiding Principles proposed not just the right to humanitarian assistance, but also an enforcement mechanism for the international community that includes the use of force should access to victims be denied.[59]

The IIHL Guiding Principles were followed by the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies developed by the World Conference on Religion and Peace in February 1994.[60] Unlike the IIHL Guiding Principles, the Mohonk Criteria were not styled as a legal text or treaty, but are split into eleven sections covering, inter alia: protecting the integrity of the humanitarian mandate; responsibility to provide assistance during

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[57] *Guiding Principles on the Right to Humanitarian Assistance*, International Institute of Humanitarian Law (IIHL), San Remo, Italy, April 1993, Preamble [emphasis added]. Hereinafter "the IIHL Guiding Principles."

[58] ibid Principle 2 and Principle 5.

[59] By taking this stance, the IIHL Guiding Principles foresaw the development of the Responsibility to Protect doctrine, and also the type of challenges posed by the lack of access following Cyclone Nargis in 2008.

[60] See: J. Ebersole, 'The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance' (February 1995) 17(1) *Human Rights Quarterly* 192. The Task Force comprised 51 academics, diplomats, government representatives, military officers, UN staff, and humanitarian workers from NGOs and the RCRC Movement.

complex emergencies; co-ordination; strategic planning; and accountability. The Mohonk Criteria state that a mandate for providing humanitarian assistance emerges from fundamental human rights, namely: 1) Everyone has the right to request and receive humanitarian aid necessary to sustain life and dignity from competent authorities or local, national or international governmental and non-governmental organisations; and 2) humanitarian agencies have the right to offer and deliver humanitarian aid where needed, consistent with universal principles.[61] In publishing the Mohonk Criteria, the Task Force called upon states to recognise the right to humanitarian assistance and the responsibility to provide it, and to acknowledge and ensure the right of access by humanitarian organisations to endangered populations in complex emergencies. The Task Force also stressed that the use of force to ensure delivery of humanitarian assistance should only be considered as a means of last resort.[62]

ii. A right to humanitarian assistance in disaster settings

Academic and practitioner interest in the topic has continued since these initial formulations of a right to humanitarian assistance. Notably, the 2003 Session of the Institute of International Law in Bruges concluded a Resolution on Humanitarian Assistance which echoed the rights-based language of the IIHL Guiding Principles and the Mohonk Criteria, stating:

> Leaving the victims of disaster without humanitarian assistance constitutes a threat to human life and an offence to human dignity and therefore a violation of fundamental human rights ... The victims of disaster are entitled to request and receive humanitarian assistance. Assistance may be sought on behalf of the victims, by the members of the group, by local and regional authorities, the government of the affected State, and national or international organisations.[63]

The Bruges Resolution also signifies the advancement of the right to humanitarian assistance specifically in disaster settings. Although texts such as the IIHL Guiding Principles and the Mohonk Criteria expressly include situations resulting from natural disasters or other emergency situations, the two documents were developed with a primary focus on armed conflicts. This was recognised by Jovica Patrnogic, IIHL Honorary President, when he

[61] ibid 195-196.
[62] ibid 195.
[63] *Resolution on Humanitarian Assistance*, Institute of International Law, Bruges Session, September 2003, arts II.1 and II.2. The International Law Commission has drawn heavily on the IIL Resolution in their discussions on the protection of persons in the event of disasters. For discussion of the work of the ILC, see: Section B, Chapter 7.

highlighted the parallel sets of legal mechanisms for conflict and non-conflict humanitarian responses and the need to harmonise rules relating to humanitarian responses in natural disasters with those for armed conflict situations.[64] This dual framework was also recognised by the ILC Secretariat in 2008:

> The potential existence of a human right to humanitarian assistance during natural disasters is a complex question. It has received significant attention notably among academic commentators, but existing positive law on the subject remains unclear. This situation differs markedly from the parallel question that arises during times of armed conflict, when a right to humanitarian assistance is established in conventional law.[65]

The Red Cross Movement has long been engaged in both aspects of this dual framework. While initially established to assist victims of war, the Red Cross Movement is also at the forefront of response to natural and human-made disasters. The internal rules for Red Cross Red Crescent relief operations, the Principles and Rules for Red Cross and Red Crescent Disaster Relief, were originally concluded in 1969 and have subsequently been revised and updated on five occasions. While they have included the duty to assist victims of disasters and the primary responsibility of national authorities to prevent and respond to disasters since their original drafting, it was only following the most recent amendments in 1996 that a right to offer and receive humanitarian assistance was specifically introduced.[66] This revision was prompted by the development of the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief[67] in 1994. The RCRC Code of Conduct was developed as a non-legally binding document to promote common standards for relief agencies, and is a voluntary code for internal enforcement by humanitarian agencies.[68] Moreover, as the title clearly articulates, the textual obligations are addressed to

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[64] 'XVIIth Round Table of the International Institute of Humanitarian Law' (November-December 1992) 291 *International Review of the Red Cross* 592, 601.

[65] Memorandum by the Secretariat, *Protection of persons in the event of disasters*, International Law Commission, 60th Session, 11 December 2007, A/CN.4/590, Summary, 152-153.

[66] Article 2.1: "The Red Cross and Red Crescent in its endeavour to prevent and alleviate human suffering, considers it a fundamental right of all people to both offer and receive humanitarian assistance. Hence it has a fundamental duty to provide relief to all disaster victims and assistance to those most vulnerable to future disasters." 'Resolutions adopted by the 26th International Conference of the Red Cross' (January-February 1996) 310 *International Review of the Red Cross* 102.

[67] See: 'Resolutions adopted by the 26th International Conference', ibid. Hereinafter "the RCRC Code of Conduct."

[68] D. Hilhorst, 'A living document? The Code of Conduct of the Red Cross and Red Crescent Movement and NGOs in Disaster Relief', Research paper produced for the conference Ten Years Code of Conduct: Principles in Practice, Disaster Studies Wageningen University, 2004, 5. See also: RRN Network Paper 7, 'Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief', Relief and Rehabilitation Network, Overseas Development Institute, September 1994.

the Red Cross Movement and NGOs only, not states.[69] Nevertheless, since its adoption the RCRC Code of Conduct has become a key reference for both governmental and non-governmental humanitarian actors.[70]

The text commences with a statement of the humanitarian imperative: "The right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries. As members of the international community, we recognise our obligation to provide humanitarian assistance wherever it is needed." It then articulates nine further fundamental principles of humanitarian assistance including: the requirement of independence from governmental foreign policies; provision of aid based on need; non-discrimination; and delivery of aid free from political or religious conditionalities.

The RCRC Code of Conduct has gained considerable authority as a source of fundamental principles of humanitarian action. This stems in part from the status of the Red Cross Movement as the oldest humanitarian agency in the world, and recognition of the consistently high level of expertise that it brings to disaster response operations and theory. Additionally, International Conferences are held every four years bringing together the global members of the Red Cross Movement and all state signatories to the Geneva Conventions. At the 26th International Conference in 1996, representatives of 143 governments, 166 Red Cross Red Crescent Societies, the ICRC and IFRC endorsed the revised Principles and Rules and the Code of Conduct.[71] Despite their non-binding status, such broad acceptance of these documents at an RCRC International Conference implies that participating governments recognised the clear expression of a right to humanitarian assistance in both documents, even if they were not willing to endorse such a right themselves.[72]

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[69] Although the Code of Conduct does include Annexes with recommendations addressed to governments and inter-governmental organisations.

[70] Empirical research conducted by Disaster Studies at Wageningen University in 2004 found that 70% of respondents from humanitarian agencies viewed the Code of Conduct's articles as binding principles. Hilhorst, 'A Living Document' (n.68) 36.

[71] Y. Sandoz, 'Editorial: Some Reflections on the 26th International Conference' (January-February 1996) 310 *International Review of the Red Cross* 3.

[72] Bugnion has argued: "when States party to the Geneva Conventions take part in the Movement's International Conferences; they are represented by delegates with sufficient powers for them to participate in the debates and to vote in accordance with the instructions of their governments; these delegates therefore legitimately represent the States whose official position they put forward; the participation of government delegates gives the International Conferences an element of public authority which cannot be disregarded by international law." F. Bugnion, 'Red Cross Law' (September-October 1995) 308 *International Review of the Red Cross* 491, 492. Bugnion further argues: "resolutions [of an International Conference] are essentially recommendations or exhortations. But it would be quite wrong, as a consequence, to see them as having no legal significance," 515.

Furthermore, although the 2007 IFRC IDRL Guidelines make no reference to a right to humanitarian assistance,[73] the Resolution passed at the 30th International Conference adopting the IDRL Guidelines recalls the Red Cross Movement's position on a right to humanitarian assistance. It is therefore possible to positively link the IDRL Guidelines to a right to humanitarian assistance. Governmental reluctance to expressly endorse the language of a right to humanitarian assistance may be due to the potential legal implications of states voting at International Conferences. Richard Perruchoud has argued:

> Voting by States transforms the originally private act into a semi-private legal act of a composite nature: the Conference's resolutions thus verge on the sphere of public international law by reason of the capacity of their authors, and any obligations they contain can be upheld vis-à-vis States to an extent to be specified later.[74]

This reticence by states towards rights-based language may also be reflected in the changing composition and variety of perspectives of government representatives – a total of 143 governments were represented at the 26th International Conference in 1996, but this had increased to 194 governments by the 30th International Conference in 2007.

In addition to RCRC International Conferences, a variety of inter-governmental fora exist where rules and principles of disaster response are developed by states. The UN Inter-Agency Standing Committee (IASC) was established in 1992, pursuant to UNGA Resolution 46/182, as an inter-agency forum for co-ordination, policy development and decision-making for UN and other humanitarian agencies, under the direction of the UN Emergency Relief Co-ordinator.[75] Drawing on linkages between disasters and internal displacement, the IASC requested the Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons to draft operational guidelines on human rights and natural disasters. The Operational Guidelines were initially published in 2006, while a pilot Field Manual was published to provide the human rights background underpinning the Guidelines and

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[73] IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (2008). By elaborating recommendations to governments on minimum quality standards and legal facilities humanitarian actors require to undertake their work effectively, the IDRL Guidelines do not attempt to expand existing understanding of international law or create new rights and obligations for states. Point 1.4 stresses that the Guidelines are "not intended to recommend any changes to, or affect the meaning and implementation of, any existing international law or agreements," 10.

[74] R. Perruchoud, *Les Resolutions des Conferences internationales de La Croix-Rouge* (Henry Dunant Institute 1979) 48, as quoted in P. Abplanalp, 'The International Conferences of the Red Cross as a factor for the development of international humanitarian law and the cohesion of the International Red Cross and Red Crescent Movement' (September-October 1995) 308 *International Review of the Red Cross* 520, 522.

[75] The IASC is comprised of nine specialised UN agencies, with standing invitations to a further nine organisations representing UN, inter-governmental and non-governmental organisations.

operational steps on implementation.[76] The final version was published in January 2011 as the *Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*.[77] The Operational Guidelines are intended to provide practical advice to inter-governmental and non-governmental humanitarian agencies to implement a human rights-based approach to humanitarian assistance following natural disasters.[78]

The 2011 version has arguably strengthened the human rights-based approach underpinning the Guidelines, and consistently highlights the primary responsibility of national authorities to respect all human rights of persons affected by natural disasters. Yet it has also removed references to individuals' right to request and receive protection and assistance from their governments.[79] This runs counter to the 2011 edition of the Sphere Handbook which now expressly includes the right to receive humanitarian assistance as one of three overarching principles in the Humanitarian Charter. The deletion of a specific reference to the right to protection and assistance by an inter-governmental agency such as the IASC may influence the content of international legal frameworks for the provision of humanitarian assistance, and possibly reflects governmental positions taken in ILC deliberations on the draft articles on the Protection of Persons in the Event of Disasters.[80]

While the IASC's universal, yet non-binding text now does not specifically reference the right to humanitarian assistance, this is contradicted at a regional level by the mechanism established by the African Union for dealing with internally displaced persons. For the first

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[76] IASC, *Protecting Persons Affected by Natural Disasters: IASC Operational Guidelines on Human Rights and Natural Disasters*, Brookings-Bern Project on Internal Displacement, June 2006; IASC, *Human Rights and Natural Disasters: Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster*, Brookings-Bern Project on Internal Displacement, pilot version March 2008.

[77] The 2011 Operational Guidelines incorporate the Field Manual's practical approach and include the text of the original Operational Guidelines. Unless otherwise stated, all references are to the 2011 publication: IASC, *Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*, Brookings-Bern Project on Internal Displacement, January 2011 (hereinafter "the Operational Guidelines"). Of note is the emphasis on "protection of persons," which mirrors language used in the ILC's draft articles and the UN Guiding Principles on Internal Displacement.

[78] The original Operational Guidelines and Field Manual posited a hierarchy of rights in disaster settings. While maintaining four categories of rights, the 2011 version clearly states: "The structure of these Guidelines … does not suggest any hierarchy among relevant rights but rather helps to quickly identify those rights that are primarily relevant during a given phase of a disaster," ibid 9-10.

[79] "Those affected by natural disasters have the right to request and receive such protection and assistance from their governments. The main duty-bearers, thus, are the governments and administrations of the countries concerned." Operational Guidelines, 2006 (n.76) 10; Operational Guidelines and Field Manual, 2008 (n.76) 7.

[80] For comments by states in the UNGA Sixth Committee expressing caution regarding a right to humanitarian assistance, see: UK (A/C.6/63/SR.23, para.64); Malaysia (A/C.6/63/SR.23, para.79); Iran (A/C.6/63/SR.24, para.41). For more supportive comments, see: Finland (A/C.6/63/SR.22, para.53); Austria (A/C.6/63/SR.23, para.10).

time in a binding regional treaty, Article 5(9) of the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa provides that:

> States Parties shall respect the right of internally displaced persons to peacefully request or seek protection and assistance, in accordance with relevant national and international laws, a right for which they shall not be persecuted, prosecuted or punished.[81]

Although one can argue that prior to its entry into force in December 2012, there were regular breaches of compliance with the agreed provisions of the Convention, which potentially reduces the value of such international commitments. Nevertheless, it remains one of the few international binding texts to include such strong normative commitments to humanitarian assistance and it remains to be seen the impact that such a regionally binding document will have on the future provision of humanitarian assistance to internally displaced persons in Africa.[82]

iii. The right to humanitarian assistance in non-binding normative standards

While international refugee law is based on the 1951 Convention relating to the Status of Refugees,[83] the rights and protection available to persons displaced within a country's borders are covered by the UN Guiding Principles on Internal Displacement.[84] By expressly including victims of natural or human-made disasters, the Guiding Principles provide a detailed framework for the provision of assistance to those displaced by disasters, and have been held up as an important soft law source for a right to humanitarian assistance.[85] Principle 3(2) states: "Internally displaced persons have the right to request and to receive protection and humanitarian assistance from [national] authorities. They shall not be persecuted or punished for making such a request." This is complemented by a right for international humanitarian organisations and other appropriate actors to offer their services

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[81] Kampala Convention (n.28). See: S. Ojeda, 'The Kampala Convention on Internally Displaced Persons: Some International Humanitarian Law Aspects' (2010) 29(3) *Refugee Survey Quarterly* 58, who argues that the Kampala Convention's provisions on protection and assistance for civilians properly reflect existing rules under IHL, 61-62.

[82] See also: F. Giustiniani, 'New Hopes and Challenges for the Protection of IDPs in Africa: The Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa' (2010-2011) 39 *Denver Journal of International Law and Policy* 347.

[83] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

[84] *Guiding Principles on Internal Displacement* (n.24).

[85] See: D. Fisher, 'The Right to Humanitarian Assistance', in W. Kälin *et al* (eds) *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges*, ASIL and Brookings-Bern Project on Internal Displacement, Studies in Transnational Legal Policy, No.41 (2010), 48.

in support of IDPs. Such offers should not be arbitrarily refused by the competent national authorities.[86] Roberta Cohen, one of the principal drafters of the Guiding Principles, has stated that a philosophical foundation behind the principles was the concept of sovereignty as responsibility, and argues that although the primary responsibility for the welfare and safety of IDPs rests with national authorities, the international community has a corresponding obligation to provide humanitarian assistance and protection if a national government is unable to fulfil their responsibilities.[87]

Meanwhile, in 1981 the Jordanian government introduced a General Assembly Resolution to strengthen international responses to humanitarian challenges, and build on existing international frameworks.[88] There have been 17 subsequent Resolutions, with the UN Secretary-General reporting on a biennial basis on new and emerging humanitarian problems, and existing issues which are inadequately addressed in international legislation or humanitarian practice. As with other humanitarian texts, a key focus of the New International Humanitarian Order Resolutions has been armed conflicts, rather than natural or human-made disasters. Nevertheless, the Secretary-General's Reports and the Resolutions themselves have consistently called for compliance with international humanitarian, human rights and refugee law.[89] The first reference to a right to humanitarian assistance came in the Secretary-General's 2004 Report:

> As for humanitarian efforts during and after armed conflicts, there are two issues which deserve special attention: *the establishment of* a right to humanitarian assistance and the establishment of a right to safe and speedy access for humanitarian agencies and workers to people afflicted by conflict and other life endangering circumstances.[90]

Despite the implication in 2004 that a right to humanitarian assistance in armed conflicts was not already in existence, the subsequent Secretary-General's report in 2006 claimed: "The issue of the right to humanitarian assistance has remained a debatable point despite the fact that reference is made to it in article 25 of the Universal Declaration of Human Rights of 1948 as well as in article 11 of the International Covenant on Economic, Social and Cultural

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[86] Guiding Principles on Internal Displacement (n.24) Principle 25(2). See also: Luopajärvi, 'Obligation on States to Accept' (n.16).
[87] R. Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10 *Global Governance* 459, 466.
[88] *Report of the Secretary-General on a New International Humanitarian Order*, 1 November 2002, A/57/583, para.4.
[89] See for example: *New International Humanitarian Order*, UNGA Res 63/147, 29 January 2009, Article 2.
[90] *Report of the Secretary-General on a New International Humanitarian Order*, 4 November 2004, A/59/554, para.6 [emphasis added].

Rights of 1966."[91] This would imply that the UN Secretary-General considered a right to humanitarian assistance existed based on international human rights provisions relating to an adequate standard of living. From the Secretary-General's 2006 Report, it is unclear whether this refers to a general right to humanitarian assistance, or if it is restricted to situations of armed conflict as per the 2004 Report. Similarly, it is unclear from the 2004 Report whether the establishment of a "right of access" for humanitarian agencies was intended as a more forceful provision for humanitarian agencies than the recognised right to offer assistance. In any case, it is significant that there is no reference to Geneva Convention IV and the Additional Protocols, only to the UDHR and ICESCR, and that there have been no further references to a right to humanitarian assistance since the Secretary-General's 2006 Report.

Unlike UN and inter-governmental processes, non-binding normative standards initiated by non-governmental actors such as the IIHL Guiding Principles and the Mohonk Criteria have considerably more freedom to propose formulations of the right to humanitarian assistance that limit state sovereignty and promote the rights of individuals and humanitarian actors. For example, the Sphere Project's Humanitarian Charter and Minimum Standards in Disaster Response was first published in 2000[92] and elaborated core principles and technical standards applicable for all humanitarian agencies. The conceptual underpinning of the Handbook is the Humanitarian Charter which draws on international law to reaffirm the primacy of the humanitarian imperative in actions to assist those affected by disasters or conflicts.[93]

The Humanitarian Charter centres around three overarching principles: the right to life with dignity; the right to protection and security; and the right to receive humanitarian assistance. However, the Charter is explicit in recognising that these rights are not formulated in the same terms under international law, arguing that the rights set out originate from the fundamental principle of humanity. By reflecting the ethical and moral obligations of humanitarian agencies, as well as legal rights and duties of states, the Humanitarian Charter accepts it exceeds recognised binding norms of international law. It invokes general principles of humanity and impartiality, and humanitarian agencies are expected to act in

[91] *Report of the Secretary-General on a New International Humanitarian Order*, 7 August 2006, A/61/224, para.5.
[92] The title was changed from "Disaster Response" to "Humanitarian Response" in 2011. See: The Sphere Project, *Humanitarian Charter and Minimum Standards in Humanitarian Response*, April 2011. It is generally known as "the Sphere Handbook."
[93] See: P. Walker and S. Purdin, 'Birthing Sphere' (2004) 28(2) *Disasters* 100; J. Darcy, 'Locating Responsibility: The Sphere Humanitarian Charter and Its Rationale' (2004) 28(2) *Disasters* 112.

accordance with these principles.[94] Yet the Sphere Project itself has noted: "We all share a moral duty to assist those affected by disaster and armed conflict, and that duty is reflected (though not always clearly stated) in national and international law and practice."[95]

Nevertheless, the Humanitarian Charter and Minimum Standards have been consistently developed and refined since 1998, and comprise the input of over 400 organisations from 80 countries. Many donors, including governments and UN agencies, now require organisations to commit to the "Sphere standards" to access funding opportunities.[96] Despite there being no explicit reference to a right to humanitarian assistance in the 2000 and 2004 editions of the Handbook, the 2011 edition contains not just a reference to the right, but bases its entire approach on this previously unacknowledged influence. If this, in conjunction with other non-governmental texts such as the RCRC Code of Conduct, now represents the consensus view of a large proportion of humanitarian actors, despite the non-binding sources relied upon, this could create a strong body of international practice to directly influence international law.[97]

iv. Customary international law and state practice

The evolution of third generation human rights,[98] and the concept of solidarity rights that developed in the late 1970s, has particular relevance regarding state practice and the development of customary international law relating to humanitarian assistance.[99] The

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[94] *The Sphere Handbook* (n.92). The 2011 edition notes: "The Sphere Handbook is a voluntary code and a self-regulatory tool for quality and accountability… [t]he Sphere Project has consciously opted for the Handbook not to be prescriptive or compliance-orientated, in order to encourage the broadest possible ownership of the Handbook," 8.

[95] See: The Sphere Project, *2011 edition of the Sphere Handbook: What is New?*, available at: <www.sphereproject.org/silo/files/what-is-new-in-the-sphere-handbook-2011-edition-v2.pdf> accessed 25 September 2013.

[96] L. McDougal and J. Beard, 'Revisiting Sphere: new standards of service delivery for new trends in protracted displacement' (2001) 35(1) *Disasters* 87, 90.

[97] Of equal importance for the development of an international normative framework for humanitarian assistance, the Sphere Project should be credited for its inter-agency co-operative approach and emphasis on complementary normative standards, such as the RCRC Code of Conduct. The Sphere Project was also a key driver of the Humanitarian Accountability Project, which developed the *Standards in Accountability and Quality Management*. By introducing core principles of accountability into humanitarian actions, with verifiable benchmarks and indicators, the HAP Standards provide an important tool for the practical application of humanitarian principles. Furthermore, the compliance mechanisms within the HAP Standards provide an example of humanitarian agencies voluntarily committing themselves to uniform standards, notwithstanding the non-legal source of those obligations accepted. See: Section A(iii), Chapter 2.

[98] See: Marks, 'Emerging Human Rights' (n.50) 439-441.

[99] During debates in the UNGA Sixth Committee on the ILC draft articles, the Polish delegation recalled the impact of the Solidarity movement in Poland, and stressed that international solidarity should be

underlying principles behind the provision of humanitarian assistance stem from a communitarian approach to supporting victims of calamities irrespective of their nationality, race, religion or other identifiable ground. The humanitarian imperative developed by the RCRC Code of Conduct has since been adopted by states, inter-governmental organisations and NGOs as a fundamental principle of humanitarian action.[100] Such solidarity is also understandable considering the scale of response required following major natural or human-made disasters, which generally require international co-operation to alleviate the suffering caused.[101] As stated by the UN Secretary-General:

> In view of the fact that colossal disasters, man-made or natural, can strike in all parts of the world, burden-sharing in humanitarian action is an essential international requirement. Consequently, it is crucial for the United Nations that burden-sharing be institutionalised as the *sine qua non* practice at the international level.[102]

International solidarity following disasters would appear to be borne out in practice, although obtaining accurate statistics on the levels of international humanitarian assistance is problematic for several reasons. Primarily, it can be hard to identify which funding is provided for humanitarian purposes, as opposed to development or security-related spending such as peacekeeping or peace building. Additionally, while self-reported statistics are available from 23 donor countries in the OECD Development Assistance Committee, many other countries provide developmental and humanitarian assistance which is not jointly collated. Similarly, private donations to international non-governmental actors are not officially collated by any one body.[103] Nevertheless, various data sets do exist which provide overviews of humanitarian funding provided by governments and private donors. The Global

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conceived not as charity but as an understanding between formally equal partners, who possess common but differentiated responsibilities and who in their own interests act for the good of the entire international community (A/C.6/63/SR.24, para.54).

[100] The RCRC Code of Conduct, Principle 1 states: "The prime motivation of our response to disaster is to alleviate human suffering amongst those least able to withstand the stress caused by disaster. When we give humanitarian aid it is not a partisan or political act and should not be viewed as such."

[101] Marks argues: "This notion of solidarity is not unique to the third generation of human rights … It is, however, the key feature of the rights of the third generation, which are inconceivable without a very broad sharing of objectives and commitment to certain forms of action. It is in the nature of certain planetary concerns, such as peace, development, ecological balance, and communication, that such solidarity is a prerequisite to action commensurate with the needs." See: Marks, 'Emerging Human Rights' (n.50) 441.

[102] *Secretary General's Report on a New International Humanitarian Order 2006* (n.91) para.9.

[103] The *Global Humanitarian Assistance Report 2010* states: "Counting humanitarian aid is complicated because of the number of different people involved in donorship and delivery, all of whom define, channel, account for and report their contributions in different ways. There is no central repository of information. This makes it difficult to research and provide a simple answer to a simple question ('How much humanitarian aid is there?'), and tracking the money through the system impossible," 130.

Humanitarian Assistance Report[104] compiles composite figures from donor governments, the UN Consolidated Appeals Process, the RCRC Movement and NGOs to provide estimates of annual global humanitarian assistance, disaggregated into funding from donor governments and private donations from individuals and corporations, as shown in Figure 2 below.

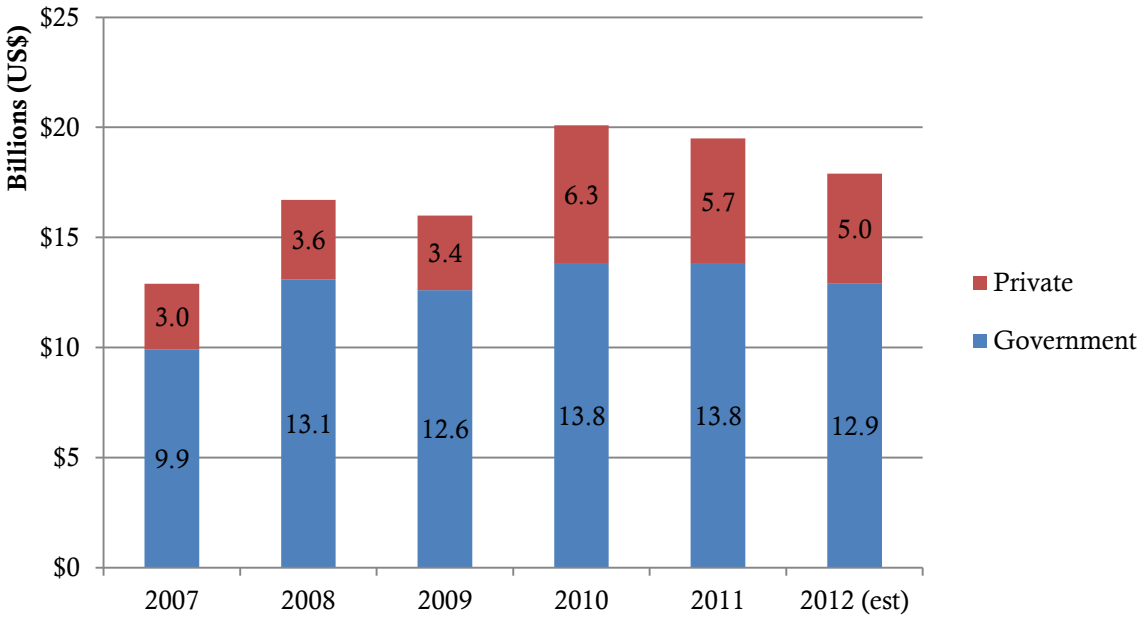

Figure 5.2: Global humanitarian assistance, 2007-2012 (*Global Humanitarian Assistance Report 2013*)

However, despite the recent exclusion of certain elements of security and post-conflict funding from the calculations, the Global Humanitarian Assistance Report figures are considerably higher than previous sources of global estimates on humanitarian funding, with an estimated US$17.2 billion provided annually in global humanitarian assistance between 2007 and 2012 by donor governments and private donations from individuals and corporations. Conversely, the ALNAP State of the Humanitarian System Report estimated that global funds directed to humanitarian programming (from public and private sources) were approximately US$6 billion in 2007 and US$7 billion in 2008.[105] Yet the definition of "humanitarian programming" encompasses a wide range of activities in emergency settings. As a result, the differences in funding totals are even more pronounced when one examines the UNOCHA Financial Tracking System data on the actual funding received for appeals specifically for natural disasters.[106] Based on 575 separate disaster appeals since 2000, the

[104] Development Initiatives, *Global Humanitarian Assistance Report 2013*, 11. Available at: <www.globalhumanitarianassistance.org/reports> accessed 25 September 2013.
[105] Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP), *The State of the Humanitarian System: Assessing performance and progress – a pilot study*, January 2010, 19.
[106] The UNOCHA FTS covers all reported international humanitarian aid (including NGOs, the Red Cross Movement, bilateral aid, in-kind aid and private donations), and is available at:

UNFTS reports that over US$20.7 billion has been provided in response to natural disasters, or an annual average of US$1.5 billion. Figure 3 below highlights the large fluctuations in funding provided each year, with the 2004 Indian Ocean Tsunami and the 2010 Haitian earthquake and Pakistan floods clearly identifiable.

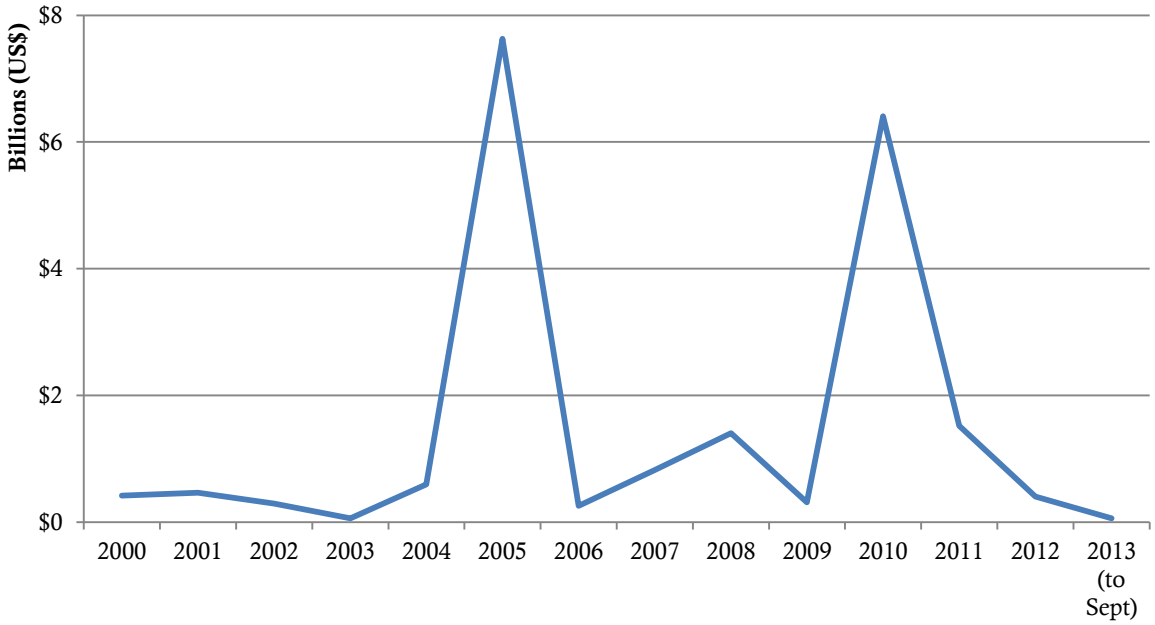

Figure 5.3: Global humanitarian assistance for natural disasters, 2000-13 (*UNOCHA FTS*)

Despite the divergence in these various estimates, the extent of state practice, both in terms of financial expenditure and the high occurrence of states providing humanitarian assistance following natural or human-made disasters, is undeniable.[107] Bošco Jakovljević has argued: "State and relevant international organisations' practice is expressed by their verbal acts, statements, but mainly in actual action to provide relief. This practice is so intense, dense and widespread, and extensive, that it represents a solid body of state practice, required for the formation of a customary law rule."[108] However this would appear overly optimistic regarding the legal status of donor state practice vis-à-vis humanitarian assistance. Ferris and Petz have highlighted that the Haiti earthquake and Pakistan floods received 96.56% of all

<http://fts.unocha.org/pageloader.aspx?page=emerg-emergencies&section=ND&year=2013> accessed 25 September 2013.

[107] As recognised in the Preamble to *New International Humanitarian Order*, UNGA Res 63/147, 27 January 2009. Non-state actors can also have a direct impact on humanitarian practice and the creation of general rules of international law. As James Crawford has highlighted: "States remain central to the process of international law making and law-applying, and it is axiomatic that every State is as such a member of the international community. But the international community includes entities in addition to States, and their role can be legally significant." J. Crawford, 'Responsibility to the International Community as a Whole' (Spring 2001) 8(2) *Indiana Journal of Global Legal Studies* 303, 314.

[108] B. Jakovljević, 'Right to Humanitarian Action and State Sovereignty', Report of the IIHL Roundtable: Humanitarian Action and State Sovereignty (2000) 95, 96.

humanitarian funding for 2010; leaving only 3.54% for the 54 other major disasters of 2010, while a further 317 reported disasters either did not receive any international funding or were not included in UNOCHA's Financial Tracking System.[109] While there were clearly massive needs in both Haiti and Pakistan, the extent of funding bias in 2010 towards these two disasters raises the question of "indirect impartiality."[110] As a key humanitarian principle, impartiality provides that assistance is provided to those most in need without discrimination. Dungel has argued that the principle of impartiality extends beyond the activities of each individual relief agency to the international community as a whole to ensure that certain disasters do not receive excessive support due to the "CNN effect."[111]

In the *North Sea Continental Shelf cases*, the International Court of Justice clearly stressed that to create new rules of customary international law actions by states must be carried out in such a way "as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it," and that the frequency or even habitual character of specific acts is not in itself enough to constitute *opinio juris*.[112] Harold Koh discussed this traditional view of international law when he argued: "[T]he concept of legal obligation (so-called *opinio juris sive necessitatis*) emerged as the keystone for distinguishing customary international law from voluntary practice to which states might conform, but which they felt legally free to disregard. The very concept of obligatory custom assumed that nations, by virtue of their sovereign statehood, had de facto consented to compliance with customary practices out of a sense of legal obligation."[113] Malcolm Shaw meanwhile has argued that states undertake particular conduct on the basis of goodwill or the hope of reciprocal benefits, and specifically highlights that: "[t]here is no law imposing upon [states] the strict duty to

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[109] E. Ferris and D. Petz, *A Year of Living Dangerously: A Review of Natural Disasters in 2010*, Brookings Institution-LSE Project on Internal Displacement, April 2011, 21-26.

[110] Similarly, in 2011 the Japanese earthquake and tsunami received over US$722 million from donor governments and agencies, which represented nearly 48% of all humanitarian funding for natural disasters in 2011. See: UNOCHA FTS data, available at: <http://fts.unocha.org/reports/daily/ocha_R12_Y2011__1208090205.pdf> accessed 25 September 2013. Indeed, if one includes the domestic Japanese response of nearly US$200 billion following the earthquake, tsunami and nuclear emergency, this represents US$486,758 per affected person, which is many magnitudes higher than any other recent disaster. See: Development Initiatives, *Global Humanitarian Assistance Report 2012*, 24. Available at: <www.globalhumanitarianassistance.org/reports> accessed 25 September 2013.

[111] J. Dungel, 'A Right to Humanitarian Assistance in Internal Armed Conflicts Respecting Sovereignty, Neutrality and Legitimacy: Practical Proposals to Practical Problems' (May 2004) *Journal of Humanitarian Assistance*, Section 2.2, available at: <http://sites.tufts.edu/jha/archives/838> accessed 25 September 2013. Dungel further argues against the right of initiative for humanitarian agencies found in Article 18(1) APII having the status of customary international law, at Section 2.3.1.3.

[112] North Sea Continental Shelf (*Germany v. Denamrk*; *Germany v. The Netherlands*) Judgment, ICJ Reports 1969, 3, para.77.

[113] H. Koh, 'Review Essay: Why do Nations Obey International Law?' (June 1997) 106(8) *Yale Law Journal* 2599, 2608.

distribute economic aid to developing nations. The bare fact that such things are done does not mean that they have to be done."[114] Similarly, the ILC Special Rapporteur on the Protection of Persons in the Event of Disasters has clearly stated that: "international practice as evidenced in international treaties shows that, although underpinned by the principles of solidarity and cooperation, the provision of assistance from one State to another upon the latter's request is premised on the voluntary character of the action of the assisting State."[115]

On this basis, widespread state and humanitarian actor practice of providing humanitarian assistance following natural and human-made disasters in itself is not sufficient for the creation of a new rule of customary international law. Hardcastle and Chua recognised this in their seminal article in 1998, arguing that the scope of any right to humanitarian assistance following natural disasters under customary international law was unclear, and highlighted the failure of certain governments to seek or provide aid following disasters.[116] Despite this, in 2000 the IFRC highlighted the possibility that the minimum standards set out in the Sphere Handbook might be a case study of customary international law in formation. Yet the difficulty of declaring that recognised humanitarian standards had reached the level of customary international law was made clear:

> If Sphere standards entered into customary international law, would there be a duty to implement them or would they, rather, have an 'aspirational' character? … If obligatory, how would the duty of implementation fall between states, insurgent groups, international organizations and the humanitarian community? How would a right to claim the benefit of these standards be enforced?[117]

It has been argued that instant customary international law can be created, for example through a unanimously accepted General Assembly Resolution that explicitly adopts particular principles as international law.[118] This key focus on the role played by state practice in the creation of customary international law is exemplified by the EU Guidelines on Promoting Compliance with International Humanitarian Law which assert that: "Customary international law is formed by the practice of states which they accept as binding

[114] M. Shaw, *International Law* (6th edn, Cambridge University Press 2008), 75.
[115] E. Valencia-Ospina, *Fifth Report*, 9 April 2012, A/CN.4/652, para.56. See also: Luopajärvi, 'Obligation on States to Accept' (n.16).
[116] Hardcastle and Chua, 'Towards a Right of Access' (n.44) 598-600. In the North Sea Continental Shelf cases (n.112), the ICJ stated: "[G]eneral or customary law rules and obligations …, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour," para.64.
[117] IFRC, *World Disasters Report 2000*, IFRC (2000), 153.
[118] See: H. Charlesworth, 'Customary International Law and the Nicaragua Case' (1984-1987) 11 *Australian Yearbook of International Law* 1, 11; and generally B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles' (1988-1989) 12 *Australian Yearbook of International Law* 82.

upon them."[119] Yet non-governmental and other transnational actors also play an important role in norm creation, including customary international law.[120] For example, it has been argued that the role of the ICRC and experts participating in the ICRC Customary International Humanitarian Law Project makes their work "something in between private scholarly codification and codification by states."[121] Nevertheless, academics have consistently questioned the existence of explicit customary rules of international law on disaster relief.[122] Indeed, both the IFRC and the ILC Special Rapporteur on Protection of Persons in the Event of Disasters have queried the existence of customary international disaster response laws, although recognising that further study in this area may be appropriate.[123]

As Anthony D'Amato has highlighted, all states have the same set of entitlements under customary international law, and therefore norms of general application apply equally to all states.[124] While it may be difficult to identify the subjective element behind specific decisions to provide humanitarian assistance, it is unlikely that such actions are undertaken in the belief of a mandatory customary law requirement to provide humanitarian assistance in every natural or human-made disaster.[125] The inconsistent responses to UN, Red Cross and NGO appeals from both governments and the public reflect the element of choice, rather than compulsion, felt by donors in the face of multiple disasters around the world, all of

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[119] *EU Guidelines on Promoting Compliance with International Humanitarian Law (IHL)* [2005] OJ C327/04, para.7.

[120] M. Reimann, 'From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum' (2003-2004) 22 *Penn State International Law Review* 397, 403-404.

[121] See: T. Treves, 'Customary International Law', Section C(6)(a), para.62, in R. Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law* (Oxford University Press, 2008), available at: <www.mpepil.com> accessed 25 September 2013.

[122] Macalister-Smith argued in 1985 that: "the individual nature of at least some disaster situations, the uncertainty as to the general character of humanitarian practices and, above all, the influence of political factors in relief, work firmly against the crystallization of particular customary international rules in this area," in P. Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff 1985), 54. For a more recent discussion, see: Z. Coursen-Neff, 'Preventive Measures Pertaining to Unconventional Threats to the Peace such as Natural and Humanitarian Disasters' (1997-1998) 30 *NYU Journal of International Law and Politics* 645, 692-702.

[123] See: M. Hoffman, 'What is the Scope of International Disaster Response Law?', in IFRC, *International Disaster Response Laws, Principles and Practice: reflections, prospects and challenges* (2003), 16; IFRC, *Law and Legal Issues in International Disaster Response: a desk study* (2007), 21-22; Valencia-Ospina, *Preliminary Report* (n.5) para.42.

[124] A. D'Amato, 'The Concept of Human Rights in International Law' (1982) 82 *Columbia Law Review* 1110, 1115-1116. D'Amato argues that most rules of customary international law can be traced back to treaty provisions that have ripened into customary international law rules, 1131. On this basis, an express treaty provision on a right to humanitarian assistance, such as contained in the regional AU Kampala Convention (n.28), could potentially be important evidence of an emerging right to humanitarian assistance.

[125] For discussion of compliance in international law, see generally: Koh, 'Why Do Nations Obey' (n.113).

which create levels of human suffering.[126] This can be extended to the international community, where there are widely divergent approaches to the provision of humanitarian assistance by donor governments. Even within the 30 most generous state donors, spending on humanitarian assistance in 2012 ranged from US$2 and US$3 per citizen by Portugal and Greece respectively to US$101 and US$142 by Norway and Luxemburg.[127]

Furthermore, positions taken by countries in receipt of humanitarian assistance are of direct relevance to the creation of a customary international law right to humanitarian assistance. The Declaration of the First South Summit of the G77 Group of States in 2000, highlighted:

> We stress that humanitarian assistance should be conducted in full respect of the sovereignty, territorial integrity, and political independence of host countries, and should be initiated in response to a request or with the approval of these States.[128]

The Declaration also emphasised that "the international machinery through which global norms are developed and actions taken must … ensure that the countries of the South can participate on an equal footing in decisions which affect them most of all."[129] Many developing countries have been particularly concerned about the potential misuse of the concept of humanitarian intervention. The First South Summit clearly stated: "We stress the need to maintain a clear distinction between humanitarian assistance and other activities of the United Nations. We reject the so-called 'right' of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law."[130] Developing countries continue to highlight the importance of the affected state in

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[126] Coursen-Neff has contended that "the unmet needs of UN programs – particularly in reconstruction and development – demonstrate that donors have not behaved as if they are legally obligated to answer the United Nations' appeals. State practice thus lags behind the developing principle of responsibility to disaster victims," Coursen-Neff, 'Preventive Measures' (n 122) 697. Such an argument reflects Koh's contention that social internalisation of norms can come before political or judicial internalisation. See: H. Koh, 'How is International Human Rights Law Enforced?' (1998-1999) 74 *Indiana Law Journal* 1397, 1413-1414. For discussion of the social internalisation of humanitarian norms, see: D. Cubie, 'Clarifying the "*Acquis Humanitaire*": A Transnational Legal Perspective on the Internalization of Humanitarian Norms', in *The International Law of Disaster Relief* (Cambridge University Press – forthcoming).

[127] *Global Humanitarian Assistance Report 2013* (n.104) 23. These disparities are not simply based on overall economic power of the donor country either: Japan only provided US$5, the USA US$12, and China a disappointing US$0.02 humanitarian assistance per citizen. Due to the on-going conflict in Syria, Turkey provided US$14 in humanitarian assistance per citizen in 2012; while Ireland came 7th out of 30 countries at US$30 humanitarian assistance provided per citizen.

[128] *Declaration of the South Summit*, Group of 77 South Summit, Havana, Cuba, 10-14 April 2000, para.54.

[129] ibid para.10.

[130] ibid para.54. See also: "The principles of sovereignty, territorial integrity and non-interference in the internal affairs of States, must be upheld at all cost, for without them, the United Nations cannot survive, and small and weak nations would be left at the mercy of larger and stronger nations," Ambassador Verson, Deputy Permanent Representative of Cuba and Chargé d'Affairs at the UN General Assembly

humanitarian responses, as in the 2011 Humanitarian Affairs Segment of ECOSOC where the G77 plus China stated:

> Respect for sovereignty, territorial integrity and national unity of States must remain the overarching parameters in all efforts for coordination of humanitarian assistance. In this regard, we also emphasize the primary role of the concerned State in the initiation, organization, coordination and implementation of humanitarian assistance. It is critical that affected States, donor countries, the UN system and other humanitarian organizations work together to provide much needed humanitarian assistance and development support, recognizing the primary role of the affected State.[131]

Against this background of extensive but irregular state practice, and conflicting statements in both binding and non-binding texts, it is hard to argue that a customary international law right to humanitarian assistance is already in existence. Yet the argument that an *acquis humanitaire*, as a distinct body of law and practice relating to humanitarian crises, is in the process of formation suggests that a study of the customary international laws relating to the provision of humanitarian assistance in disaster settings is overdue.[132] Perhaps, in a manner similar to the ICRC study on the customary international humanitarian law of armed conflict, the Red Cross Movement should initiate a comprehensive study of the *acquis humanitaire*, and the status of a right to humanitarian assistance within this developing body of law.

C. Conclusion: Current Status of a "Right to Humanitarian Assistance"

Explicit references to a right to humanitarian assistance in authoritative and diverse documents emanating from the UN, Red Cross Movement,[133] respected academics and

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Interactive debate on the Responsibility to Protect, Plenary Meeting of the General Assembly (New York, 12 July 2011), available at: <http://responsibilitytoprotect.org/Cuba.pdf> accessed 25 September 2013.

[131] Statement on behalf of the Group of 77 and China by Minister Salvia, Permanent Mission of Argentina to the UN, Humanitarian Affairs Segment, 2011 Substantive Session of the Economic and Social Council (Geneva, 19 July 2011).

[132] As the IFRC and ILC Special Rapporteur have recognised, see n.123 above and accompanying text.

[133] It has been argued that the Red Cross itself contributes to the formation of international law, both by its activities and by the drafting of legal instruments submitted to diplomatic conferences. See: Bugnion, 'Red Cross Law' (n.72) 492. If this is true, greater weight should be given to the Red Cross Movement's promotion of a right to humanitarian assistance than other non-governmental sources. However, arguably the claimed relevance and influence of the Red Cross Movement over public international law is limited to IHL as embodied in the Geneva Conventions and Additional Protocols, where the ICRC has a specific, treaty-based authority. It is less clear whether the Red Cross Movement can claim similar influence over other aspects of public international law, including humanitarian responses not covered by the Geneva

humanitarian agencies may mean that a general right to humanitarian assistance covering both armed conflict settings and natural and human-made disasters is in the process of formation. There are compelling arguments to justify such a stance based on the development of international humanitarian, human rights and refugee law, which are further strengthened by the existence of extensive state practice and *opinio juris* through authoritative non-binding normative standards endorsing a right to humanitarian assistance. Furthermore, the international legal obligations regarding humanitarian assistance for civilians and humanitarian organisations under both customary and general international humanitarian law of armed conflict are undeniable.

However, if a general right to humanitarian assistance encompassing both the right of individuals to request and receive assistance and organisations to offer assistance is already in existence, why are states reticent to adopt rights-based language when discussing the delivery of humanitarian assistance?[134] The removal of the reference to a right to humanitarian assistance in the 2011 IASC Operational Guidelines would seem to be at odds with the 2009 AU Kampala Convention and 2011 edition of the Sphere Handbook which both incorporate such a right. Furthermore, the ILC's work to date on the protection of persons in the event of disasters has contained limited references to a "right to humanitarian assistance,"[135] and it is noticeable that even in the context of offers of assistance, the Special Rapporteur's proposal for draft article 12 entitled "Right to Offer Assistance" was modified to simply "Offers of Assistance." The Commentaries for draft article 12 are likely to be completed during the ILC's 2013 sessions, and it will be interesting to see if they highlight distinctions between the right to offer assistance proposed for state and inter-governmental organisations and the non-rights-based language for non-governmental organisations. Nevertheless, as described in the

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Conventions and Additional Protocols. Furthermore, despite the authority one should place on Red Cross interpretations of international law, under Article 38(1) of the ICJ Statute, teachings of the most highly qualified publicists, including the Red Cross, are simply subsidiary means of determining the rules of international law.

[134] Although state practice is not uniform: in June 1993, the German Humanitarian Aid Coordinating Committee (comprised of aid organisations and governmental agencies) agreed Twelve Basic Rules of German Humanitarian Assistance Abroad, including a right to humanitarian assistance (Basic Rule 2: "Everyone has the right to receive, and must have the right to provide, humanitarian assistance and humanitarian protection"). By acceding to these Basic Rules, arguably the German Federal Government explicitly accepted the right to humanitarian assistance as a foundation of its humanitarian, developmental and foreign affairs policy. See: German Federal Foreign Office, *The Federal Government's Humanitarian Aid*, available at: <www.auswaertiges-amt.de/cae/servlet/contentblob/475722/publicationFile/5122/HumanitäreHilfederBundesregierung2007.pdf> accessed 25 September 2013.

[135] The 158-page ILC Secretariat background Memorandum of 2008 only devoted six pages to the question of a right to humanitarian assistance and existing human rights law applicable in the event of disasters. See: *Secretariat Memorandum* (n.65) 149-154.

following Chapter, the inclusion of substantive articles on human dignity and human rights by the ILC, even in the absence of specific references to an individual right to receive or request assistance, clearly ties the emerging international legal framework into the broader international human rights mechanisms.[136]

Interestingly, despite claims that the Red Cross Movement has recognised a right to humanitarian assistance since the 1960s, explicit references to the right were only adopted into "Red Cross law" in 1996; and many of the key sources of the claimed right to humanitarian assistance (including the RCRC Code of Conduct, IIHL Guiding Principles, Mohonk Criteria and the UN Guiding Principles on Internal Displacement) were only developed in the 1990s. Currently, the 2007 IDRL Guidelines which the IFRC uses to promote international disaster laws specifically highlight state sovereignty and avoid references to a right to humanitarian assistance, either as a right for victims to receive assistance or for humanitarian agencies to provide assistance. So, in the absence of explicit universal international legal provisions and conflicting non-binding normative standards, and despite extensive state practice in the provision of humanitarian assistance following natural and human-made disasters, it is submitted that state and humanitarian actors' practice is not sufficiently consistent to reach the level of customary international law. States do not treat all disasters equally, and there has been constant criticism of public and governmental responses to certain disasters, with sudden-onset disasters like earthquakes gaining attention at the expense of other disasters such as slow-onset famines.[137] Therefore, I contend that states and humanitarian agencies provide humanitarian assistance to victims of natural and human-made disasters on moral, political, religious or humanitarian grounds, rather than based on a belief that there is a binding or enforceable obligation to provide humanitarian assistance under international law.[138]

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[136] Draft article 7 reads: "In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person"; while draft article 8 states: "Persons affected by disasters are entitled to respect for their human rights". For text of draft articles 6-9, see: A/CN.4/L.776, 14 July 2010.

[137] See generally: Oxfam GB, 'An End to Forgotten Emergencies?', Briefing Paper, May 2000; C. Eldridge, 'The tsunami, the internet and funding for forgotten emergencies' (June 2005) 30 *Humanitarian Exchange Magazine*; Irish Aid, 'Irish Aid assistance for "forgotten emergencies"', Press release, December 2006.

[138] A similar argument was made during the ILC discussions on the protection of persons in the event of disasters, see: Provisional Summary Record of 2980th ILC Meeting, A/CN.4/SR.2980, 17 July 2008, Mr Nolte. Furthermore, the suggestion to include humanitarian principles within the operative draft articles was opposed by at least one government concerned this emphasised that humanitarian responses were managed by governments as a legal obligation, rather than as policy considerations. See *Report of the 62nd Session of the International Law Commission*, Chapter VII: Protection of Persons in the Event of Disasters, para.313, 317, A/65/10.

So while IHL has formalised an individual's right to assistance in situations of armed conflict, a specific right for individuals to request and receive assistance or right for organisations to provide assistance (as opposed to offering assistance) have not yet crystallised into international law due to the continuing reliance on respect for state sovereignty and Article 2(7) of the UN Charter.[139] This means that claims for assistance are generally dependent on domestic mechanisms, which often lack enforcement procedures.[140] On this basis, it is clear that Professor Dinstein's view is as applicable today as it was 18 years ago; namely, "there is no right *de lege lata* to render humanitarian assistance. There is only a right to offer such assistance, but its exercise is contingent on consent by the State concerned."[141] Yet despite this pessimistic conclusion, arguably a right to humanitarian assistance is in the process of crystallisation. The increased attention and analysis of international law and practice in humanitarian crises, signified by the emerging *acquis humanitaire*, highlights the norm life-cycle that a specific right to humanitarian assistance is engaged in. Indeed, the ILC's development of a comprehensive international legal framework for responding to major natural and human-made disasters based on human rights principles may well promote further interpretations on the desirability and practicality of transforming a general right to humanitarian assistance from *de lege ferenda* to *de lege lata*.[142] Nevertheless, there is no guarantee that a consensus will emerge – even within the ILC it has been argued that intervention for disaster relief purposes is neither part of *lex lata* nor justifiable as *de lege ferenda* due to the serious policy consequences ensuing, as such a right could be exercised by major powers over smaller states for political rather than humanitarian objectives.[143]

The emerging international legal framework for disaster responses may or may not include a specific right or rights to humanitarian assistance; yet the mere development of such a framework highlights the progression of a body of law relating specifically to disaster response. Irrespective of whether or not a specific right to humanitarian assistance exists, this consistent focus on the legal implications of disasters highlights the need to consider the broader human rights implications of disasters. The subsequent Chapter will take as its starting point the position that a general right to humanitarian assistance in natural and

[139] Dinstein, 'Right to Humanitarian Assistance' (n.8).
[140] Fisher, 'Right to Humanitarian Assistance' (n.85) 48-49.
[141] Dinstein, 'Right to Humanitarian Assistance' (n.8) para.3.
[142] See: J. Benton-Heath, 'Disasters, Relief, and Neglect: The Duty to Accept Humanitarian Assistance and the Work of the International Law Commission' (2010-2011) 43 *NYU Journal of International Law and Politics* 419, who argues that international human rights law creates a legal space for the progressive development of a right to humanitarian assistance, but such a right does not currently exist, 437-441.
[143] Provisional Summary Record of 2980th ILC Meeting, A/CN.4/SR.2980, 17 July 2008, Mr Vasciannie.

human-made disasters is not yet in existence, but that international human rights law is equally applicable in disaster settings. Therefore, the specific application of international human rights provisions in disaster settings, including the right to life with dignity, and the rights to food, shelter and medical care, will be examined. In particular, human rights-based approaches to disaster responses will be analysed to identify the institutional and structural mechanisms required to promote accountability and the consistent application of human rights law in disasters.

Chapter 6

Applying Human Rights Norms in Disaster Settings

> *[N]eglect of the basic human rights to education, food, a healthy and secure environment, access to health care, housing, and decent employment is the manmade cause of the obscene impact of the hurricane's disaster for the underserved residents of New Orleans and other areas of Louisiana and Mississippi. Neglect of these rights has ultimately resulted in failure to protect the right to life of many hurricane victims.*
>
> Susannah Sirkin, 2006[1]

Irrespective of the debate surrounding whether or not a general right to offer, request and receive humanitarian assistance currently exists in international law, it is clear that the extensive body of international human rights law applies equally in disaster settings.[2] Fundamental non-derogable rights, including the right to life, freedom from torture and cruel, unusual or degrading treatment, and freedom from discrimination apply at all times during a disaster, even in the face of emergencies threatening the life of the nation.[3] Similarly, a broad range of national, regional and international substantive human rights provisions are directly relevant for a state's preparations for and responses to natural and human-made disasters. Meanwhile, the traditional view of humanitarian assistance as the external provision of food, medical care and shelter has been superseded by the broader conception of humanitarian action and recognition that individuals and communities affected by disasters are not just in need of material goods.[4] This mirrors the increasing appreciation of the universality and interconnection of all human rights, and the need to ensure access to

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[1] S. Sirkin, 'The Debacle of Hurricane Katrina: A Human Rights Response' (2006) 30 *The Fletcher Forum of World Affairs* 223, 225.

[2] See for example: E. Valencia-Ospina, *Fifth Report*, 9 April 2012, A/CN.4/652, para.170. It is not the intention of this Chapter to examine each specific human right in the context of disasters, for example how the rights to health, housing, or life can best be ensured in a disaster setting. Instead, this Chapter intends to examine the overall application of international human rights law in disasters, and provide analysis of the increasing recognition of the human rights implications of disasters within UN human rights monitoring and accountability mechanisms.

[3] For examination of customary international laws relevant to humanitarian assistance in times of armed conflict, see: J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law: Rules* (Cambridge University Press 2009). Also available at: <www.icrc.org/customary-ihl/eng/docs/v1_rul> accessed 25 September 2013.

[4] For a definition and description of "humanitarian action," see: Section A(ii)(a), Chapter 3.

economic, social and cultural rights as well as civil and political rights. As stated by Mary Robinson in her final address as UN High Commissioner for Human Rights:

> I … reiterat[e] my belief that progress has been made throughout the world in promoting the idea of all human rights for all. But the question remains: what of the millions who suffer from deprivation of the basic means of life or who live under oppression and discrimination? When they stand up – as they will increasingly do – to claim those universal rights, what are we to say to them?[5]

As noted in the previous Chapter, the 1993 IIHL Guiding Principles on the Right to Humanitarian Assistance proposed that a right to humanitarian assistance could be invoked when essential humanitarian needs were not being met, arguing that the abandonment of victims without assistance would constitute a threat to human life and a grave offence to human dignity.[6] Similarly, both academics and practitioners have argued that a right to humanitarian assistance can be derived from international human rights law, in particular the right to life and the right to an adequate standard of living.[7] Furthermore, specific references to the human rights implications of disasters for particularly vulnerable groups, such as children and those living with HIV/AIDS, have been expressly included in international human rights texts. Yet for human rights to be effective and relevant for individual rights-holders, it is necessary for people to know what their rights are and then be able to access those rights. So do traditional human rights instruments, such as the Universal Declaration of Human Rights and the two 1966 International Covenants, guarantee specific rights and responsibilities in disaster settings? If yes, how can such rights claims be accessed and enforced? Furthermore, can one argue that a specific right to humanitarian assistance can be formed through an amalgam of existing international human rights norms?

Therefore, this Chapter will commence by examining the broad body of international human rights law to understand the human rights implications of natural and human-made disasters, including whether a hierarchy of rights exists in a disaster context and the implications of utilising human rights-based approaches and accountability mechanisms for disaster

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[5] M. Robinson, 'Making Human Rights Matter: Eleanor Roosevelt's Time Has Come' (2003) 16 *Harvard Human Rights Journal* 1, 11.

[6] *Guiding Principles on the Right to Humanitarian Assistance*, International Institute of Humanitarian Law (IIHL), April 1993, Principle 3. XVII[th] Round Table on Current Problems of Humanitarian Law: "The Evolution of the Right to Assistance", IIHL, San Remo, Italy, 2-4 September 1992.

[7] See for example: R. Stoffels, 'Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps' (September 2004) 86(855) *International Review of the Red Cross* 515; D. Fisher, 'The Right to Humanitarian Assistance', in W. Kälin *et al* (eds) *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges*, ASIL and Brookings-Bern Project on Internal Displacement, Studies in Transnational Legal Policy, No.41 (2010).

preparedness and response. The Chapter will then proceed to analyse the implementation of human rights law in disaster settings, with reference to different classifications of rights and the status afforded to human dignity and human rights in the current text of the ILC draft articles on the protection of persons in the event of disasters. Finally, the implications of the increasing juridification in disaster settings for individuals and states will be outlined, before the Chapter concludes with a determination on whether or not one can argue that a composite right to humanitarian assistance exists based on prevailing human rights law.

A. Human Rights Implications of Disasters

The "protection of persons" is generally accepted to encompass "all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law, and refugee law."[8] Yet in spite of the expanding body of law and practice covering responses to humanitarian crises encompassed by the *acquis humanitaire*, exemplified by the on-going work of the ILC, it has proven difficult to define a comprehensive unified framework of protection in disasters addressing the numerous facets of disaster management, from practical matters such as the entry of humanitarian workers and visa requirements to the normative standards regarding the extent and quality of assistance provided. However, increasingly, there is recognition of the need to systematically embed the protection of human rights within the emerging international legal frameworks for disaster preparation and response.[9] Indeed, human rights law provides a logical framework for disaster contexts as it includes explicit rights and obligations for the protection of persons, including the rights to life, health and an adequate standard of living.[10] Furthermore, the universality of and interconnection between such human rights is of direct importance in disaster preparation and response. For example, as noted in General Comment No.14: The Right to the Highest Attainable Standard of Health, not only is health a fundamental human right indispensable for the exercise of other human rights, the right to health is dependent upon the realisation of other human rights.[11]

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[8] S. Giossi Caverzasio (ed), *Strengthening Protection in War: A Search for Professional Standards: Summary of Discussions among Human Rights and Humanitarian Organizations*, Workshops at the ICRC, 1996-2000 (ICRC 2001), 19.

[9] Consider, for example, discussions in the ILC in 2008: Official Records of the General Assembly, Sixty-third Session, *Supplement No.10* (A/63/10), para.227-229.

[10] As discussed in: E. Valencia-Ospina, *Preliminary Report*, 8 May 2008, A/CN.4/598, para.26.

[11] UN Committee on Economic, Social and Cultural Rights, General Comment No.14, *The right to the highest attainable standard of health* (11 August 2000), E/C.12/2000/4, para.1 and 3.

The humanitarian imperative to alleviate suffering wherever it may be found clearly links human rights norms into the core of measures taken to provide humanitarian assistance in disaster situations, especially when humanitarian actions are understood to include any assistance, services or goods indispensable for the survival and fulfilment of the essential needs of victims or intended to save lives and alleviate the suffering of crisis-affected populations. As a result, specific rights-holders can be identified, as can governmental and non-governmental duty-bearers. At the national level, if the domestic authorities are unable, or unwilling, to provide the necessary assistance to tackle such needs, the UN Committee on Economic, Social and Cultural Rights has clearly pointed out that:

> States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities.[12]

Yet the practical application of human rights law in actual disaster settings can be challenging. For example, although General Comment No.14 states that: "The right to treatment includes … the provision of disaster relief and humanitarian assistance in emergency situations,"[13] the difficulties of actually providing medical treatment in the midst of a major disaster are well documented.[14] Therefore, during discussions within the ILC it was argued that a human rights approach might risk affecting the flexibility and freedom needed to deal with disaster situations by a sovereign state, and that focusing excessively on rights and obligations could interfere with other legally applicable international principles, such as non-intervention and state sovereignty.[15] Furthermore, although human rights law was originally seen as primarily addressing only states, other humanitarian actors now play a

[12] ibid., para.40 and 65. See also: CESCR, General Comment No.12, *The right to adequate food* (12 May 1999), E/C.12/1999/5, para.38.
[13] ibid., para.16.
[14] While the Haitian Ministry of Health was commended for its response in the face of the major difficulties created by the destruction of infrastructure and loss of personnel after the 2010 earthquake, the lack of sanitation and healthcare facilities within the internally displaced persons camps established around Port-au-Prince has been held to be one of the key factors in the rapid spread of cholera after it was allegedly introduced into the camps by UN peacekeepers. See: *From Relief to Recovery: Supporting good governance in post-earthquake Haiti*, Oxfam Briefing Paper 142, 6 January 2011, 10; M. Schuller, 'Haiti's Disaster after the Disaster: The IDP Camps and Cholera' (December 2010) *Journal of Humanitarian Assistance*, available at: <http://sites.tufts.edu/jha/archives/869> accessed 25 September 2013.
[15] See: Valencia-Ospina, *Preliminary report* (n.10) para.25-26. See also: D. Fidler, 'Disaster Relief and Governance after the Indian Ocean Tsunami: what role for International Law?' (2005) 6 *Melbourne Journal of International Law* 458, 471-472; D. Cubie, 'An Enchanted Tool? Humanitarian Assistance and the ILC Draft Articles on the Protection of Persons in the Event of Disasters' (2009-2010) IV-V *Irish Yearbook of International Law* 119, 150.

fundamental role in humanitarian responses to disasters and therefore in the protection of persons.[16] Finally, the fact that not all states have signed up to the relevant international human rights instruments can create practical problems, leaving gaps in the uniformity of the applicable framework and challenges for a systematic approach to the promotion of human rights in disaster settings. Therefore, the following sections will examine both substantive provisions already contained within international human rights texts and the operational application of human rights norms in disaster settings, and then what is meant by a "human rights-based approach" to humanitarian crises and the identification of appropriate accountability mechanisms.

i. Recognition of disasters in international human rights law

The range and extent of human rights implications of disasters were starkly highlighted in the recent International Development Law Organization manual on the international law and standards applicable in disasters, which covers judicial rights, civil and political rights, economic, social and cultural rights, as well as specific vulnerable groups such as children, the elderly and minorities.[17] Considering the potentially severe impacts on victims of disasters, the denial of human rights in a disaster setting may lead not only to violations of the right to an adequate standard of living, but potentially also the right to life. Indeed, over 30 years ago Peter Macalister-Smith noted the connection between the fundamental rights to food,[18] clothing,[19] adequate housing,[20] sanitation,[21] health and medical services,[22] and the supply of water[23] and an individual's inherent right to life in a disaster setting.[24] Moreover, as

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[16] See for example: CESCR, General Comment No.14 (n.12) para.42; *Protection of persons in the event of disasters*, Memorandum by the Secretariat, International Law Commission, 11 December 2007, A/CN.4/590, para.250; International Law Commission, Report of the International Law Commission, 2008, A/63/10, para.229, 231; Valencia-Ospina, *Preliminary Report* (n.10) para.56; C. Gould, 'The Right to Housing Recovery After Natural Disasters' (2009) 22 *Harvard Human Rights Journal* 169.

[17] E. Harper, *International Law and Standards Applicable in Natural Disaster Situations* (International Development Law Organization 2009).

[18] See: International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 11; Declaration of the Rights of the Child, UNGA Res 1386(XIV), 1959; Universal Declaration on the Eradication of Hunger and Malnutrition, UNGA Res 3348(XXIX), 1974, para.1; Food and Agricultural Problems, UNGA Res 39/166, 1984, Principle 6.

[19] See: Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 25; ICESCR, art 11.

[20] ICESCR, ibid art 11.

[21] ibid.

[22] ibid, art 12.

[23] Convention on the Elimination of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), art 14(2)(h).

[24] P. Macalister-Smith, 'Human Rights and Disaster Relief' (1980) 5 *Holdsworth Law Review* 173. For a recent analysis of the rights applicable in the context of internal displacement, see: Fisher, 'The Right to

highlighted in the 2006 IASC Operational Guidelines on Human Rights and Natural Disasters, numerous human rights violations can occur as a result of humanitarian operations, including: unequal access to assistance; discrimination in aid provision; enforced relocation; sexual and gender-based violence; loss of documentation; recruitment of children into fighting forces; unsafe or involuntary return or resettlement; and issues of property restitution.[25]

So although the specific situation of natural and human-made disasters is not referenced in the International Bill of Rights,[26] an individual's right to the basic necessities of survival is clearly covered by international human rights law, with Article 22 of the Universal Declaration of Human Rights highlighting not only an individual's entitlement but also the duty of international cooperation required for the realisation of economic, social and cultural rights "indispensable for … dignity."[27] There are also a number of specific references to natural or human-made disasters in both binding and non-binding international human rights texts. For example, the UN General Assembly Resolution[28] that introduced the Convention on the Rights of the Child,[29] the most widely ratified multilateral treaty, called for urgent and effective national and international action due to the critical situation of children resulting from, inter alia, natural disasters. This built on the 1959 UN Declaration on the Rights of the Child, a precursor to the 1989 Convention, which stressed the importance of ensuring children were provided with protection and relief.[30] Meanwhile, the UN Convention on the Rights of Persons with Disabilities uniquely provides an operative article explicitly recognising the vulnerability of persons with disabilities in disasters:

> *States Parties shall take*, in accordance with their obligations under international law, including international humanitarian law and international human rights law, *all*

Humanitarian Assistance' (n.7) 51-52. See also: D. Fisher, 'Legal Implementation of Human Rights Obligations to Prevent Displacement Due to Natural Disasters', in particular 554-557, in the same volume.

[25] Inter-Agency Standing Committee, *Protecting Persons Affected by Natural Disasters: IASC Operational Guidelines on Human Rights and Natural Disasters*, June 2006, 8.

[26] See generally: UNHCHR, Fact Sheet No.2 (Rev.1), *The International Bill of Human Rights*, last updated 16 January 2013. Available at: <www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> accessed 25 September 2013.

[27] UDHR (n.19) art 22. For general discussion, see: M. Salomon, *Is There a Legal Duty to Address World Poverty?*, Robert Schuman Centre for Advanced Studies Policy Paper 2012/03 (European University Institute 2012).

[28] UNGA Res 44/25, 12 December 1989.

[29] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

[30] Declaration of the Rights of the Child (n.18) art 8.

> *necessary measures* to ensure the protection and safety of persons with disabilities in situations of risk, including … the occurrence of natural disasters.[31]

Similarly, at the regional level, the Preamble to the African Charter on the Rights and Welfare of the Child[32] contains wording similar to the Preamble of UNGA Resolution 44/25, while Article 23(4) expressly states that the provisions on refugee children apply equally to children displaced internally due to natural disasters. Furthermore, Article 25(2)(b) places obligations on state parties to take "all necessary measures" to trace and reunite families of separated children, including separation caused by internal and external displacement arising from natural disasters.

The UN General Assembly has also highlighted the specific risks posed to persons with HIV/AIDS in disaster settings. Resolution S-26/2[33] noted that armed conflicts and natural disasters exacerbate the spread of the HIV/AIDS epidemic, and called on governments to implement national strategies that incorporate HIV/AIDS awareness, prevention, care and treatment elements into programmes that respond to emergency situations. The Resolution also called on UN agencies to urgently incorporate such elements into their emergency response plans and programmes and to provide HIV/AIDS awareness and training to their personnel. Nevertheless, although both the UN Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child have made reference to disasters in their General Comments on the rights to housing,[34] food,[35] health,[36] water,[37] and HIV/AIDS and children,[38] none examine the issue of human rights in disasters in a systematic manner, and generally only refer to victims of disasters and those living in disaster-prone areas as part of a list of particularly vulnerable persons.[39] Likewise, while various UN human rights monitoring bodies have examined the human rights implications

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[31] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art 11 [emphasis added].
[32] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (adopted 11 July 1990, entered into force 29 November 1999).
[33] Declaration of Commitment on HIV/AIDS, UNGA Res S-26/2, 27 June 2001.
[34] CESCR General Comment No.4: *The right to adequate housing* (13 December 1991), para.8, E/1992/23.
[35] CESCR General Comment No.12 (n.12) para.5, 6, 13, 15 and 38.
[36] CESCR General Comment No.14 (n.12) para.16, 40 and 65.
[37] CESCR General Comment No.15: *The right to water* (20 January 2003), para.16, 22, 34 and 60, E/C.12/2002/11.
[38] CRC General Comment No.3: *HIV/AIDS and the rights of the child* (17 March 2003), para.34, CRC/GC/2003/3.
[39] For empirical analysis of comments made by relevant UN human rights bodies on substantive human rights provisions in the context of disasters, see: D. Cubie and M. Hesselman, 'Monitoring and Accountability of the Human Rights Implications of Disasters: Proposals for Systemic International Oversight', currently under consideration by the *Netherlands Quarterly of Human Rights* (copy on file with authors). For discussion of the potential for increased engagement by the UN human rights bodies in the monitoring of human rights in disasters, see: Section D, Chapter 7.

of disasters in the context of individual state reports, to date there has been no systematic approach to the implementation of human rights law across the UN human rights monitoring bodies. Nevertheless, the March 2013 Human Rights Council Resolution 22/16[40] calling on the Advisory Committee to conduct research on best practices and challenges in the promotion and protection of human rights in post-disaster and post-conflict situations, with a focus on human rights mainstreaming in relief, recovery and reconstruction efforts, may provide a valuable opportunity to consolidate the work already conducted on the issue by the competent UN bodies and mechanisms.

ii. A hierarchy of rights?

The paucity of explicit provisions in international human rights law has led to confusion as to the appropriate weight and status of human rights provisions in disaster response operations. In January 2011, the UN Inter-Agency Standing Committee (IASC) published an updated version of their Operational Guidelines on the Protection of Persons in Situations of Natural Disasters[41] to provide practical advice to humanitarian agencies on implementing human rights-based approaches to humanitarian assistance following natural disasters. As one of the key inter-agency forums for humanitarian agencies, encompassing both inter-governmental and non-governmental organisations, the IASC and its (albeit non-binding) policy approaches must be viewed as particularly authoritative. The 2011 version of the Operational Guidelines followed the original iteration from 2006, and supplemental Field Manual of 2008.[42] While providing express recognition of the human rights implications of disasters, it is of note that the 2006 and 2008 publications originally posited a hierarchy of rights, stating that priority during the initial emergency phase of a disaster should be given to the rights to physical security, integrity, and basic necessities of life, over and above other economic, social, cultural, civil or political rights.[43]

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[40] UNHRC Res 22/16, *Promotion and protection of human rights in post-disaster and post-conflict situations*, 18 March 2013, A/HRC/22/L.23.
[41] IASC, *Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*, Brookings-Bern Project on Internal Displacement, January 2011 (hereinafter "the Operational Guidelines"). See also: Section B(ii), Chapter 5.
[42] IASC, *Operational Guidelines 2006* (n.25); IASC, *Human Rights and Natural Disasters: Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster*, (pilot version) March 2008.
[43] *Operational Guidelines and Field Manual 2008*, ibid 7-8.

This hierarchy was ultimately rejected in the 2011 Operational Guidelines which stress that all human rights are universal, indivisible, interdependent and interrelated,[44] and proceed by noting that: "The structure of these Guidelines … does not suggest any hierarchy among relevant rights but rather helps to quickly identify those rights that are primarily relevant during a given phase of a disaster." It is now simply suggested that users may want to limit themselves to consulting the rights in the first two chapters (A and B) during the emergency phase of an operation, before turning to other sections of the Guidelines later.[45] Reflecting this operational stance, the Guidelines set out four categories of human rights applicable in natural disaster settings:

A. Rights related to protection of life; security and physical integrity; and the protection of family ties in the context of evacuations.
B. Rights related to the provision of food; health; shelter; and education.
C. Rights related to housing, land and property; and livelihoods.
D. Rights related to documentation; free movement in the context of durable solutions for IDPs; re-establishment of family ties; expression and opinion; and elections.

Yet despite references to other non-binding normative standards for humanitarian assistance, the Operational Guidelines have been criticised for both a responsibility gap and a participation gap.[46] As with many non-binding normative standards, there is no accountability or compliance mechanism built into the Operational Guidelines, so while they are intended to provide concrete guidance to humanitarian staff, it is not possible to verify whether or not agencies are abiding by the principles laid down or how individuals affected by disasters can challenge or potentially make a claim against a specific humanitarian actor. Similar issues arise with the Sphere Handbook's Humanitarian Charter and Minimum Standards, which are explicitly based on the right to life with dignity, and are likewise seen as a key non-binding normative standard by both humanitarian agencies and state officials.[47] So despite the avowed aim of supporting human rights-based approaches to disasters in such

[44] The 2011 Operational Guidelines reference the World Conference on Human Rights *Vienna Declaration and Programme of Action*, A/CONF.157/23, 12 July 1993, in this regard but it is unclear what debate occurred internally within the IASC to prompt the shift away from an explicit hierarchy of rights.
[45] IASC, *Operational Guidelines 2011* (n.41) 9-10. Arguably, such an approach reflects the reality of emergency operations, whereby various types of protection and assistance need to be provided or prioritised at different phases of the response.
[46] E. Ferris and D. Paul, 'Protection in Natural Disasters', paper submitted to *Protecting people in conflict and crisis: Responding to the challenges of a changing world*, Refugee Studies Centre, University of Oxford, 22-24 September 2009, 36.
[47] Sphere Project, *Humanitarian Charter and Minimum Standards in Humanitarian Response*, April 2011, 4-5.

texts, there remains considerable leeway for debate as to what a human rights-based approach entails in practice.

iii. Human rights-based approaches to disaster preparedness and response

As is widely recognised, those most vulnerable in society are most likely to be negatively impacted by natural or human-made disasters.[48] Terry Cannon has identified five inter-related components to an individual's vulnerability to natural hazards, namely: livelihood strength and resilience; well-being and base-line status; self-protection; social protection; and governance.[49] Such an approach reflects the universal and interconnected nature of human rights, from civil and political rights to economic, social and cultural rights. Yet the limitations of progressive realisation built into many economic, social and cultural rights raises specific questions regarding their justiciability and individual applicability in disaster settings.[50] Indeed, the Commentaries to the International Law Commission's draft articles on the protection of persons in the event of disasters stress: "it [is] understood that some of the relevant rights are economic and social rights, which states have an obligation to ensure progressively. As such, the present formula of 'with full respect for' was accepted as being more neutral, but nonetheless carries an active connotation of the rights being 'fully' respected."[51]

So considering the human suffering caused by natural and human-made disasters, one can argue that a human rights-based approach to disaster preparedness and response is one that ensures individuals and communities are placed at the centre of any legal framework for protection. Crucially, human rights-based approaches examine both obligations of conduct and of result, to ensure that states actually devote the necessary resources and effort into

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[48] See for example: Sirkin, 'The Debacle of Hurricane Katrina' (n.1).

[49] T. Cannon, 'Reducing People's Vulnerability to Natural Hazards: Communities and Resilience', United Nations University, World Institute for Development Economic Research, Research Paper No.2008/34, April 2008, 2-3. The fundamental role that governance plays was highlighted in the official inquiry into the 2011 Fukushima nuclear melt-down, which concluded that the disaster was exacerbated by human actions and inactions. See: The National Diet of Japan, *Official Report of the Fukushima Nuclear Accident Independent Investigation Commission*, Executive Summary, July 2012, 26.

[50] See: M. Dennis and D. Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?' (2004) 98 *American Journal of International Law* 462; R. Barber, 'Protecting the Right to Housing in the Aftermath of Natural Disaster: Standards in International Human Rights Law' (2008) 20(3) *International Journal of Refugee Law* 432, in particular 434-441; Gould, 'The Right to Housing' (n.16).

[51] Commentary on draft article 2: Purpose. For text of the ILC Commentaries on draft articles 1-5, see: Official Records of the General Assembly, Sixty-fifth Session, *Supplement No.10* (A/65/10), Chapter VII, p.323.

complying with their international human rights obligations.[52] While a state may not be responsible for the disaster event itself, such as an earthquake or cyclone, their preparations for such risks and responses to them will engage their direct responsibility.[53] So although a state's obligation to commit the maximum available resources to socio-economic rights can be sorely stretched in the case of a major natural or human-made disaster, its obligations of conduct to provide support and assistance to those affected are absolute, even in the context of a developing country with limited resources, and requires states to continuously reassess their strategies for optimum protection – including the potential necessity of external assistance.[54] For example, the conduct of the Myanmar authorities in denying access to external humanitarian agencies offering their services after the devastating Cyclone Nargis in 2008 was arguably in breach of international human rights law, not least the non-derogable right to life.[55] As highlighted by the UN Human Rights Committee back in 1982: "the right to life [is] too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures."[56]

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[52] See: *Towards Freedom from Fear and Want: Human Rights in the Post-2015 Agenda*, Thematic Think Piece, Office of the High Commissioner for Human Rights, May 2012, produced for the UN System Task Team on the Post-2015 UN Development Agenda, 9. The human rights obligations of non-state humanitarian actors is outside the scope of this thesis, but it should be noted that many non-governmental organisations profess to follow human rights-based approaches, and support the promotion of human rights norms such as through the Sphere Handbook. See: Section A(i), Chapter 3.

[53] This thesis focuses specifically on the accountability of states towards individuals for their actions and inactions in preparation for and response to major natural and human-made disasters, rather than the general law of responsibility of states and international organisations. For discussion of the evolving nature of state responsibilities based on the twin functions of reparation for injury and protection of the rule of law and global order, see: A. Nollkaemper, 'Constitutionalization and the Unity of the Law of International Responsibility' (2009) 16 *Indiana Journal of Global Legal Studies* 535. See also: J. Brunnée, 'International Legal Accountability through the Lens of the Law of State Responsibility' (2005) 36 *Netherlands Yearbook of International Law* 21.

[54] While not expressly following a human rights-based approach to disaster preparedness and response, the work of the Red Cross Movement in analysing national legal and institutional mechanisms is intended to assist states in assessing the extent and limitations of their preparedness and response capacities. See for example: British Institute of International and Comparative Law (BIICL), *Analysis of Law in the United Kingdom pertaining to Cross-Border Disaster Relief*, British Red Cross (London June 2010); *Legal Aspects of International Disaster Response in Dutch Emergencies and Crisis Situations*, The Netherlands Red Cross (The Hague 2010).

[55] One can even argue this denial of access constituted a crime against humanity, see: 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' (2009-2010) 38 *Denver Journal of International Law and Policy* 227. Of note, debate around the inadequate response primarily focused on the Responsibility to Protect doctrine, rather than on the law of state responsibility, despite the fact that all states may invoke the responsibility of a state that violates a *jus cogens* norm, such as the obligation to protect fundamental human rights "not because their subjective rights are affected or because they would suffer legal injury, but because they are empowered to enforce the interest of the international community," Nollkaemper (n.53) 548.

[56] UN Human Rights Committee, General Comment No.6, *Article 6 (Right to life)*, Sixteenth session (1982), para.5. For discussion of states' international obligations under human rights law, see: D. Fisher,

Yet in the face of a major disaster it can be hard for any government to provide sufficient support to all those affected, as witnessed in the US after Hurricane Katrina.[57] So in view of the recognised difficulties of ensuring respect for human rights in the challenging context of a complex disaster operation, several non-binding texts provide guidance on the human rights implications that must be considered. For instance, a fundamental basis of the 2011 IASC Operational Guidelines[58] is its human rights-based approach, which stresses that those affected by disasters must be viewed as "individual rights-holders who can claim rights from particular duty-bearers rather than simply being passive beneficiaries and recipients of charity."[59] The Operational Guidelines take a strong stance in promoting rights-based approaches, covering preparedness as well as response activities, while consistently highlighting the primary responsibility of national authorities to respect the universality of human rights for persons affected by natural disasters.[60] Similarly, several other key non-binding initiatives such as the UN Guiding Principles on Internal Displacement,[61] the Sphere Handbook, and the HAP Standard in Accountability and Quality Management[62] advocate the promotion of accountability within the context of disaster responses. Therefore, it is necessary to examine the concept of accountability in humanitarian action in more detail, and to question how accountability mechanisms might assist in the implementation of human rights law in disaster settings.

iv. Accountability for disaster preparedness and response

Human rights-based approaches to disaster situations have a number of distinct advantages, in particular concerning the identification of rights and obligations of most direct relevance for affected individuals and communities. Basing preparations for and responses to major disasters on human rights ensures the applicability of the entire body of human rights norms and obligations, including a state's obligation to respect, protect and fulfil all human rights, the existence of non-derogable core obligations in emergency situations, and well-established

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'Domestic regulation of international humanitarian relief in disasters and armed conflict: a comparative analysis' (June 2007) 89(866) *International Review of the Red Cross* 345, 347-349.

[57] See for example: M. Medina, 'Confronting the Rights Deficit at Home: Is the Nation Prepared in the Aftermath of Katrina? Confronting the Myth of Efficiency' (2006-2007) 43 *California Western Law Review* 9.

[58] IASC, *Operational Guidelines 2011* (n.41).

[59] ibid 2. See also: IASC, *Human Rights Guidance Note for Humanitarian Co-ordinators*, June 2006.

[60] For more on the IASC Operational Guidelines and the Sphere Handbook, see: D. Cubie, 'An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?' (2011) 2 *Journal of International Humanitarian Legal Studies* 177, 200-203, 207-210.

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

[62] *The 2010 HAP Standard in Accountability and Quality Management*, HAP International (2nd edn, 2010).

principles of non-discrimination and protection of vulnerable groups.[63] Such obligations arguably also apply to the international community as whole.[64] For example, following the January 2010 earthquake in Haiti, the UN Human Rights Council called upon the international community to "continue to ensure adequate and coordinated support to the government and the people of Haiti in their efforts to overcome the challenges arising from the earthquake, *keeping in mind the importance of integrating a human-rights approach*."[65]

Another distinct advantage of applying and elaborating the human rights framework in disaster settings, as noted by the Office of the High Commissioner for Human Rights (OHCHR), is the focus on measurable and enforceable obligations through mechanisms of accountability.[66] The OHCHR argues that this focus on accountability helps strengthen political commitment, justifications for resource allocations, and improves incentives for the fair delivery of social services. Furthermore, such accountability mechanisms require:

> transparent, objective and public justification of policy choices, the identification of duties owed under international human rights standards, accountability mechanisms at the global and national levels (including administrative, political, judicial, quasi-judicial and independent national institutions…), and active benchmarking, monitoring and reporting on progress (or retrogression), thereby ensuring transparency and allowing for necessary adjustments in policies and programmes.[67]

This is particularly true if accountability is understood as encompassing: a) standards which shape expectations of behaviour; b) the existence of transparent avenues where information is made available, gathered and assessed about the actual and future conduct of responsibility

[63] See for example, Article 4(2) of the International Covenant on Civil and Political Rights, and the Human Rights Committee's General Comment No.29, *States of Emergency (Article 4),* (31 August 2001), para.5, CCPR/C/21/Rev.1/Add.11: "If States purport to invoke the right to derogate from the Covenant during … a natural catastrophe … or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation."

[64] Jutta Brunnée has noted that due to the relatively limited options for vindication of human rights abuses in international law, including the inaccessibility of the state responsibility regime set out in the ILC draft articles on the responsibility of states, "the ability of other states to hold a state that perpetrates human rights violations legally accountable thus assumes particular importance," see: Brunnée (n.53) 31-32.

[65] UNHRC Res A/HRC/S-13/2, 2 February 2010, para.1 [emphasis added]. For debate in the ILC and UNGA Sixth Committee surrounding whether third states have a legal obligation to provide assistance, see: Section B(iii)(b), Chapter 7.

[66] OHCHR, *Towards Freedom from Fear and Want* (n.52) 6-7. As noted by Bovens, the most concise description of accountability is "the obligation to explain and justify conduct." See: M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 447, 450. See also: D. Curtin and A. Nollkaemper, 'Conceptualizing Accountability in International and European Law' (2005) 36 *Netherlands Yearbook of International Law* 3 who note that "Accountability is a broad term that reflects a range of understandings rather than a single paradigm … What can be designated the original or 'core' sense of accountability is that associated with the process of being called 'to account' to some authority for one's actions" 4.

[67] OHCHR, ibid.

bearers in light of such standards; and c) the existence of sanctions, incentives, or redress mechanisms.[68] Moreover, if one considers that accountability mechanisms need not be purely legal in nature, but can be judicial, quasi-judicial, administrative, political and/or social[69] and perform both proscriptive and retrospective functions,[70] a range of options are presented whereby a human rights-based framework and accountability mechanisms can improve oversight and implementation of human rights norms in disaster situations. Indeed, the UN General Assembly recently recognised that accountability is "an integral part of effective humanitarian assistance" and emphasised the need to enhance the accountability of humanitarian actors at all stages of humanitarian assistance.[71]

Therefore, one can argue that elaborating and strengthening the application of international human rights law in the context of disaster situations not only advances norm setting and domestic recognition of the relevance and applicability of human rights standards in such settings,[72] but also opens up international mechanisms of human rights accountability and oversight in the context of disasters, such as the Universal Periodic Review process, state reporting, and individual and inter-state complaints mechanisms.[73] As Helen Potts has argued, human rights accountability processes require the incorporation of continuous monitoring into all aspects of policy development and implementation, while simultaneously promoting the involvement of non-governmental actors and civil society in this process.[74] While these processes take place in various formats at the international, regional and national level, arguably promoting accountability at the national level is of most direct relevance to those affected by a disaster.[75] Paul Hunt, the former UN Special Rapporteur on the Right to Health, has noted the procedural nature of accountability as a process that

[68] As elaborated in: A. Buchanan and R. Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20(4) *Ethics and International Affairs* 405, 426. For further discussion of the concept of accountability, see: H. Potts, *Accountability and the Right to the Highest Attainable Standards of Health*, Human Rights Centre, University of Essex (2008); M. Koenig-Archibugi, 'Accountability in Transnational Relations: How Distinctive Is It?' (2010) 33(5) *West European Politics* 1142.
[69] Potts, ibid 13, 17.
[70] In other words, accountability processes do not merely focus on assessment of conduct after the fact to obtain redress, but also allow for the internalisation of norms and adjustment of conduct through continued dialogue and policy (re)assessment, ibid 13; Curtin and Nollkaemper (n.66) 8.
[71] UNGA Res 67/87, 26 March 2013, A/RES/67/87, para.10.
[72] Public accountability following tragedies such as natural disasters can also play an important ritual, purifying function, thereby providing public catharsis, see: Bovens (n.68) 464.
[73] Reflecting the need for systemic approaches to international accountability, Curtin and Nollkaemper argue that models of accountability, such as human rights reporting and complaints mechanisms, which do not necessarily involve a formal determination of state responsibility or the imposition of remedies, are nevertheless themselves shaped by international law and subject to the system of international accountability, see: Curtin and Nollkaemper (n.66) 6.
[74] Potts, 'Accountability' (n.68) 5.
[75] ibid 17.

"helps to identify what works, so it can be repeated, and what does not, so it can be revised. It is a way of checking that reasonable balances are fairly struck."[76]

The need to clarify the exact rights and obligations at play in disaster settings is therefore evident, and as such norms are developed their applicability in actual disasters should become more routine and accepted both nationally and internationally. So while this thesis will highlight the specific contributions to be made by UN accountability mechanisms in disaster settings, the fundamental role played by regional and national accountability mechanisms in complementing such international processes must also be recognised. Focusing on international accountability is nevertheless justified due to the wide-spread international ramifications major disasters often have, for example via the involvement of international humanitarian actors or requests for international assistance, and the potential for internal and external displacement of large-numbers of persons. Furthermore, by mainstreaming the human rights implications of disasters into the UN human rights monitoring and accountability mechanisms, all states must equally explain the measures they have taken to prepare for and respond to disasters within their territory. Having now examined the human rights implications of disasters for individuals and groups affected, as well as the need for national and international accountability mechanisms, the following section will continue by analysing the practical implementation of human rights law in disaster settings.

B. Implementation of Human Rights Law in Disaster Settings

i. Classification of rights

Although human rights have classically been broken down into three generations of rights, in particular separating civil and political rights from economic, social and cultural rights,[77] an alternative method is to distinguish between rights claims regarding entitlements to resources and so-called liberty rights. Seyla Benhabib has defined claims to entitlements to resources as

[76] *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/HRC/7/11, 31 January 2008, para.99. For discussion of the internalisation of humanitarian norms into domestic legal systems, see: D. Cubie, 'Clarifying the "*Acquis Humanitaire*": A Transnational Legal Perspective on the Internalization of Humanitarian Norms', in *The International Law of Disaster Relief* (Cambridge University Press – forthcoming).

[77] See for example: P. Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78 *American Journal of International Law* 607; S. Marks, 'Emerging Human Rights: A New Generation for the 1980s?' (1980-1981) 33 *Rutgers Law Review* 435.

those entailing obligations on the part of others to act in a certain way and to provide certain material goods.[78] Meanwhile rights claims regarding liberties generate duties of forbearance, in other words rights which ensure that somebody else cannot oblige a person to act or not to act in a particular way. Benhabib continues by arguing that the notion of universalism of human rights is in fact an aspiration, rather than an accurate reflection of the world we live in, and therefore for individuals to have the 'right to have rights' requires political struggle, social movements and learning processes within and across groups and nations.[79] Hence in the face of growing acceptance that human needs following major natural and human-made disasters include more than simply food and medicine, and the increased agency of "beneficiaries" of humanitarian assistance,[80] it is necessary to analyse the role that human rights law and concepts can and should play in disaster settings.

While there is an increasing desire to link relief, rehabilitation and development activities on the ground, historically there has been a separation and polarisation between the contrasting aims and objectives of development assistance and humanitarian assistance. Joanne Macrae, a senior official in the UK Department for International Development (DFID), has noted that "development assistance was designed to build sustainable economic, social and political systems. In contrast, humanitarian assistance was designed to save the lives of individuals, and is not concerned with sustainability."[81] Ms Macrae argues that development assistance can be seen as a means of engaging with governments when they are perceived as legitimate and effective by donor states and humanitarian agencies; while humanitarian aid is a means of avoiding engagement with national governments, for example due to their status as one of the belligerents in an armed conflict. Such an approach to development and humanitarian assistance raises two key aspects: first, that humanitarian assistance is seen by donor countries as a means of assisting individuals in need, rather than support for the broader

[78] S. Benhabib, 'Is There a Human Right to Democracy? Beyond Interventionism and Indifference', in C. Corradetti (ed), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, (Springer: 2012) 195-196.

[79] ibid 197-198. Such an understanding of the process by which universal human rights are created parallels Blichner and Molander's description of "juridification as legal framing" as the process by which people increasingly tend to think of themselves and others as legal subjects. See: L.C. Blichner and A. Molander, *What is Juridification?*, Centre for European Studies, University of Oslo, Working Paper No.14, March 2005, 5. Available at: <https://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2005/wp05_14.pdf> accessed 25 September 2013.

[80] It would seem that Hugo Slim's warning in 1997 regarding the heresy that "the humanitarian imperative usually seems to relate solely to 'humanitarian assistance' – the minimum package of relief commodities which donor governments are prepared to allow as emergency aid" has generally been heeded, at least by humanitarian agencies. See: H. Slim, 'Relief agencies and moral standing in war: principles of humanity, neutrality, impartiality and solidarity' (November 1997) 7(4) *Development in Practice* 342, 346.

[81] See: J. Macrae, 'The Continuum is Dead: Long Live Resilience' (May 2012) 15 *VOICE Out Loud Newsletter* 8.

domestic policy aims of a recipient government. Secondly, there is the danger that a greater level of responsibility for the actual delivery of humanitarian assistance is seen to fall on external agencies rather than working with and through local and national structures already in place.[82]

Yet just as development and humanitarian assistance differ, so too are the responses and frameworks required in situations of natural and human-made disasters compared to armed conflict settings. Over 20 years ago UNGA Resolution 46/182 recognised that humanitarian responses and disaster prevention and mitigation efforts required affected states to take the primary role in the initiation, organisation, coordination, and implementation of humanitarian assistance within its territory.[83] Therefore, although the Geneva Conventions set out a range of explicit rights for civilian populations in war time, it is necessary when applying a human rights-based approach to humanitarian responses to determine what specific rights are applicable for victims of natural or human-made disasters. Furthermore, what are the implications of the necessary balancing between the rights set out in the International Covenant on Civil and Political Rights, including the right to life, and the progressive realisation allowed for other rights under the International Covenant on Economic, Social and Cultural Rights? Upendra Baxi has argued that the insistence on the universality, interdependence, indivisibility and inalienability of human rights makes judgments on the effectiveness of different rights regimes difficult and, at times, impossible.[84]

As a case in point, the boundaries and parameters of economic, social and cultural rights are constantly being questioned and challenged. This has led some authors to argue against the

[82] This attitude appears to be changing, with greater emphasis being placed on engagement of local and national disaster management structures, for example through the UN International Strategy for Disaster Reduction (ISDR) and the Hyogo Framework for Action 2005-2015. For background to the ISDR, see: L. Corredig, 'Effectiveness and Accountability of Disaster Risk Reduction Practices: An Analysis Through the Lens of Informal International Lawmaking', IFRC Disaster Law Working Paper Series No.2, February 2012. Conversely, see criticism of the lack of engagement with local actors in the review of the UN Cluster system: J. Steets *et al*, *Cluster Approach Evaluation 2: Synthesis Report*, April 2010, (independent report commissioned by the IASC), 9-10.

[83] *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, UNGA Res 46/182, 19 December 1991, Annex, Guiding Principle I.4.

[84] U. Baxi, 'Too Many, or Too Few, Human Rights?' (2001) 1 *Human Rights Law Review* 1, 3: "the constant endeavour to convert needs into rights, howsoever problematic, is the hallmark of contemporary human rights. But this makes difficult any serious judgment on efficiency and quality. To take but one large example, when certain sets of rights entail duties of here and now enforcement (as with the Covenant on Civil and Political Rights) and certain others are subject only to the regime of 'progressive' realisation (as with the Covenant on Social, Economic and Cultural Rights) how does one apply the four mantras in the evaluation of effectiveness of rights regimes?"

"overproduction" and "inflation" of rights,[85] while it is also argued that the current understanding and classification of human rights does not take into account the diversity of priorities and aspirations of different countries and cultures around the world.[86] Yet such claims are not new – ever since the conclusion of the Universal Declaration of Human Rights in 1948, academics, practitioners and governments have been debating and disagreeing over what claims of rights fall under the vaulted heading of "human rights." For example, in 1969 Richard Bilder argued that "it remains unclear what the criteria are for deciding whether a particular claim is a human right." He continued, "[i]n practice a claim is an international human right if the United Nations General Assembly says it is. But what definitional theory lies beyond the General Assembly's judgment?"[87] This fear of uncontrolled and ad hoc declarations of new human rights was highlighted by Philip Alston in 1984 when he argued for the UN system, and in particular the Secretary-General, Commission on Human Rights (as then was) and the General Assembly, to engage in a detailed procedure before proclaiming any new human right to ensure the appropriate "quality control" by the UN.[88] Writing at the same time, and in response to the power-based real politick promoted by the newly established Reagan administration, Anthony D'Amato conducted a forceful defence of the concept of human rights and their importance in the body of international law.[89]

Reflecting the increasing recognition of the role transnational legal processes play in developing international norms, one can argue that there has been a concomitant reduction in the role of the General Assembly (and other organs of the UN) in the process of determining and pronouncing the creation of new human rights. In the context of responses to natural and human-made disasters, non-state actors have been fundamental in advancing the understanding and operational practices for the provision of humanitarian assistance. The resulting transnational interactions and interpretations across and between the numerous humanitarian agencies and state authorities may not yet have led to the creation of a specific right to humanitarian assistance. Nevertheless, the increasing focus on the human rights implications of disasters and the application of human rights-based approaches to humanitarian programming have substantially advanced the international dialogue on the applicable normative standards. Therefore, it is important to now consider how the primary

[85] ibid. Philip Alston argued that human rights were being conjured up out of thin air in his 1984 article: Alston, 'Conjuring Up New Human Rights' (n.77).
[86] See: J.C. Mubangizi, 'Towards a new approach to the classification of human rights with specific reference to the African context' (2004) 4 *African Human Rights Law Journal* 93.
[87] R. Bilder, 'Rethinking International Human Rights: Some Basic Questions' (1969) *Wisconsin Law Review* 171, 173.
[88] Alston, 'Conjuring Up New Human Rights' (n.77).
[89] A. D'Amato, 'The Concept of Human Rights in International Law' (1982) 82 *Columbia Law Review* 1110.

UN agency responsible for the codification and progressive development of international law has tackled the question of human rights in disasters.

ii. Human rights and the ILC draft articles on the protection of persons in the event of disasters

While cognisant of the complexities involved in determining the limits of applicable human rights, in his Preliminary Report, the ILC Special Rapporteur Eduardo Valencia-Ospina, noted: "[t]he essence of a rights-based approach to protection and assistance is the identification of a specific standard of treatment to which the individual, the victim of a disaster … is entitled."[90] Having traced the evolution of rights-based approaches to development, the Special Rapporteur observed in his Second Report that: "[t]here is no stark opposition between needs and a rights-based approach to the protection of persons in the event of disasters. On the contrary, a reasonable, holistic approach to the topic seems to require that both rights and needs enter the equation, complementing each other when appropriate."[91] Reflecting this dual approach to needs and rights in disaster settings, the purpose of the draft articles is currently set out in draft article 2 as "to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights."[92] As explained in the Commentaries, "[t]he Commission was aware of the debate in the humanitarian assistance community on whether a 'rights-based', as opposed to the more traditional 'needs-based' approach was to be preferred, or vice versa. The prevailing sense of the Commission was that the two approaches were not necessarily mutually exclusive, but were best viewed as being complementary."[93]

Having established the applicability of rights in disaster settings, the draft articles then expand on this, setting out two connected articles specifically covering human dignity and human rights.[94] Draft article 7 provides that states and relevant humanitarian organisations shall "respect and protect the inherent dignity of the human person" – which the Commission reaffirms as the core principle that informs and underpins international human

[90] Valencia-Ospina, *Preliminary Report* (n.10) para.12.
[91] E. Valencia-Ospina, *Second Report*, 7 May 2009, A/CN.4/615, para.17. For empirical research into the different forms of rights-based approaches undertaken by developmental non-governmental organisations, see: E. Harris-Curtis, O. Marleyn and O. Bakewell, *The Implications for Northern NGOs of Adopting Rights-Based Approaches*, INTRAC Occasional Papers Series No.41, November 2005, in particular 11-17.
[92] For text of draft articles 1-5, see: A/CN.4/L.758, 24 July 2009.
[93] For text of the Commentaries on draft articles 1-5, see: Official Records of the General Assembly, Sixty-fifth Session, *Supplement No.10* (A/65/10), Chapter VII, 323.
[94] For text of draft articles 6-9, see: A/CN.4/L.776, 14 July 2010.

rights law, and one that connotes both positive and negative obligations on states and humanitarian actors.[95] As explained by the Chairperson of the Drafting Committee, the phrase "inherent dignity of the human person" is intended to reflect the wording in Article 10(1) of the ICCPR which reads: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[96] The inclusion of a specific draft article on human dignity provides a clear correlation between the underlying motivation behind humanitarian responses to crises, namely to alleviate human suffering, with the well-established international legal human rights framework.[97]

Draft article 8 therefore reaffirms that "persons affected by disasters are entitled to respect for their human rights." This deceptively simple article masks the range of issues raised. First of all, the Commentaries highlight that the general reference to human rights covers both obligations expressed in relevant international agreements and customary international law, as well as best practices for the protection of human rights in international non-binding texts.[98] This reference to best practices, as opposed to binding legal norms, raises interesting questions regarding the systemic interpretation of international law, and also its connections to the ILC's work on the fragmentation of international law.[99] Indeed, it appears that the ILC is keen to expressly link the draft articles to the broad body of international law and practice on humanitarian responses to natural and human-made disasters including a wide range of non-binding normative standards. The extent of progressive development of the law, as opposed to codification of existing international law, is therefore unclear and the exact legal

[95] For text of the Commentaries on draft articles 6-11, see: Official Records of the General Assembly, Sixty-sixth Session, *Supplement No.10* (A/66/10), Chapter IX, p.255. See also: C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655.
[96] See: *Statement of the Chairperson of the Drafting Committee*, Protection of Persons in the Event of Disasters, 20 July 2010, 6.
[97] As argued by Conor O'Mahony: "the concept of human dignity as employed in international human rights law … involves both descriptive and normative elements. It is a descriptive statement (i.e. every human being has an inherent human dignity by virtue of his or her humanity, irrespective of external characteristics) which entails a normative corollary (i.e. that every human being, because of his or her inherent human dignity, should be afforded human rights on the basis of equal treatment and respect)." See: C. O'Mahony, 'There is no such thing as a right to dignity' (2012) 10(2) *International Journal of Constitutional Law* 551, 563.
[98] Commentaries draft articles 6-11 (n.95). For examination of relevant international non-binding texts, see Cubie, 'Analysis of Soft law' (n.60).
[99] See for example: *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006. See also: M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553; C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (April 2005) 54(2) *International and Comparative Law Quarterly* 279.

obligations for duty-bearers in disaster settings requires further elaboration.[100] The Commission was also keen to point out that a general reference to human rights, rather than an enumeration of the applicable rights, was intended to ensure that all human rights obligations applicable to states were included.[101] Furthermore, the Commentaries highlight that reference to human rights encompasses both the substantive provisions of international human rights law as well as applicable derogations.[102] Finally, the Commentaries note the differential rights and responsibilities that various state and non-state actors may face in a disaster setting, from affected, donor and transit states to relevant inter-governmental and non-governmental actors.

The unambiguous focus on both human dignity and human rights in the ILC draft articles as they currently stand highlights the overwhelming recognition that potentially serious human rights implications for individuals and communities arise from natural and human-made disasters, while the Commentaries reinforce the interconnections between the draft articles and the broad body of existing international human rights law. Yet the ILC draft articles have not yet been concluded, and it is possible that changes will still be made to both the articles and the Commentaries before they are finalised. Critical comments in the UN General Assembly Sixth Committee while examining these specific articles underline the potential risks of dilution should the draft articles be sent forward to a diplomatic conference for conclusion as a multi-lateral treaty.[103] Against this backdrop, it is beneficial to examine the limitations of effective enforcement of human rights law for individuals affected by disasters and the role that promoting domestic compliance with human rights law within states may play.

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[100] For discussion of the ILC draft articles in general, and the balance between codification and progressive development, see: Sections A and B, Chapter 7.

[101] See: *Statement of the Chairman of the Drafting Committee*, Protection of Persons in the Event of Disasters, 20 July 2010: "Draft article 8 is … included in the draft articles as a general indication of the existence of human rights obligations, without seeking to specify what those obligations are, nor seeking to add to or qualify such obligations," 9.

[102] For discussion of derogations in times of emergency, see: S. Joseph, 'Human Rights Committee: General Comment 29' (2002) 2(1) *Human Rights Law Review* 81.

[103] See for example comments made by government representatives during the 2010 sessions from: Hungary (A/C.6/65/SR.22, para.33 – concerning human dignity); Greece (A/C.6/65/SR.22, para.52 – arguing that draft Article 8 was of doubtful usefulness); China (A/C.6/65/SR.22, para.64 – highlighting the need for flexibility and the applicability of derogations to international legal instruments); the Russian Federation (A/C.6/65/SR.23, para.57 – regarding a state's right to suspend certain human rights in emergency situations).

C. Juridification of Disaster Settings

i. Enforcement of human rights law by individuals

One of the key advances in the development of international human rights law has been the increased availability of individual enforcement and complaint mechanisms. So in addition to juridification within a national, regional or transnational legal order or evolving legal order, Blichner and Molander have argued that juridification as legal framing can be seen as the process whereby people increasingly tend to think of themselves and others as legal subjects.[104] Such an approach can be useful in examining the impact of human rights law in the context of disasters. Do victims of disasters view themselves as legal actors who have enforceable legal rights to humanitarian assistance, or are legal considerations the least of their concerns in the immediate aftermath of a major disaster? Furthermore, is there a cultural or geographical bias to those victims who do view themselves as entitled to the fulfilment of their human rights in a disaster?[105]

However, any examination of the human rights implications of disasters has to confront both philosophical and practical questions of how a rights-holder can claim a specific right, and against which duty-bearer such a claim can be made. For example, if an individual's right to adequate housing remains unfulfilled months after a major disaster, who can they take a case against? The national government, the United Nations, donor countries, humanitarian agencies, none of the above?[106] The invocation of the Convention on Privileges and Immunities of the United Nations by the UN Secretary-General to avoid potential compensation claims against the UN for the alleged introduction of cholera by UN peacekeepers following the Haiti earthquake is a stark reminder of the challenges victims face

[104] Blichner and Molander, *What is Juridification?* (n.79). See also: Section C(iii), Chapter 1.

[105] For description of the differential impact of Hurricane Katrina on low income minorities in New Orleans, see: Medina, 'Confronting the Rights Deficit' (n.57). Furthermore, reflecting the proportionally heavy losses in life and property faced by low-income African Americans, the Committee against Racial Discrimination (CRD) monitoring the International Convention on the Elimination of all forms of Racial Discrimination expressed its concern over the US authorities' slow and inadequate protection of the right to housing after the hurricane. See: CERD, Concluding Observations United States of America, 2008, CERD/C/USA/CO/6, para.31.

[106] For examples of some of the challenges in organising domestic legal empowerment in a post-disaster setting, see: M. Jagannath, N. Phillips and J. Shah, 'A Rights-Based Approach to Lawyering: Legal Empowerment as an Alternative to Legal Aid in Post-Disaster Haiti' (2011-2012) 10 *Northwestern Journal of International Human Rights* 7. For challenges relating to housing in post-disaster settings, see: Barber, 'Protecting the Right to Housing' (n.50); Gould, 'The Right to Housing' (n.16).

in seeking redress.[107] Even countries with highly developed legal systems and domestic human rights protections have struggled to ensure the rights of those affected by major disasters,[108] although regional mechanisms such as the European Court of Human Rights (ECtHR) can provide an additional avenue for domestic accountability and redress for human rights violations resulting from disasters.

Indeed, the European Court of Human Rights presents the classic example of a regional tribunal which has allowed individuals to pursue international judicial proceedings to challenge breaches of their rights at the national level.[109] Furthermore, the internalisation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[110] into the domestic law of the member states of the Council of Europe allows for the enforcement of international human rights norms set out in the ECHR at the domestic level.[111] This internalisation takes place both through the proactive incorporation of the ECHR into domestic law, and through the binding requirement to give effect to interpretations of the ECHR provided by the European Court of Human Rights in cases addressed to a specific state.[112]

Nevertheless, although cases before the ECtHR have ranged from an examination of the right to freedom of expression to say that natural disasters are a punishment from God,[113] to the right of access to justice and an effective remedy for workers involved in the clean-up operation following the Chernobyl nuclear disaster,[114] in reality only a small proportion of

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[107] *UN rejects Haiti cholera compensation claims*, BBC News Online, 21 February 2013, available at: <www.bbc.co.uk/news/world-latin-america-21542842> accessed 25 September 2013. See also: Schuller, 'Haiti's Disaster after the Disaster' (n.14). For discussion of the ILC draft articles on the Responsibility of International Organizations and the UN's general reluctance to accept attribution of responsibility, see: P.J. Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?' (2010) 7 *International Organizations Law Review* 9, 20-21.

[108] See for example: Sirkin, 'The Debacle of Hurricane Katrina' (n.1).

[109] Article 34, ECHR, states: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto."

[110] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

[111] S. Jensen and A. Rodriguez-Vergara Diaz, 'The European Convention on Human Rights in Domestic Law: A Comparative Study of the Convention's Position in Denmark and Spain' (1994) 63 *Nordic Journal of international Law* 139. See also: H. Koh, 'Bringing International Law Home' (1998-1999) 35 *Houston Law Review* 623, 670-674 for description of the ECHR's incorporation into UK law.

[112] ECHR (n.110) art 46. See also: R. Higgins, 'The Relationship Between International and Regional Human Rights Norms and Domestic Law' (1992) 18 *Commonwealth Law Bulletin* 1268.

[113] See: *Kutlular v. Turkey*, Application 73715/01, judgement of 29 April 2008; *Nur Radio Ve Televizyon Yayinciligi A.S. v. Turkey*, Application 6587/03, judgement of 27 November 2007.

[114] There have been a total of 35 cases from both Russia and the Ukraine relating to aspects of the Chernobyl nuclear disaster. See for example: *Burdov v. Russia (No.2)*, Application 33509/04, judgement of

persons affected by a major disaster will be in a position to pursue such a legalistic, lengthy and expensive search for a remedy. However, the European Court's expanding analysis of a state's responsibility to undertake preventive measures to reduce the risk of disasters occurring[115] and emerging jurisprudence on disaster prevention, preparation and response may help guide states' future actions to reduce human rights violations. Similarly, the African Union's Convention for the Protection and Assistance of Internally Displaced Persons in Africa provides some of the most explicit multilateral treaty provisions concerning the rights and obligations of states and certain non-state actors to provide protection and humanitarian assistance.[116] State parties to the Convention have provided explicit commitments to "take measures to protect and assist persons who have been internally displaced due to natural or human made disasters"[117] and to "ensure assistance to internally displaced persons by meeting their basic needs as well as allowing and facilitating rapid and unimpeded access by humanitarian organizations and personnel."[118] However, the Convention does not proscribe or propose any monitoring or individual compliance mechanisms to allow enforcement of such provisions, beyond the requirement for state parties to incorporate their obligations under the Convention into their domestic legal systems.[119] This highlights the reluctance of states to subject themselves to specific individual complaints mechanisms, and the potentially insurmountable difficulties an individual may face in accessing their rights in the confusing and complex aftermath of a disaster.

While a member of the UN Commission on Human Rights, Rosalyn Higgins argued that the key difference in approach taken by the UK judiciary to rights set out in the ECHR and those set out in the ICCPR was that the right to individual complaint in the ECHR meant that the UK judiciary had to be aware of ECHR rights as the European Court could make findings

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15 January 2009; *Derkach and Palek v. Ukraine*, Applications 34297/02, 39574/02, judgement of 21 December 2004; *Davletkhanov and other 'Chernobyl pensioners' v. Russia*, Applications 7182/03, 10115/04, 21752/04, 22963/04, judgement of 23 September 2010.

[115] *Öneryildiz v. Turkey*, Application 48939/99, judgment of 30 November 2004; *Budayeva and others v. Russia*, Applications 15339/02, 2116602, 20058/02, 11673/02 and 15343/02, judgment of 20 March 2008. See also: W. Kälin and C.H. Dale, 'Disaster risk mitigation – why human rights matter' (October 2008) 31 *Forced Migration Review* 38.

[116] African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention") (adopted 22 October 2009, entered into force 6 December 2012). For discussion see: S. Ojeda, 'The Kampala Convention on Internally Displaced Persons: Some International Humanitarian Law Aspects' (2010) 29(3) *Refugee Survey Quarterly* 58; F. Giustiniani, 'New Hopes and Challenges for the Protection of IDPs in Africa: The Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa' (2010-2011) 39 *Denver Journal of International Law and Policy* 347.

[117] Kampala Convention, ibid art 5(4).

[118] ibid art 3(1)(j).

[119] ibid art 3(2)(a).

against the UK.[120] Professor Higgins made these arguments in 1992, before the incorporation of the ECHR into UK domestic law and reform of the ICCPR individual complaints mechanisms, yet they highlight the importance of the internalisation of international norms for the domestic application of international human rights law. In the absence of effective individual enforcement mechanisms, such as the ECHR, individuals whose rights have been breached under international human rights law may not be able to obtain either domestic or international redress.[121] However, internalisation of international norms does not only imply the creation of judicial avenues of redress. As noted by Harold Koh, bureaucratic compliance procedures within government structures are also used to ensure that policies and practices at the national level are consistent with international norms.[122] Indeed, in the context of emergency humanitarian responses to major disasters, the utility of court-centred individual enforcement mechanisms such as the ECHR may be limited.[123] It is unrealistic to expect an individual in the immediate aftermath of a disaster who feels their rights are being breached due to a lack of humanitarian assistance to be in a position to take a judicial case.[124] The possibility of using a court-based approach may be more realistic in a pre-disaster scenario when an individual or community is pushing for disaster risk reduction or prevention actions to be taken by a state. The responsibility of a state to take preventative measures was one of the key issues examined in the *Öneryildiz* and *Budayeva* cases in the ECHR,[125] although both cases were only brought after the disastrous event had already occurred. Yet the cost and length of time court cases generally take precludes them as an option for vulnerable individuals and communities who face the greatest risks from natural and human-made disasters. Therefore, would a process of mediation or conciliation between individuals affected by disasters and the state and non-state humanitarian actors involved in

[120] Higgins, 'Human Rights Norms and Domestic Law' (n.112) 1269.
[121] For discussion of individual complaints mechanisms, see: A. Vandenbogaerde and W. Vandenhole, 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An Ex Ante Assessment of its Effectiveness in Light of the Drafting Process' (2010) 2 *Human Rights Law Review* 207.
[122] Koh, 'Bringing International Law Home' (n.111) 651-653.
[123] It is possible inter-state judicial actions could be considered, for example before the ICJ, but such cases would be exceptional and face the same drawbacks as individual court actions. For example, it is arguable that the transboundary threats from the 2008 cholera epidemic in Zimbabwe (as infected people and water crossed into Botswana, Mozambique, South Africa and Zambia) could have led to international cases under state responsibility rules. See: S. Davies, 'Is There an International Duty to Protect Persons in the Event of an Epidemic?' (Spring 2010) III(2) *Global Health Governance*. However, senior members of the ICJ have voiced concern over the potential fragmentation of international law resulting from the proliferation of international tribunals and judicial mechanisms, see: Koskenniemi and Leino, 'Fragmentation of International Law?' (n.99).
[124] For discussion in the context of Haiti, see: Jagannath et al, 'Rights-Based Approach to Lawyering' (n.106) 11-12.
[125] *Öneryildiz v. Turkey* (n.115); *Budayeva and others v. Russia* (n.115).

humanitarian action at all stages of the disaster cycle be a more appropriate method of ensuring that individuals receive the support and assistance they require?

This was the exact question underlying the concept of a "Humanitarian Assistance Ombudsman" in the late 1990s. The Humanitarian Ombudsman was intended to be an "impartial and independent voice for those affected by disaster and conflict in order to strengthen the accountability of the international humanitarian system and to facilitate improved performance."[126] Led by the British Red Cross, the Humanitarian Ombudsman Project was well aware of the potential difficulties it faced, not least in securing compliance:

> Finding a consensus on interpreting codes and standards will no-doubt present big challenges as different agencies … may interpret the [RCRC] Code of Conduct differently according to their own values and the political and ethical context in question. The Ombudsman would examine the potential for identifying a more regulatory approach so that *sanctions may be used* if facilitation does not affect the required changes in practice.[127]

The project's aim was to research the feasibility of establishing a Humanitarian Ombudsman to act as an independent, impartial body to regulate NGO activities in humanitarian emergencies. Nevertheless, the research mandate was broad and included not just mechanisms to deal with organisations' failures to comply with relevant legal obligations or codes of practice, but also mechanisms to investigate grievances from beneficiaries. However, due to resistance from humanitarian agencies, and recognition that ombudsmen structures work best when there are well-established public services and an accountable judicial system, the Humanitarian Ombudsman Project evolved into the Humanitarian Accountability Partnership (HAP) – a self-regulatory body for humanitarian NGOs which promotes accountability through monitoring compliance to specific standards and the provision of technical support to member agencies.[128] Crucially, the right to investigate grievances from beneficiaries was an aspect of the project that did not proceed. So while initiatives such as the Humanitarian Accountability Partnership, the RCRC Code of Conduct and the Sphere Handbook have helped to improve the professionalism of humanitarian agencies and have

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[126] 'Ombudsman for Humanitarian Accountability Update' (December 1999) 6 *Forced Migration Review* 43.
[127] D. Doane, 'An Ombudsman for Humanitarian Assistance?' (November 1998) 12 *Humanitarian Exchange Magazine* [emphasis added]. See also: D. Peppiatt, 'The Ombudsman Project: pilot project to investigate the concept of an Ombudsman for humanitarian assistance' (November 1997) 9 *Humanitarian Exchange Magazine*.
[128] For background to the project, see: <www.hapinternational.org/about/history.aspx> accessed 25 September 2013. The *HAP Standard in Accountability and Quality Management* (n.62) details how humanitarian agencies can establish accountability mechanisms and processes to deliver appropriate programmes for people affected by disasters and conflict.

highlighted the need for normative and rights-based approaches to humanitarian action, there is no question of individual enforcement of the rights contained in such non-binding texts. Despite references to "sanctions" in the original conception of the Humanitarian Ombudsman, recent attempts to improve accountability towards individuals in disaster settings, such as HAP or the Communicating with Disaster Affected Communities (CDAC) network,[129] are premised on improving accountability to disaster affected *communities*, rather than *individual enforcement* of human rights norms.[130]

ii. Promoting compliance with human rights law within states

It is well-recognised that an affected state has the primary responsibility to take care of victims of natural disasters and other emergencies occurring on its territory,[131] yet as noted by Allehone Mulugeta Abebe: "no session of the former Human Rights Commission or that of the [Human Rights] Council was held to exclusively examine the question of human rights during disasters. Neither has there been a legal outcome that identifies and underscores the relationship between human rights and natural disasters."[132] So would a more effective method of ensuring those affected by disasters had access to adequate support be through international monitoring of domestic compliance with human rights norms? Rather than judicial or decision-making processes centred on individuals, could a specific accountability process of regular monitoring and reporting by states on their compliance with international and national human rights norms relating to disasters be established? Indeed, should such a monitoring process be included within the ILC draft articles? Such a monitoring process could potentially take the form of states reporting on the human rights implications of disasters within their territory via an established UN Treaty Body, or through a regional monitoring process such as the OSCE or ASEAN.

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[129] Ensuring access to accurate information for people affected by disasters was first highlighted following the 2004 Indian Ocean Tsunami when hundreds of international NGOs, UN agencies and local governmental actors simultaneously attempted to provide assistance. The BBC World Service Trust examined these issues in: *Left in the Dark: The unmet need for information in humanitarian responses* (October 2008, I. Wall). The CDAC network was established in 2009 as a consortium of humanitarian agencies, media organisations and UN bodies, see: <www.cdacnetwork.org> accessed 25 September 2013. The Red Cross Movement has also been actively involved in improving access to information in disaster settings. See: IFRC, *Beneficiary Communication and Accountability: A responsibility, not a choice* (2011) which outlines lessons learned and recommendations from humanitarian responses to the 2004 Tsunami, 2010 Haiti earthquake, and 2010 Pakistan floods.

[130] For discussion of accountability mechanisms of relevance for disaster settings, see: Section D, Chapter 7.

[131] See: Guiding Principle 4, UNGA Res 46/182 (n.83).

[132] See: A.M. Abebe, 'Special Report – Human Rights in the Context of Disasters: The Special Session of the UN Human Rights Council on Haiti' (2011) 10 *Journal of Human Rights* 99, 103.

To date, the Hyogo Framework for Action on disaster risk reduction[133] comes closest to establishing such a dedicated monitoring process for disasters; but while the Hyogo Framework provides detailed guidance for states, regional institutions and international organisations on the actions required to monitor risks and mitigate threats posed by disasters, it is noticeable that it does not set up a process for monitoring state responses to such risks and threats. The Hyogo Framework only requires states, regional institutions and international organisations to support "soft" activities such as networking, advocacy and coordination.[134] The lack of inter-state monitoring and reporting on states' actions in preparation and response to disasters represents a serious shortcoming with the existing framework, albeit one which may be remedied in the post-2015 Hyogo Framework currently under negotiation.[135]

Key to an approach that promotes the international monitoring of the human rights implications of disasters is the fact that, in the vast majority of cases, such violations of human rights result from an inability of the affected state to respond effectively to a particular disaster, either due to a lack of preparation for a particular hazard or due to the severity of impact of the event. Therefore, as a state's preparations for known or expected risks are likely to be a major aspect of any examination of potential violations of human rights in disasters, the primary role of the international community in promoting the protection of persons in the event of disasters would be to support and provide guidance to states to ensure that they fully appreciate the human rights implications of disasters.[136] From an operational perspective, Elizabeth Ferris has suggested that within the UN Cluster approach, a lead agency should be designated to ensure the protection of those affected by disasters.[137] Nevertheless, one cannot discount situations whereby a state deliberately and actively denies a portion of its

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[133] UNISDR, *Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters*, as adopted at the World Conference on Disaster Reduction, 18-22 January 2005, Kobe, Hyogo, Japan (A/CONF.206/6). The Hyogo Framework for Action followed the *Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation* and its Plan of Action, as adopted at the World Conference on Natural Disaster Reduction, 23-27 May 1994, Yokohama, Japan.

[134] ibid Section IV(A).

[135] As noted by the Overseas Development Institute, "In most countries, accountability and evaluation mechanisms to monitor the HFA are weak." See: *Disaster Risk Management in Post-2015 Policy Frameworks: Forging a More Resilient Future*, Briefing Paper, Overseas Development Institute, June 2012, 2. See also: *Consultation in Support of a Post-2015 Framework for Disaster Risk Reduction and Resilience*, Information Note, UN International Strategy for Disaster Reduction, November 2012.

[136] The IFRC is currently engaged in a similar process to highlight the legal implications of disasters through the development of the IDRL Guidelines, national Model Act and draft national Model Emergency Decree.

[137] E. Ferris, 'Displacement, Natural Disasters, and Human Rights', paper presented at *Ten Years of the Guiding Principles on Internal Displacement – Achievements and Future Challenges*, Oslo, Norway, 17 October 2008.

population protection and assistance in a disaster setting, as occurred in Myanmar following Cyclone Nargis or in North Korea during the famines of 1997-8.[138] It follows that any international monitoring and accountability mechanism must be robust enough to promote compliance and to hold states accountable for actions or omissions which result in the violation of human rights in disasters, while also elaborating the normative frameworks against which conduct can be tested and potentially challenged.

D. Conclusion: A Composite Right to Humanitarian Assistance?

Before analysing the emerging international legal framework for responses to major disasters, and mechanisms for the oversight of human rights in disasters, it is necessary to examine the contention that a specific right to humanitarian assistance can be identified due to the amalgamation of pre-existing human rights.[139] David Fisher of the IFRC has argued that:

> [T]he status of the right to humanitarian assistance articulated by the Guiding Principles [on Internal Displacement] is not as shaky as the foregoing [arguments] might suggest. A number of human rights treaties guarantee the component rights to life, food, clothing, shelter, emergency medical care, and other necessities. The remaining gaps in law on the right to humanitarian assistance are being filled with a growing number of "soft law" instruments, of which the Guiding Principles is one important example, as well as with the consistent practices of states and humanitarian organizations.[140]

Similarly, mirroring Peter Macalister-Smith's original observation of the link between fundamental human rights and the right to life in disaster contexts,[141] Susannah Sirkin has argued that one can collate violations of basic necessities of life, such as food, health care and housing with a failure to protect the right to life of disaster victims.[142] Meanwhile the Institute of International Law's 2003 Resolution on Humanitarian Assistance states that:

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[138] C. Allan and T. O'Donnell, 'An Offer You Cannot Refuse? Natural Disasters, the Politics of Aid Refusal and Potential Legal Implications' (2013) 5(1) *Amsterdam Law Forum* 36, 38. See also: C. Allan and T. O'Donnell, 'A Call to Alms?: Natural Disasters, R2P, Duties of Cooperation and Uncharted Consequences' (2012) *Journal of Conflict and Security Law* 1.

[139] For discussion of similar arguments supporting the existence of a right to development, see: J. Donnelly, 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development' (1985) 15 *California Western International Law Journal* 473; plus Philip Alston's response: P. Alston, 'The Shortcomings of a "Garfield the Cat" Approach to the Right to Development' (1985) 15 *California Western International Law Journal* 510.

[140] Fisher, 'The Right to Humanitarian Assistance' (n.7). For discussion of inconsistent practice in the provision of humanitarian assistance by states and other humanitarian actors, see: Section B(iv), Chapter 5.

[141] Macalister-Smith, 'Human Rights and Disaster Relief' (n.24), 175-176.

[142] See: Sirkin, 'The Debacle of Hurricane Katrina' (n.1), 225

> Leaving the victims of disaster without humanitarian assistance constitutes a threat to human life and an offence to human dignity and therefore a violation of fundamental human rights ... The victims of disaster are entitled to request and receive humanitarian assistance.[143]

However, one can turn this argument on its head by arguing that the applicability of international human rights law in disaster settings precludes a need for a specific right to humanitarian assistance.

Jürgen Habermas has argued that: "Human dignity, which is one and the same everywhere and for everyone, grounds the indivisibility of all categories of human rights. Only in collaboration with one another can basic rights fulfill the moral promise to respect the human dignity of every person equally."[144] The ILC has acknowledged that human dignity provides the core principle that informs and underpins international human rights law, and that the existing body of international human rights law applies in disaster settings.[145] Therefore, considering the indivisibility of existing human rights, what benefit accrues from the pronouncement of a specific "right to humanitarian assistance"? While the Humanitarian Charter of the Sphere Handbook[146] and the RCRC Code of Conduct[147] both proclaim the existence of a right to humanitarian assistance, considering the negative reaction by states to the concept of even a right to offer humanitarian assistance in the UN General Assembly Sixth Committee,[148] it is hard to accept that state practice accepts the existence of such a right. In the face of resistance by states, and divergent opinions within academic sources,[149] a specific right to humanitarian assistance must be considered as *lex ferenda*, as opposed to *lex lata*. This is not to negate the important advocacy role that claiming such a right may have for humanitarian actors who provide life-saving assistance on a daily basis.[150] However, it

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[143] Resolution on Humanitarian Assistance, Institute of International Law, Bruges Session, September 2003, arts II.1 and II.2. Such clear rights-based language is particularly relevant as the International Law Commission has drawn heavily on the IIL Resolution in their discussions on the protection of persons in the event of disasters.

[144] J. Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (July 2010) 41(4) *Metaphilosophy* 464, 469.

[145] See: Commentaries on draft article 7 (n.95); and the text of draft articles 7 (Human dignity) and 8 (Human rights).

[146] The Sphere Project, *Humanitarian Charter and Minimum Standards in Humanitarian Response*, April 2011, 20-21.

[147] 'Resolutions adopted by the 26th International Conference of the Red Cross' (January-February 1996) 310 *International Review of the Red Cross* 102, art 1.

[148] For examples of state comments on a right to humanitarian assistance, see: Section B(ii), Chapter 7.

[149] See for example: Y. Dinstein, 'The legal consequences of infringing upon the right to humanitarian assistance', paper presented at the International Colloquium on the Right to Humanitarian Assistance, Paris, 25-27 January 1995, para.3.

[150] Elizabeth Ferris and Chareen Stark specifically highlight the importance of humanitarian diplomacy in the work of the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) through

does question the legal status of such a right. As noted by Arjun Sengupta, former UN Independent Expert on the Right to Development, "in order for a claim to be recognized as a right, the feasibility of realizing the right still has to be established. A non-realizable claim, however laudable it may be, can possibly be a societal goal but not a right."[151]

So while proclaiming a "right to humanitarian assistance" may aid humanitarian agencies in accessing beneficiaries in many non-contentious situations, if a recalcitrant state denies the requirement for external humanitarian assistance and therefore access for humanitarian actors, focusing primarily on a right to receive humanitarian assistance for individual victims may not lead to an identifiable change in their situation. As will be discussed in the next Chapter, while certain rights to assistance in natural and human-made disasters may be in the process of crystallisation, the development of international legal frameworks for humanitarian responses to such disasters are currently proceeding on the basis of international cooperation and solidarity, rather than a novel and contentious right. It is suggested that the rights of persons affected by disasters may be better served, and ultimately enforced, by focusing on existing well-recognised human rights provisions, rather than collating these pre-existing rights under the heading of a new third generation right. The explicit focus on human dignity and human rights within the ILC draft articles provides the international affirmation of such an approach. As Jürgen Habermas has noted: "The heuristic function of human dignity is the key to the logical interconnections between these … [generations] of rights."[152] This can therefore provide a strong and legally enforceable platform for ensuring that states protect, respect and fulfil the inherent dignity of the human person, and the concomitant full range of human rights that may be violated in a disaster setting.

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their ability to: "nuance advocacy efforts to denounce human rights abuses while at the same time maintaining a working relationship with Israeli authorities to enable the Agency to protect individuals in particular situations." See: E. Ferris and C. Stark, *Incorporating Protection into Humanitarian Action: Approaches and Limits*, paper presented at IFI-UNRWA International Conference, American University of Beirut, Lebanon, 8 October 2010, 13. Available at: <www.brookings.edu/papers/2010/1104_unrwa_ferris.aspx> accessed 25 September 2013.

[151] A. Sengupta, *Second Report of the Independent Expert on the Right to Development*, E/CN.4/2000/WG.18/CPR.1, para.8. Although Sengupta also described the right to a particular process of development as a "vector" of all the different rights and freedoms, noting that each element of the vector is "a human right just as the vector itself is a human right." See: A. Sengupta, 'On the Theory and Practice of the Right to Development' (November 2002) 24(4) *Human Rights Quarterly* 837, 868. Conversely, Arne Vandenbogaerde has argued that the right to development does not create new substantive rights beyond existing human rights law, particularly economic, social and cultural rights, and therefore the added value of a specific right to development is debateable and may even harm the application of existing human rights norms due to the highly politicised nature of the right to development. See: A. Vandenbogaerde, 'The Right to Development in International Human Rights Law: A Call for its Dissolution' (2013) 31(2) *Netherlands Quarterly of Human Rights* 187.

[152] Habermas, 'The Concept of Human Dignity' (n.144), 468.

Therefore, considering that the overall structure of the international legal framework for humanitarian responses to disasters is still under development, the following Chapter will examine the codification and progressive development of international disaster laws, in particular via the work of the ILC on the protection of persons in the event of disasters, before providing a series of proposals to promote the improved monitoring and accountability of the human rights implications of disasters by international institutions, in particular the UN human rights mechanisms.

Chapter 7

Emerging International Legal Frameworks for Humanitarian Responses to Disasters

> *The doctrine of State sovereignty seems to imply the right of a State to treat its own people as it pleases. However … sovereignty signifies not unbridled freedom, but rather is an attribute of equality between States and it is subject to the duty to comply faithfully with international obligations.*
>
> Peter Macalister-Smith, 1985[1]

Before analysing the on-going work of the International Law Commission (ILC) on the protection of persons in the event of disasters, it is worthwhile to briefly examine the process of codification and progressive development of international law. Considering the mixed success of previous attempts at codification of international humanitarian responses to natural and human-made disasters, it is important to remember that many of the questions testing the ILC, states and other humanitarian actors today are not new. Although operational, institutional and conceptual approaches have changed over the years, as have the extent and impact of disasters;[2] several key trends have been recurring stumbling blocks or points of contention in the international instruments adopted or proposed to regulate international disaster responses. When one remembers initiatives such as the 1927 Convention Establishing an International Relief Union[3] and the 1984 draft Convention on Expediting the Delivery of Emergency Assistance,[4] issues such as the appropriate balance between sovereignty and the rights of victims of disasters, the advisability of undertaking technical and operational approaches or broader statements of humanitarian principles, and the relative value to be placed on binding or non-binding instruments were vital. These issues

[1] P. Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff 1985), 56.

[2] For a description of the emerging international disaster relief system, and analysis of evolving institutional and systemic responses in the 1970s and early 1980s, see: R. Kent, 'Reflecting upon a Decade of Disasters: The Evolving Response of the International Community' (Autumn 1983) 59(4) *International Affairs* 693.

[3] Convention Establishing an International Relief Union (adopted 12 July 1927, entered into force 27 December 1932) 135 LNTS 247.

[4] Convention on Expediting the Delivery of Emergency Assistance, A/39/267/Add.2 – E/1984/96/Add.2, 18 June 1984.

may affect the ultimate form and function of an international instrument, or relate more fundamentally to the relationship between states and their citizens, or between states at the international or regional level. While many of these issues have been raised during the ILC deliberations or by state representatives in the UN General Assembly Sixth Committee, there remain a number of unanswered questions as to key elements of the international legal framework envisaged by the ILC draft articles which has important ramifications for the emerging international legal framework for humanitarian responses to disasters.

This Chapter will therefore provide a brief overview of the codification and progressive development of international law, before analysing the current ILC process to develop draft articles on the protection of persons in the event of disasters. The Chapter will then proceed to examine some of the conceptual approaches and questions remaining surrounding the emerging international legal framework for disaster responses, before discussing proposals intended to promote more systemic monitoring and accountability within the UN human rights mechanisms regarding the human rights implications of disasters. The Chapter will conclude with a brief summary of the progress made towards and challenges facing the international legal framework, setting up the final arguments in the thesis Conclusions.

A. Codification and Progressive Development of International Law

i. Benefits and drawbacks to codification

The fact that the International Law Commission commenced consideration of the protection of persons in the event of disasters in 2007 can be seen as recognition of the increasing international profile of the legal implications of disasters, and the desire of states and humanitarian actors for greater legal certainty on the interplay of rights and responsibilities of all actors in a disaster setting. Yet the practical benefits of an additional international legal instrument for both humanitarian actors and victims of disasters need to be established. An analogy can be made with the UN Guiding Principles on Internal Displacement.[5] 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, then Representative of the UN Secretary-General on the Human Rights of IDPs noted that although the Principles were not a binding legal

[5] United Nations, Commission on Human Rights, *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2 (1998).

instrument they had already gained considerable authority. He continued by highlighting that:

> [T]he 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."[6]

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.[7] 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 Council, allowed for a more inclusive and less explicit focus on state sovereignty.[8] 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."[9] 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.[10] It follows that there could be a

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[6] W. Kälin, *Guiding Principles on Internal Displacement: Annotations*, ASIL and Brookings-Bern Project on Internal Displacement, Studies in Transnational Legal Policy, No.38 (2008), vii [references omitted]. Roberta Cohen has argued that this wide-spread support was also due to the inclusive process by which the Guiding Principles were developed. Of note, leading members of the Inter-Agency Standing Committee, including UN agencies, the Red Cross Movement and leading inter-governmental and non-governmental humanitarian agencies have endorsed the Guiding Principles. See: R. Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' (2004) 10 *Global Governance* 459.

[7] Response from the Representative of the UN Secretary-General on Internally Displaced Persons, Francis Deng, to Questions Posed by the Delegate of Algeria, Third Committee of the General Assembly, 12 November 2001, as quoted in Cohen, ibid 473-474. See also: H. Entwisle, 'Tracing Cascades: The Normative Development of the UN Guiding Principles on Internal Displacement' (2004-2005) 19 *Georgetown Immigration Law Journal* 369, 384.

[8] In addition to the work undertaken by the independent legal experts, 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 Austrian government. For background to the process see: <www.idpguidingprinciples.org> accessed 25 September 2013.

[9] 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, 7.

[10] See: Entwisle, 'Tracing Cascades' (n.7); A.M. Abebe, 'Special Rapporteurs as Law-Makers: the developments and evolution of the normative framework for protecting and assisting internally displaced persons' (February 2011) 15(2) *International Journal of Human Rights* 286. See also: A. Nollkaemper, 'The Power of Secondary Rules of International Law to Connect the International and National Legal Orders', in T. Broude and Y. Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing 2011).

correspondingly strong argument for the on-going codification of international law 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, UNGA Resolution 46/182 of 1991[11] has already set out non-binding "Guiding Principles" for UN humanitarian responses; while the RCRC Code of Conduct elaborates ten points of principle which non-governmental humanitarian organisations should voluntarily adhere to in their disaster response work. At the state level, the 2007 IFRC IDRL Guidelines are aimed at local and national authorities to assist them in developing their domestic legal preparedness for disasters. Meanwhile, the IFRC national Model Act and draft national Model Emergency Decree are intended to assist states to integrate the recommendations of the IDRL Guidelines into their national laws.[12] Moreover, the Guiding Principles on Internal Displacement themselves specifically cover persons displaced internally as a result of natural disasters. The ILC is therefore well aware of the need not to duplicate instruments 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."[13] While in the context of the ILC draft articles on State Responsibility, James Crawford has explained that although the eventual product of more than 40 years deliberations was likely to be a statement or text appended to a UN General Assembly resolution, he doubted whether this would affect the influence the text would have, as the draft articles on state responsibility were cited by courts and tribunals and so influenced the development of international law even prior to their formal conclusion.[14]

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

[12] IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (2008); IFRC, *Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* available at <www.ifrc.org/en/what-we-do/idrl/model-act-on-idrl> accessed 25 September 2013; IFRC, draft *Model Emergency Decree for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* available at: <www.ifrc.org/what-we-do/idrl/draft-model-emergency-decree> accessed 25 September 2013.

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

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

Yet arguably, the topic of international humanitarian responses to disasters requires a more systematic approach to codification. While the Guiding Principles on Internal Displacement have proven to be an innovative and effective instrument, the context of disaster response may require a different approach.[15] There is already a plethora of non-binding resolutions, codes of conduct, and minimum standards relating to humanitarian assistance, which cover both humanitarian principles and operational responses.[16] There are also a wide range of bilateral, trilateral and regional instruments relating to disaster risk reduction, civil defence and humanitarian assistance that have a direct bearing on the topic.[17] Yet despite the Special Rapporteur stressing in 2008 that it would be preferable for the final form of the draft articles to be clearly articulated as early as possible, there has still not been any formal determination of their final form. Identifying this will help shape the discussions and analysis of the content of the draft articles; while also clarifying whether a binding multilateral convention establishing the rights and responsibilities of states, humanitarian actors and individuals would provide the greatest benefits for people affected by disasters, or whether the draft articles are simply intended to add an authoritative voice to the growing number of non-binding texts already in place.[18]

ii. Codification or progressive development?

Another issue that has prompted debate within the ILC has been the extent to which their work should codify current practices of states and humanitarian actors, or whether the ILC should engage in the progressive development of international law on the topic. As per the Statute of the ILC:

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[15] Of note, 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' (n.9) 2-5; Cohen, 'Innovation in International Standard Setting' (n.6) 475-476.

[16] See: D. Cubie, 'An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?' (2011) 2 *Journal of International Humanitarian Legal Studies* 177.

[17] See: IFRC, *Law and Legal Issues in International Disaster Response: A Desk Study* (2007); Memorandum by the Secretariat, *Protection of persons in the event of disasters*, International Law Commission, 60th Session, 11 December 2007, A/CN.4/590.

[18] Arnold Pronto has highlighted it may not be entirely correct to portray the status of a particular text as "non-binding" when some of its provisions may be binding on states at the international level, either by virtue of existing treaty arrangements or customary rules, or binding internally by virtue of domestic law. For discussion of the final form of the ILC draft articles, see: A. Pronto, 'Consideration of the Protection of Persons in the Event of Disasters by the International Law Commission' (2008-2009) 15 *ILSA Journal of International and Comparative Law* 449, 455-457; D. Cubie, 'An Enchanted Tool? Humanitarian assistance and the ILC draft articles on the Protection of Persons in the Event of Disasters' (2009-2010) IV-V *Irish Yearbook on International Law* 119. See also: Section C below.

> "progressive development of international law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression "codification of international law" is used for convenience as meaning the more precise formulation and systematisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.[19]

In light of such definitions, it is notable that the original Secretariat proposal in 2006 stated: "Given the nature of what is a rapidly developing field, it is anticipated that the work on the topic would be primarily limited to the codification of existing norms and rules, with emphasis on progressive development as appropriate."[20] Yet the Special Rapporteur highlighted in his Preliminary Report that: "this topic seems in principle to be the subject of progressive development,"[21] and has subsequently strongly reasserted the right of the ILC to propose elements of progressive development in their work on the topic.[22] This thesis cannot undertake a detailed evaluation of which provisions of the ILC draft articles specifically entail codification or progressive development of international law, not least because a detailed study of state practice and customary international law, along the lines of the ICRC Customary IHL study,[23] would be required to identify the extent of customary activities. Furthermore, it is well recognised that work undertaken by the ILC is likely to include elements of both codification and progressive development, and that it is not always possible to distinguish into which category each provision falls.[24] Indeed, progressive development may well be part of the process of codifying international law.[25] Nevertheless, the final balance between codification and progressive development is likely to have important

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[19] Article 15, Statute of the International Law Commission, 1947, adopted by UNGA Res 174(II), 21 November 1947, and amended by Resolutions: 485(V), 12 December 1950; 984(X), 3 December 1955; 985(X); 3 December 1955; 36/39, 18 November 1981.

[20] General Assembly Official Records, Sixty-first session, *Supplement No.10* (A/61/10), Annex C, para.25.

[21] E. Valencia-Ospina, *Preliminary Report*, 8 May 2008, A/CN.4/598, para.42.

[22] See: Summary of 25th UNGA Sixth Committee Meeting (2011), A/C.6/66/SR.25, para.66-67 (Valencia-Ospina).

[23] See: J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law: Rules and Practice* (Cambridge University Press 2005). Also available at: <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule55> accessed 25 September 2013.

[24] As noted in the Max Planck Encyclopaedia of Public International Law: "The ILC has not insisted on distinguishing in its work between 'codification' and 'progressive development'. In the field of international humanitarian law, however, the importance of a clear determination of existing customary rules has had as a consequence that the study on Customary International Humanitarian Law conducted by the ICRC … concentrated on determining the existence of such rules, without engaging in progressive development." See: T. Treves, 'Customary International Law', Section C(6)(c), para.70, in R. Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law* (Oxford University Press, 2008), available at: <www.mpepil.com>, accessed 25 September 2013.

[25] A. Pellet, 'Between Codification and Progressive Development of the Law: Some Reflections from the ILC' (2004) 6 *International Law FORUM du droit international* 15. See also: Valencia-Ospina, *Preliminary Report* (n.21) para.59.

ramifications as to the willingness of states to move from non-binding draft articles to a binding international instrument on the protection of persons in the event of disasters. Therefore, it is now pertinent to consider the current status and content of the ILC's work on the topic.

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

i. Scope of an international legal framework for disaster response

Since the ILC Secretariat first introduced the topic of disasters into the work plan of the ILC in 2006,[26] the ILC has progressed rapidly and to-date sixteen draft articles have been provisionally adopted, plus Commentaries for draft articles 1-11.[27] The initial approach taken by the Special Rapporteur was to divide the topic into four broad areas: *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione locis*. While it is not feasible to analyse all of the key issues raised during the ILC deliberations, the following sections will briefly examine aspects which have already gained a level of consensus, before highlighting some of the issues which remain to be resolved.

The first task of the Special Rapporteur, Eduardo Valencia-Ospina, was to determine the scope of the project being undertaken. To this end, it was necessary to identify key issues, including the definition of a "disaster," the actors involved in humanitarian responses, the time period when rights and responsibilities were applicable, and also the geographic reach of the proposed framework.[28] As set out in the Commentary to draft article 1, the draft articles are intended to cover the rights and obligations of states affected by a disaster in relation to persons on their territory, third states and inter-governmental organisations, and other entities in a position to cooperate.[29] Therefore, they cover both the relationship between a state and persons on its territory, and the relationships between states and humanitarian

[26] *Secretariat Memorandum* (n.17).
[27] For text of draft articles 1-5, see: A/CN.4/L.758, 24 July 2009. For text of the Commentaries on draft articles 1-5, see: Official Records of the General Assembly, Sixty-fifth Session, *Supplement No.10* (A/65/10), Chapter VII, p.323. For text of draft articles 6-9, see: A/CN.4/L.776, 14 July 2010. For text of draft articles 10-11, see: A/CN.4/L.794, 20 July 2011. For text of the Commentaries on draft articles 6-11, see: Official Records of the General Assembly, Sixty-sixth Session, *Supplement No.10* (A/66/10), Chapter IX, p.255. For text of draft articles 5*bis*, 12-15, see: A/CN.4/L.812, 12 July 2012. For text of draft articles 5*ter* and 16, see: A/CN.4/L.815, 23 July 2013.
[28] See: E. Valencia-Ospina, *Second Report*, 7 May 2009, A/CN.4/615 for full details.
[29] Commentaries on draft article 1 (Scope) (n.27).

actors. Although the primary focus is on inter-state relationships, the draft articles also cover in general terms the rights of individuals affected by disasters.

It was decided that the draft articles would cover natural persons affected by disasters, rather than legal personalities, focusing on the protection of persons with references to the protection of property and the environment only where this impacted on individuals affected by disasters. The Special Rapporteur has also noted the various stages to a disaster, from pre-disaster risk reduction and mitigation activities, to emergency assistance and the post-disaster rehabilitation and recovery phase.[30] The Commentary explains the primary focus is on the immediate post-disaster response and recovery phase, although pre-disaster activities may be covered where relevant.[31] Finally, it is recognised that disasters may have transboundary effects, either due to the disaster affecting more than one country directly or due to the requirements for transit of staff and equipment through neighbouring countries. The draft articles do not limit their application to specific geographic areas; rather, the key to triggering applicability of the draft articles is the onset of a "disaster," which is defined in draft article 3 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.

To determine the boundaries of the topic, and following debate in the ILC and UN General Assembly Sixth Committee regarding the appropriate approach to take regarding "rights" and "needs," the provisionally adopted draft articles set out both the scope and purpose of the articles.[32] The purpose of the draft articles as set out in draft article 2 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."[33] As noted in Chapter 6, the Special Rapporteur has highlighted that there is no stark opposition between needs and rights-based approaches to the protection of persons in the event of disasters,[34] and that the essence of a rights-based approach is the identification of specific standards of treatment to which individuals are

[30] Valencia-Ospina, *Second Report* (n.28) para.29.
[31] Commentaries on draft article 1 (Scope) (n.27). Of note, the Special Rapporteur's Sixth Report of May 2013 focuses specifically on measures to be taken for prevention of disasters, and to promote international cooperation in prevention activities. See: E. Valencia-Ospina, *Sixth Report*, 3 May 2013, A/CN.4/662.
[32] See draft article 1 (Scope) and draft article 2 (Purpose). See also: Valencia-Ospina, *Second Report* (n.28) para.16-27; Summary of 18-23rd UNGA Sixth Committee Meetings (2009), A/C.6/64/SR.18-2325.
[33] For text of draft article 2, see: A/CN.4/L.758 (n.27).
[34] Valencia-Ospina, *Second Report* (n.28) para.17.

entitled.[35] The Commentary to draft article 2 reference debate within the humanitarian community between "rights-based" and more traditional "needs-based" approaches, concluding that "[t]he prevailing sense of the Commission was that the two approaches were not necessarily mutually exclusive, but were best viewed as being complementary."[36]

The ILC has also set out the conceptual framework for the draft articles, with the duty of international cooperation established in draft article 5. Indeed, the Special Rapporteur has noted, perhaps ironically, that where the international community needed to work together to resolve a situation of concern to all its members, the ILC had not failed to find that states had an obligation to do so.[37] Meanwhile, the duty of the affected state to ensure the protection of persons and the provision of disaster relief on its territory is set out in draft article 9, while the related duty to seek assistance from other states and competent non-state actors if the disaster exceeds the national response capacity is covered in draft article 10. The consent of the affected state is required prior to the provision of external humanitarian assistance through draft article 11, although this consent shall not be withheld arbitrarily. Following debate on the "right to offer" assistance in 2011, draft article 12 currently sets out the framework for offers of assistance by states and humanitarian actors, while draft articles 13-15 cover more technical aspects of the conditions a state may impose on external assistance, including measures required to facilitate external assistance and the subsequent termination of assistance.[38] Over the course of the past six years, a wide range of other issues have been identified and discussed by the ILC and state representatives, including: the relationship of the draft articles to international humanitarian law; the applicability or otherwise of the Responsibility to Protect doctrine; and humanitarian principles in disaster response.[39] As may be expected, the discussions on how to balance the potentially competing rights and obligations arising from state sovereignty and individual rights have been particularly acute and are likely to continue for some time.

[35] Valencia-Ospina, *Preliminary Report* (n.21) para.12.
[36] Commentary on draft article 2 (Purpose) (n.27).
[37] Provisional Summary Record of 3015th ILC Meeting, A/CN.4/SR.3015, 14 July 2011, para.14.
[38] For text of draft articles 5*bis*, 12-15, see: A/CN.4/L.812 (n.27).
[39] For analysis of various stages of the ILC debates, see: Pronto, 'Protection of Persons (n.18); Cubie, 'An Enchanted Tool?' (n.18); J. Benton-Heath, 'Disasters, Relief, and Neglect: The Duty to Accept Humanitarian Assistance and the Work of the International Law Commission' (2010-2011) 43 *NYU Journal of International Law and Politics* 419.

ii. The right to humanitarian assistance in the ILC draft articles

As outlined previously, a right to humanitarian assistance for civilian populations in peacetime, such as following a natural or human-made disaster, is not yet recognised in either conventional or customary international law. Indeed, the ILC Secretariat was careful to limit references to the phrase "right to humanitarian assistance" in its detailed Memorandum of 2008.[40] While recognising that the right to humanitarian assistance had received considerable attention from academic sources, the Secretariat Memorandum stated that positive law on a right to humanitarian assistance outside of armed conflicts remains unclear.[41] Nevertheless, as detailed in Chapter 5, in reality a "right to humanitarian assistance" is comprised of two distinct rights.[42] It is therefore necessary to examine each of these two positions in turn to determine whether or not the inclusion of these within the ILC draft articles would represent codification of existing international law or progressive development of the topic.

a. The right to request and receive humanitarian assistance

In his Second Report, the Special Rapporteur noted: "In disaster settings ... it appears that no legal instruments explicitly acknowledge the existence of [a right to humanitarian assistance]. At most, it could be said to be implicit in international human rights law."[43] The Special Rapporteur went on to question the nature of a right to humanitarian assistance, asking whether it be a human right or just a right of those affected by disasters, and whether it was an individual or collective right.[44] He raised additional concerns as to the extent that a right to humanitarian assistance might constitute progressive development, rather than codification, of the law and the potential conflicts with sovereignty and states' views on the creation of new human rights. Indeed, the Special Rapporteur highlighted that "recognition of the existence of such a right could be taken as constituting a challenge to the guiding principle of the sovereignty of the State and its corollary of non-intervention, according to

[40] *Secretariat Memorandum* (n.17).
[41] ibid 152-153. Elizabeth Ferris noted in 2009 that she was "surprised that the document did not reference the argument that the right to food, health care, and shelter infer a right to humanitarian assistance when the government lacks the capacity to protect such basic rights." See: E. Ferris, 'Humanitarian Perspectives on 'Protection of Persons in the Event of Disasters', presentation at *Roundtable on Canada and International Law*, Department of Foreign Affairs and International Trade, 21 April 2009.
[42] See: Section A, Chapter 5.
[43] Valencia-Ospina, *Second Report* (n.28) para.54.
[44] ibid.

which the State had the primary responsibility to afford protection to disaster victims on its territory or territory under its jurisdiction or control."[45]

During debates within the ILC and by government representatives in the UNGA Sixth Committee following the Special Rapporteur's Preliminary Report, the main focus of discussion was on whether or not there was a right to impose assistance on a recalcitrant state.[46] The discussions centred primarily on the issue of consent, and spilt over into an examination of sovereignty, non-intervention and the possible applicability of the Responsibility to Protect doctrine. While recognising the role of the affected state, both Malaysia and Iran made strong statements in defence of sovereignty and non-intervention and stressed that humanitarian assistance could not be imposed without the consent of the affected state.[47] These debates over the relative balance between state sovereignty, territorial integrity and non-intervention on the one hand, and the protection of persons and the rights and obligations of states on the other hand have continued, and even increased in volume as the work of the ILC has progressed.[48] Yet there has been little discussion on whether an individual victim of a disaster has a right to request or receive humanitarian assistance. Nevertheless, Marcelo Vázquez-Bermúdez has argued that a right to humanitarian assistance would promote the realisation of the human rights affected during a disaster, such as the rights to life, health and physical integrity and dignity, as well as rights relating to fulfilment of basic human needs such as the availability of water, food, sanitation and shelter. He has further argued that such a right would also promote rights important in post-disaster situations, such as the rights to education, freedom of expression, work and housing.[49] Meanwhile Marie Jacobsson has noted that a rights-based approach raised certain questions

[45] Provisional Summary Record of 2978th ILC Meeting, A/CN.4/SR.2978, 15 July 2008, Mr Valencia-Ospina. Conversely, Mr Vázquez-Bermúdez argued that viewing the right to humanitarian assistance as a human right would not create tensions with the basic principles of sovereignty and non-intervention, since it would be implemented in the same way as other human rights. See: Provisional Summary Record of 2982nd ILC Meeting, A/CN.4/SR.2982, 22 July 2008, Mr Vázquez-Bermúdez.

[46] For discussion of this issue prior to the commencement of the ILC's work, see: K. Luopajärvi, 'Is there an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?' (2003) 15(4) *International Journal of Refugee Law* 678.

[47] See: Malaysia (A/C.6/63/SR.23, para.79); Iran (A/C.6/63/SR.24, para.41-42). The UK and Venezuela also highlighted sovereignty, non-interference and the requirement of consent, see: A/C.6/64/SR.20, para.38 and 42. Meanwhile, Finland (on behalf of the Nordic countries) stated that the right to humanitarian assistance should be complemented by rules governing humanitarian access, and the need for an affected state to cooperate with the international community (A/C.6/63/SR.22, para.53).

[48] For examples of recent emphasis placed on state sovereignty by a wide range of states in the UNGA debates, see: France (A/C.6/66/SR.23, para.38); Malaysia (A/C.6/66/SR.24, para.116); Argentina (A/C.6/66/SR.25, para.10); India (A/C.6/66/SR.25, para.13); Egypt (A/C.6/66/SR.25, para.36).

[49] Provisional Summary Record of 2982nd ILC Meeting, A/CN.4/SR.2982, 22 July 2008, Mr Vázquez-Bermúdez. The Austrian government likewise stressed the connections between the protection of persons in the event of disasters and international human rights law, while acknowledging that the consent of an affected state is required for the provision of external assistance (A/C.6/63/SR.23, para.10).

such as: "what was the content of the right? Who were the rights-holders and were they able to claim their rights? And who were the corresponding duty-bearers and were they able to fulfil their obligations?"[50]

During these initial discussions, Rohan Perera reflected the majority view by highlighting that human rights constituted only part of the overall legal approach to the topic.[51] In other words, it was proposed that the ILC should adopt a human-rights-oriented approach rather than an approach based exclusively on human rights. Taking this perspective, rather than focusing on the right of an individual to receive humanitarian assistance, the ILC was encouraged to focus on the rights and obligations of states as they relate to individuals. Therefore, any "right to humanitarian assistance" should not be seen as an individual human right which could be enforceable against a state or humanitarian agency, but as an individual right that was exercised collectively. The logic of this approach can now be seen in the draft articles. Draft article 9 confirms that the affected state, *by virtue of its sovereignty*, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory, as well as the primary role in the direction, control, coordination and supervision of such relief and assistance.[52] Meanwhile, draft article 10 reinforces an affected state's duty to seek assistance should the disaster exceed its national response capacity.[53] Nevertheless, via draft article 11, external assistance requires the consent of the affected state although consent should not be withheld arbitrarily.[54]

It is therefore clear that the current text of the draft articles do not contain an individual right to request or receive humanitarian assistance in natural or human-made disasters. Furthermore, from the tenor of debate both within the ILC and in the UNGA Sixth Committee, it is very unlikely that this will change at any time in the near future. However, despite the lack of an express right to request or receive humanitarian assistance, as discussed in Section D below, the inclusion of the concepts of human dignity and reaffirmation of the applicability of human rights in disasters set out in draft articles 7 and 8 provide an

[50] Provisional Summary Record of 2981st ILC Meeting, A/CN.4/SR.2981, 18 July 2008, Ms Jacobsson.
[51] Provisional Summary Record of 2981st ILC Meeting, A/CN.4/SR.2981, 18 July 2008, Mr Perera.
[52] Draft article 9 (Role of the affected state) [emphasis added].
[53] Draft article 10 (Duty of the affected state to seek assistance). The phrase "seek assistance" was chosen over "request assistance" to reflect an interactive process between an affected state and donors. It is also intended to highlight that an affected state does not have to accept all offers of assistance, as "requesting assistance" might imply that consent was created once an affected state requested assistance and an offer was made by a donor. See: E. Valencia-Ospina, *Fourth Report*, 11 May 2011, A/CN.4/643, para.44.
[54] Draft article 11 (Consent of the affected state to external assistance).

authoritative basis for the increased awareness, promotion and monitoring of the overall human rights implications of disasters.

b. The right to offer humanitarian assistance

While the ILC draft articles are unlikely to engage in the progressive development of international law by proposing an individual right to request or receive humanitarian assistance, states in the UNGA Sixth Committee have been equally sceptical regarding the use of rights language in the context of a right to offer humanitarian assistance for third states and humanitarian organisations.[55] So despite the Special Rapporteur's Fourth Report[56] providing detailed arguments and examples of such a right in binding and non-binding international texts, states such as Israel have made clear that the role of third parties in offering assistance to affected states should be defined on the basis of international cooperation, not as an assertion of rights.[57] Conversely, Russia has noted that the right to offer assistance set out in draft article 12 has "no evident independent value but simply recognises the reality in disaster situations,"[58] while the UK has argued that "[t]he idea in draft article 12 that there was a right to offer assistance seemed superfluous, since States already had a sovereign right to make such offers."[59] The Special Rapporteur responded to such criticisms by highlighting that the proposed right in draft article 12 was merely to offer, not to provide, assistance and so the affected state could accept in whole or in part any offer of assistance when a disaster exceeded its national response capacity.[60] Following these UNGA Sixth Committee debates and the work of the ILC Drafting Committee, the key change that has occurred to the wording proposed by the Special Rapporteur for draft article 12 is the separation between a right to offer assistance for states, the UN and other competent

[55] See for example comments made in 2011: USA (A/C.6/66/SR.21, para.69); Singapore (A/C.6/66/SR.21, para.75); Poland (A/C.6/66/SR.21, para.86). As noted by Austria: "Assistance must be given in a spirit of cooperation, and that debarred the imposition of any obligation" (A/C.6/66/SR.23, para.25). Conversely, see supportive comments by: El Salvador: "the rules governing the right to offer assistance should be as broad as possible … His delegation therefore suggested reformulating the draft article so as to extend the right to offer assistance to all persons, both natural and legal" (A/C.6/66/SR.22, para.14); Romania: "draft article 12 (Right to offer assistance) was necessary; the right in question was not only a practical manifestation of solidarity but an important part of the principle of cooperation" (A/C.6/66/SR.25, para.19).

[56] See: Valencia-Ospina, *Fourth Report* (n.53) para.78-109 for discussion of draft article 12 and the right to offer assistance. It should be noted that the Commentaries on draft article 12 have not yet been finalised, so there remains potential for discussion and clarification of what the actual impact of the current wording means.

[57] Summary of 23rd UNGA Sixth Committee Meeting (2011), A/C.6/66/SR.23, para.33.

[58] Summary of 24th UNGA Sixth Committee Meeting (2011), A/C.6/66/SR.24, para.37.

[59] Summary of 23rd UNGA Sixth Committee Meeting (2011), A/C.6/66/SR.23, para.45.

[60] Summary of 25th UNGA Sixth Committee Meeting (2011), A/C.6/66/SR.25, para.64.

inter-governmental organisations, and for relevant non-governmental organisations which "may also offer assistance." In practice, an affected state will still be able to refuse offers of assistance from third states and inter-governmental actors, despite the existence of a "right to offer assistance."[61] Therefore, the difference in wording, whereby one group of humanitarian actors has an express right while non-governmental actors "may also offer" assistance, may not be of great import in actual humanitarian operations. Nevertheless, it unnecessarily highlights a division between governmental and non-governmental humanitarian agencies, and perhaps reflects an increasing focus on state sovereignty within the discussions around the ILC draft articles. As noted by the Special Rapporteur's Fourth Report, "the protection of persons in the event of disasters is a project of the international community as a whole, which is hinged upon the primary responsibility of the affected state and its sovereignty."[62] However, as it will be up to the affected state to choose which offers of assistance to accept, and despite the provision that consent cannot be withheld arbitrarily, it is hard to tell what measures beyond diplomatic pressure could be brought to bear on an affected state that denied a disaster had exceeded its national response capacity.

iii. Conceptual framework for the ILC draft articles

a. Sovereignty and non-intervention

Considering that the work of the ILC has avoided expressly referencing either a right to request or receive humanitarian assistance, one must now examine the overall conceptual framework for the draft articles. As with any branch of international law, the fundamental starting point is state sovereignty. In recognition of this, the Special Rapporteur has promoted the concept of international cooperation as the basis for the rights and responsibilities set out in the draft articles. While there have been no explicit references to the concept of sovereignty as responsibility, one can argue that this is in fact the underlying conceptual framework. As set out by Francis Deng and his colleagues, and reflected in the Guiding Principles on Internal Displacement:

> The normative principles of sovereignty, responsibility, and accountability have internal and external dimensions. The internal dimension has to do with the degree to which the government is responsive to the needs of its people … The international dimension has to do with the cooperation of sovereign states in helping or checking

[61] Draft article 11(2) provides that "consent to external assistance shall not be withheld arbitrarily."
[62] Valencia-Ospina, *Fourth Report* (n.53) para.80.

> one another when a fellow state loses or refuses to use its capacity to provide protection and assistance for its citizens.[63]

The Special Rapporteur has similarly noted the "dual nature" of disasters, with the primary responsibility lying on the part of the affected state, and the global interest of the international community in the protection of persons affected.[64] Therefore there is no contradiction with having an explicit reference to the duty of international cooperation in the draft articles, while the underlying conceptual basis is recognised as sovereignty as responsibility. Indeed, neither the Guiding Principles on Internal Displacement nor their detailed Annotations[65] reference sovereignty as responsibility. One can envisage the duty of international cooperation providing the operational and management framework for international responses to disasters, with sovereignty as responsibility providing the philosophical foundation for the relationships between states and between a state and persons in need of protection.

However, sovereignty as responsibility is a concept primarily developed by international relations and political scientists. ILC member Georg Nolte, writing before the ILC started deliberating the protection of persons in the event of disasters, argued that sovereignty as responsibility is a highly ambiguous concept and dubious if used as a legal term.[66] Nolte noted that if states, through the application of sovereignty as responsibility, are not viewed as equals this opens up the possibility of enforcement actions being undertaken outside those allowed by international law. Taking the Kosovo example, Nolte extrapolates that third states could justify military enforcement actions on the basis of the presence of terrorists in a particular state as that state would not have fulfilled its responsibility to control its territory. Similarly, if good governance is a fundamental aspect of responsible sovereignty, third states may feel justified in dictating economic and social policies to protect a civilian population. Such approaches would weaken global institutions such as the UN, and the concept of sovereignty equality, as states may unilaterally react to perceived humanitarian and human

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[63] D. Rothchild *et al, Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution Press 1996), xvii-xviii.
[64] Valencia-Ospina, *Fourth Report* (n.53) para.83.
[65] Kälin, 'Annotations' (n.6).
[66] G. Nolte, 'Sovereignty as Responsibility?' (2005) 99 *American Society of International Law Proceedings* 389. For discussion of the concept of sovereignty as responsibility from an international relations perspective, see: A. Etzioni, 'Sovereignty as Responsibility', paper presented at the annual meeting of the International Studies Association, San Diego, California, USA, 22 March 2006, available at: <www.gwu.edu/~ccps/etzioni/documents/A347a-SoverigntyasResponsibility-orbis.pdf> accessed 25 September 2013.

rights needs in other states.[67] Nolte is correct is stressing the potentially important ramifications and challenges for enforcement should sovereignty as responsibility be adopted as the *legal* basis for the ILC draft articles. Nevertheless, this does not preclude the concept forming the *political or moral* basis of the draft articles.

Even if sovereignty as responsibility is not explicitly recognised as the conceptual basis of the draft articles, the role of sovereignty must be acknowledged. Yet in the vast majority of cases when a serious natural or human-made disaster overwhelms a state's national response capacity, the affected state will actively seek assistance from other states and competent humanitarian agencies. So while the ILC draft articles as they currently stand requires an affected state's consent for external agencies to operate on its territory, only in a limited number of cases will access be proactively denied.[68] The principles of humanity and human dignity therefore are likely to dictate that generally such consent is not arbitrarily refused, and that competent humanitarian agencies are allowed to offer their services.[69]

b. The duty to cooperate and international solidarity

In his Second Report in 2009, the Special Rapporteur identified the principles of solidarity and cooperation as being indispensable for the protection of persons in the event of disasters.[70] Since then, both in the ILC and the UNGA Sixth Committee, there has been an increasing focus on the status and implications of the duty of cooperation set out in the draft articles.[71] While draft article 5 established that states shall cooperate both amongst themselves and with the UN, competent inter-governmental organisations, the Red Cross Movement and relevant NGOs,[72] draft article 5*bis* was added in 2012 to provide additional

[67] ibid., 391.
[68] For discussion of refusal of aid by various states, see: C. Allan and T. O'Donnell, 'An Offer You Cannot Refuse? Natural Disasters, the Politics of Aid Refusal and Potential Legal Implications' (2013) 5(1) *Amsterdam Law Forum* 36.
[69] See draft articles 9 (Role of the affected state), 10 (Duty of the affected state to seek assistance), 11 (Consent of the affected state to external assistance), and 12 (Offers of assistance). For discussion, see: Valencia-Ospina, *Fourth Report* (n.53); Summary of 18-25th UNGA Sixth Committee Meetings (2011), A/C.6/66/SR.18- A/C.6/66/SR.25.
[70] Valencia-Ospina, *Second Report* (n.28) para.50-51.
[71] As noted by Spain, the concept of solidarity is not an international legal principle, as reflected in the Special Rapporteur's differential treatment of the concepts of solidarity and cooperation in his Second Report. See: Summary of 20th UNGA Sixth Committee Meeting (2009), A/C.6/64/SR.20, para.50.
[72] Draft article 5 (Duty to cooperate) states: "States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organisations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organisations." For discussion see: Valencia-Ospina, *Second Report* (n.28) para.50-70.

guidance as to the types of cooperation covered by the draft articles, such as humanitarian assistance, coordination of activities and communications, and making available relief personnel and supplies.[73] The Special Rapporteur has stressed that state sovereignty also entails obligations on the part of states – both for affected states towards people affected by disasters, and third states that may be in a position to assist.[74] As a result, the role of an affected state, its duty to seek assistance should a disaster exceed its national response capacity, and the requirement of consent from the affected state for the provisions of external assistance, as set out in draft articles 9-11, have been widely debated in the UNGA Sixth Committee, with Colombia calling these provisions the "core of the draft articles."[75]

Many states have clearly expressed their view that the duty to cooperate should not be construed as an obligation to provide assistance but as an obligation to consider requests for assistance from an affected state, without there being a legal duty to accede to such requests.[76] Germany has noted there is already an enormous challenge to collect and analyse existing practice in order to elucidate *lex lata*, so the Commission should refrain from developing controversial rules *de lege ferenda*.[77] Meanwhile, Portugal has argued that an affected state could bear responsibility for a refusal to accept assistance, as this may give rise to an internationally wrongful act if it undermined the rights of affected persons under international law.[78] Therefore, in highlighting the central role cooperation plays in disaster responses, the Special Rapporteur has noted that a fine balancing act must be played between three fundamental principles of international law: the duty to cooperate must not impinge on the national sovereignty of an affected State; the duty imposes an obligation of conduct on assisting States, as opposed to obligations of result;[79] and cooperation has to be relevant and confined to offering the various forms of assistance required in the event of a disaster.[80] Nevertheless, considering the fundamentally differing views within the global community of states, it is likely that the debate over the relationship between rights and duties in disasters and the limitations of state sovereignty will continue and potentially become more polarised. As argued by the UK delegation in 2012: "the terminology of 'rights' and 'duties' used in the

[73] For text of draft article 5*bis* (Forms of cooperation), see: A/CN.4/L.812, 12 July 2012.
[74] E. Valencia-Ospina, *Third Report*, 31 March 2010, A/CN.4/629, para.75.
[75] Colombia (A/C.6/66/SR.18, para.27).
[76] See for example: Summary of 18th UNGA Sixth Committee Meeting (2011), Mexico (A/C.6/66/SR.18, para.55); Slovenia (A/C.6/66/SR.20, para.12); Malaysia (A/C.6/66/SR.24, para.114).
[77] Summary of 23rd UNGA Sixth Committee Meeting (2011), A/C.6/66/SR.23, para.28 (Germany).
[78] Summary of 24th UNGA Sixth Committee Meeting (2011), A/C.6/66/SR.24, para.66 (Portugal).
[79] For discussion of obligations of conduct and result, see: E. Valencia-Ospina, *Fifth Report*, 9 April 2012, A/CN.4/652, para.88-92.
[80] Provisional Summary Record of 3138th ILC Meeting, A/CN.4/SR.3138, 2 August 2012, Mr Valencia-Ospina.

draft articles was at odds with existing State practice and with the essentially voluntary nature of the principle of cooperation;"[81] while China noted that the relationship between international cooperation and state sovereignty "could not be simplistically defined as one between rights and duties, nor should a duty on the part of an affected State be linked with a right on the part of the international community, because establishing such a link could have a negative impact on international cooperation."[82]

c. Does the Responsibility to Protect doctrine apply in disasters?

Nevertheless, although an affected state has the primary responsibility to protect persons within its territory and to regulate offers of assistance from third parties, and the international community has a duty of cooperation to ensure the protection of persons affected by disasters, the difficult question of enforcement of international norms remains. When, if ever, are forcible humanitarian interventions authorised in the face of a government's unwillingness to assist victims of a natural disaster on its territory? This question raises the limits of state sovereignty in the face of acute suffering. The Responsibility to Protect doctrine (R2P) was developed to ensure that states and the international community have joint responsibilities to prevent and respond to genocide, war crimes, ethnic cleansing and crimes against humanity.[83] However, despite calls to expand the concept to a range of other areas of harm where individual rights may be violated, such as in the aftermath of natural disasters,[84] the UN Secretary-General has made clear:

> The responsibility to protect applies, *until Member States decide otherwise*, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.[85]

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[81] Summary of 19th UNGA Sixth Committee Meeting (2012), A/C.6/67/SR.19, para.65 (United Kingdom).
[82] Summary of 23rd UNGA Sixth Committee Meeting (2011), A/C.6/66/SR.23, para.42 (China).
[83] ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, December 2001. See also: *Implementing the Responsibility to Protect: Report of the Secretary-General*, Ban Ki-Moon, A/63/677, January 2009.
[84] See: T.R. Saechao, 'Natural Disasters and the Responsibility to Protect: From Chaos to Clarity' (2006-2007) 32 *Brookings Journal of International Law* 663; J. Wong, 'Reconstructing the Responsibility To Protect in the Wake of Cyclones and Separatism' (2009-2010) 84 *Tulane Law Review* 219; T. Jackson, 'Bullets for Beans: Humanitarian Intervention and the Responsibility to Protect in Natural Disasters' (2010) 59 *Naval Law Review* 1.
[85] *Report of the Secretary-General*, A/63/677 (n.83) 8 [emphasis added]

Furthermore, in 2009 the ILC supported the conclusion of the Special Rapporteur that R2P would not play a role in the Commission's work on the protection of persons in the event of disasters.[86] This position has been supported by a wide range of states,[87] and David Fidler has argued that due to its significant impact on sovereignty, demands for a right of humanitarian intervention based on a responsibility to protect may actually increase states' reticence to accept binding international rules for humanitarian assistance.[88] Nevertheless, Alain Pellet announced during the 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.[89] Some government representatives support this position and have continued to argue that R2P should not be excluded from the Commission's deliberations.[90]

The draft articles therefore need to be clear that there is a balance between state sovereignty, a state's international responsibilities, and the rights of individuals, and what that balance means in practice. At present, the duty of international cooperation has been highlighted as the basis for this balancing act. However, the rights of individuals who are affected by disasters should not be lost in a fog of sovereignty and inter-state cooperation. The legitimate legal principles of sovereign equality and non-intervention must support the protection of persons in the event of disasters, rather than being used as an excuse to deny international assistance when it is required. This is why the provisions set out in draft articles 7 and 8 on human dignity and human rights provide such an important restatement regarding the applicability of international human rights law in disaster settings. As highlighted during discussions on sovereignty in the ILC in 2010, the purpose of the topic is the protection of persons in the event of disasters, not the protection of the rights of states.[91] Furthermore, as Marie Jacobsson has noted:

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[86] For a summary of debates within the ILC on the applicability of R2P, see: Official Records of the General Assembly, Sixty-third Session, *Supplement No.10* (A/63/10), para.247-250. Confirmation on the non-applicability of R2P can be found at: Official Records of the General Assembly, Sixty-fourth Session, *Supplement No.10* (A/64/10), para.164.

[87] See: China (A/C.6/64/SR.20, para.22); Czech Republic (A/C.6/64/SR.20, para.43); Ghana (A/C.6/64/SR.22, para.12); Iran (A/C.6/64/SR.22, para.82; A/C.6/65/SR.24, para.36); Ireland (A/C.6/64/SR.22, para.14); Israel (A/C.6/64/SR.23, para.40); Russian Federation (A/C.6/64/SR.20, para.46); Sri Lanka (A/C.6/64/SR.21, para.54); Thailand (A/C.6/64/SR.21, para.16); Venezuela (A/C.6/64/SR.21, para.41).

[88] D. Fidler, 'Disaster Relief and Governance after the Indian Ocean Tsunami: What Role for International Law?' (2005) 6 *Melbourne Journal of International Law* 458, 472.

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

[90] For example: Poland (A/C.6/64/SR.21, para.76; A/C.6/66/SR.21, para.85); Hungary (A/C.6/65/SR.21, para.33); 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.

[91] A/65/10 (n.27) para.316.

> If the Commission was serious about upholding the belief that the right to sovereignty also implied a responsibility on the part of States, then it should spell out in legal terms exactly what that responsibility entailed. That would not be an abstract exercise. The Commission had already established that the individual, as a bearer of rights and as a person with essential needs, stood at the centre of its work and that its aim was to ensure the protection of persons. It must now give form to those views and transform legal principles into concrete legal proposals.[92]

This requirement is crucial for the credibility and success of the ILC draft articles. However, it should be remembered that ultimately it was diplomatic pressure from neighbouring countries that had the greatest impact on allowing access to the areas affected by Cyclone Nargis in Myanmar in 2008; despite calls from various Western nations for the forcible provision of humanitarian assistance against the wishes of the Myanmar government.[93] Although less analysed than Cyclone Nargis, similar diplomatic pressure from Zimbabwe's neighbours eventually led the Mugabe regime to recognise the severity and cross-border implications of the cholera epidemic that hit Zimbabwe in 2008.[94] While hard cases may make bad law, in the 2011 sessions Ernest Petrič argued that the purpose of the law was precisely to regulate irregular situations, such as when states refuse to provide assistance to persons in need on their territory, and so the Commission should concentrate on that aspect of the topic.[95] Yet the ILC is right to be wary of engaging in progressive development of the law by reviving debates on forcible humanitarian interventions in natural disaster settings and expanding concepts such as the Responsibility to Protect doctrine to situations of natural or human-made disaster. Roberta Cohen has highlighted that no government has explicitly challenged the concept of sovereignty as responsibility.[96] So the fact that states and humanitarian actors have accepted sovereignty as responsibility as the basis of the Guiding

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[92] Provisional Summary Record of 3057th ILC Meeting, A/CN.4/SR3057, 4 June 2010, Ms Jacobsson.

[93] Furthermore, the UN opposed coercive landing of supplies or military air drops on the grounds it was an inefficient and counterproductive way of delivering aid that could cause more deaths. Edward Luck, former Special Adviser to the UN Secretary-General on the Responsibility to Protect, has remarked: "Secretary-General Ban himself went to Myanmar and used quiet diplomacy, along with ASEAN and others, to try to push that door open an inch or two. Modest results were achieved. If he had gone there under an RtoP label, in all likelihood he would not have gained admission or access to the leadership." See: E. Luck, 'Environmental Emergencies and the Responsibility to Protect: A Bridge Too Far?' (2009) 103 *American Society of International Law Proceedings* 32, 37. Although, Roberta Cohen has noted that by invoking R2P, Bernard Kouchner's "bad cop" may have helped the UN and ASEAN to enter Myanmar to assist as "good cops." See: R. Cohen, 'The Burma Cyclone and the Responsibility to Protect', Brookings Institute, paper presented at Congressional Briefing on Security for a New Century, 21 July 2008, available at: <www.brookings.edu/research/speeches/2008/07/21-myanmar-cohen> accessed 25 September 2013.

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

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

[96] Cohen, 'Innovation in International Standard Setting' (n.6) 466. Although Cohen notes that some states, in particular Egypt, India and Sudan, were concerned regarding the implications for state sovereignty raised by the Guiding Principles on Internal Displacement and challenged their development outside the normal inter-governmental deliberative processes, 472-475.

Principles on Internal Displacement suggests that this would be a less controversial framework for the draft articles than reviving debates on humanitarian interventions and the applicability of R2P in natural disaster settings.

C. Developing International Legal Frameworks for Humanitarian Responses to Disasters

i. Forms of international instrument

International disaster response laws are still developing, and the ILC 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."[97] However, the possible forms that international legal texts can take are multitudinous. Boško Jakovljević, a legal advisor to the Red Cross Movement since the mid-1960s, identified the following forms of international instrument 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 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.[98]

Considering such a wide range of potential legal texts, one may well ask: what is the most appropriate form for codification of international disaster response law, and will the choice of instrument affect the humanitarian results for persons affected by disasters? As highlighted during the ILC discussions in 2008, the ultimate form of the ILC draft articles will be influenced by the balance between codification and progressive development of the law

[97] Valencia-Ospina, *Preliminary Report* (n.21) para.60. For initial discussions within the ILC on the form of the draft articles see: Records of 2979th to 2982nd 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).

[98] B. Jakovljević, 'Some Reflections on International Disaster Relief Law', paper presented at the International Institute of Humanitarian Law conference panel discussion on 'The Protection of Human Beings in Disaster Situations', San Remo, Italy, 8-10 September 2005, 171.

undertaken. Georg Nolte has argued that a binding convention would make sense only if states that are generally reluctant to allow free access for humanitarian assistance would be likely to ratify it, and such states will only ratify a convention if it is a credible effort to codify existing law and ensure good practice. If, on the other hand, the emphasis is on progressive development, then guidelines would be more appropriate.[99] Donald McRae, meanwhile, has argued that the pragmatic goal is to lay down a framework of rules, guidelines or mechanisms that facilitates practical international cooperation in order to make disaster responses more effective and thus provide protection to individuals entitled to it. Nevertheless, he recognised that such principles or guidelines would involve placing obligations on states and other humanitarian actors which might ultimately require the conclusion of a draft convention.[100]

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 in the course of the ILC 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.[101] 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 substantive content of a text, James Crawford conversely 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 was logically excluded. Yet the Vienna Convention on the Law of Treaties is now recognised as having had more influence as a binding multilateral convention than it would have had as a non-binding resolution or declaration.[102] Meanwhile, during 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. There was no guarantee that states

[99] Provisional Summary Record of 2980th ILC Meeting, A/CN.4/SR.2980, 17 July 2008, Mr Nolte.
[100] ibid Mr McRae.
[101] D. Bodansky and J. Crook, 'The ILC's State Responsibility Articles: Introduction and Overview' (2002) 96 *American Journal of International Law* 773, 790-791. See also: S. Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?' (2000) 32 *NYU Journal of International Law and Politics* 591, 616-617; Kälin, 'How Hard is Soft Law' (n.9) 2-5; Cohen, 'Innovation in International Standard Setting' (n.6) 475-476.
[102] J. Crawford, *First Report on State Responsibility*, A/CN.4/490, 24 April 1998, para.41.

would not attach interpretative declarations to the instrument; therefore a General Assembly declaration entailed the same problems as a convention, but without the advantages.[103]

Indeed, writing in 1985 just after the publication of the unsuccessful draft UN Convention, 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."[104] 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."[105] Previous topics examined by the ILC have produced a range of outcomes, from multilateral conventions such as the Vienna Convention on the Law of Treaties,[106] to draft articles such as those on state responsibility.[107] But even if the ILC is working on the assumption that developing a universal instrument is preferable over purely regional or sub-regional approaches, this still begs the question what form should this universal instrument take?

ii. The Framework Convention approach

The original suggestion from the UN 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.[108] 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

[103] Official Records of the General Assembly, Fifty-third Session, *Supplement No.10* (A/56/10), Chapter IV, para.65.
[104] Macalister-Smith, *International Humanitarian Assistance* (n.1) 160.
[105] ibid. Although, see also Macalister-Smith's view that "a comprehensive framework of principles for humanitarian assistance would usefully supplement the technical measures which have already been formulated in some detail." P. Macalister-Smith, 'Disaster Relief: Reflections on the Role of International Law' (1985) *Heidelberg Journal of International Law* 25, 41-42.
[106] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[107] For more on the draft articles on state responsibility and discussion on their final form, see: Crawford, 'Responsibility to the International Community' (n.14); Caron, 'ILC Articles on State Responsibility' (n.14).
[108] A/61/10, Annex C (n.20) para.24.

alarm bells ringing in advance.[109] States meanwhile have been more reticent, with only Poland and Ghana explicitly supporting a binding convention format. Most states have reserved their positions but certain countries, in particular the UK, have expressed their preference for non-binding guidelines or a set of principles.[110] Indeed, the framework convention format is an attractive one. An overarching framework convention could provide a legally binding foundation for international cooperation by ensuring agreed definitions and principles for humanitarian responses between the parties to the convention. Such a convention could also act as an authoritative point of reference for the conclusion of bilateral, trilateral and regional agreements. As highlighted by Shinya Murase, a framework convention may in fact facilitate such bilateral, trilateral or regional agreements.[111]

This approach would also recognise that international disaster laws and practices are evolving as a result of transnational dialogues, and may require amendment in the coming years. One can envisage an overarching framework convention providing a solid base by ensuring agreed definitions and principles for humanitarian responses, both between parties and as an authoritative point of reference for the conclusion of bilateral, trilateral and regional agreements. Over time, the framework could be strengthened by protocols or subsidiary agreements on technical or operational matters, thereby promoting legal certainty and efficiency of disaster responses. As such, it would form the overarching framework for understanding humanitarian norms in disaster settings within the *acquis humanitaire*, in a similar manner to the role played by the Rome Statute for the International Criminal Court for international criminal law and the Geneva Conventions and Additional Protocols for the international humanitarian law of armed conflict.[112]

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[109] Provisional Summary Record of 2981st ILC Meeting, A/CN.4/SR.2981, 18 July 2008, Mr Pellet. Dr. Jakovljević cautioned that a universal international convention or framework convention containing specific and concrete obligations should only be considered when international disaster response laws have attained a certain degree of general recognition on the main principles and rules. See: Jakovljević, 'Reflections on International Disaster Relief' (n.98). Arguably, the ILC's work on the protection of persons in the event of disasters has helped to consolidate the main principles and rules. As contended by the ILC Special Rapporteur: "[t]o the extent that international disaster relief law might be said to exist as an autonomous branch of international law, it owed that character to the Commission's work," Summary of 25th UNGA Sixth Committee Meeting (2011), A/C.6/66/SR.25, para.67.

[110] See for example: India (A/C.6/63/SR.23, para.21); Republic of Korea (A/C.6/63/SR.23, para.24); Spain (A/C.6/63/SR.23, para.37 and A/C.6/67/SR.18, para.118); UK (A/C.6/63/SR.23, para.64, A/C.6/64/SR.20, para.40 and A/C.6/66/SR.23, para.45); Poland (A/C.6/63/SR.24, para.56); Czech Republic (A/C.6/63/SR.24, para.43); Venezuela (A/C.6/64/SR.21, para.42); Russian Federation (A/C.6/66/SR.24, para.37). The UK was also reluctant to support the original proposal for a convention on the International Relief Union in the 1920s. See: P. Macalister-Smith, 'The International Relief Union: Reflections on the Convention Establishing an International Relief Union of July 12, 1927' (1986) 54 *Tijdschrift voor Rechtsgeschiedenis* 363, 365.

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

[112] See also: Section C(iii), Chapter 4.

Yet the evidence base for analysing whether or not a binding framework convention is the most effective means of promoting the protection of persons in the event of disasters is not available. Would a binding text actually produce a greater benefit for persons affected by disasters? Furthermore, what should the normative content of such a framework convention 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[113] 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[114] 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.[115]

In the context of humanitarian responses to disasters, 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 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, 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.[116]

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[113] Framework Convention on Civil Defence Assistance, International Civil Defence Association (adopted 22 May 2000, entered into force 23 September 2001) 2172 UNTS 213.

[114] Framework Convention on the Protection of National Minorities, Council of Europe (adopted 1 February 1995, entered into force 1 February 1998) 2151 UNTS 243.

[115] 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' (2000) 7 *International Journal on Minority and Group Rights* 291. Similarly, Steven Ratner has questioned what "binding" means in the context of the Framework Convention when states are simply required to "endeavour to ensure" certain protections for minorities or to provide protection only "as far as possible," and compares these weak duties with an explicit binding obligation to ban certain forms of discrimination. Ratner, 'Does International Law Matter' (n.101) 610-611.

[116] See for example: 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' (2009-2010) 38 *Denver Journal of International Law and Policy* 227; Davies, 'International Duty to Protect' (n.94).

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 this to "Protection of persons in the event of disasters."[117] It has been argued that this change in the title, and therefore in emphasis, indicates a preference for concentrating on the protection of persons and specific standards of treatment to which individual victims of disaster are entitled, rather than on the operational aspects of relief.[118] While the ILC's work risks raising expectations within the humanitarian community of a new approach to individual rights in disaster settings, perhaps, as advocated by Donald McRae, it is through facilitating the operational responses of states and international humanitarian actors that the ILC can have the greatest humanitarian results. Yet by expressly linking operational aspects to the body of international human rights law via draft articles 7 and 8, the text may also help to promote awareness of the need to examine multiple branches of international law and the importance of the human rights implications of disasters.

However, before concluding that a binding framework convention is the only appropriate instrument to improve international disaster responses, it is worthwhile to flag other options that are available, in particular as some do not require extensive codification or progressive development by the international community.[119] One approach would be for the ILC to present the draft articles as a restatement of the law; although this would imply that the ILC was able to identify sufficient existing international practice, and not have to engage in large-scale progressive development. An alternative approach would be to update the 1982 UNITAR Model Rules to regulate the modern complexity of international disaster response operations. In this scenario, the ILC could develop model agreements for affected states to utilise with donor States, UN agencies and other humanitarian organisations. Such agreements could include general statements of humanitarian principles as well as technical and operational rules, or could focus purely on technical rules. Finally, the ILC could decide to support the work of the IFRC on improving the national response capacities of states so that delays in response are minimised should international relief be required. While these are all options, and the ILC does not always recommend that its work progresses to a diplomatic

[117] Provisional Summary Record of 2978th ILC Meeting, A/CN.4/SR.2978, 15 July 2008, Mr Valencia-Ospina.
[118] ibid. See also: Provisional Summary Record of 2980th ILC Meeting, A/CN.4/SR.2980, 17 July 2008, Mr Saboia.
[119] As David Caron has noted: "It is essential to recognise that internationally, the freezing effect of a code may be greater [than national legal codes] because the system lacks both a legislative body to amend the codes and an authoritative judiciary with jurisdiction over enough cases to adapt them to new circumstances and needs." Caron, 'ILC Articles on State Responsibility' (n.14) 861.

conference immediately, it has been slow to adopt forms of instrument that are not draft articles, and which do not at least stylistically resemble an international convention.[120]

iii. Universal and regional approaches to codification

One also has to consider whether or not a global approach is the most appropriate solution to humanitarian responses to disasters. While developing the concept of sovereignty as responsibility in the context of conflict management in Africa, Francis Deng and his colleagues stated:

> On the international level ... sovereignty becomes a pooled function, to be protected when exercised responsibly, and to be shared when help is needed ... It is best to think of the international exercise in terms of layers of assistance. The state exercises sovereignty at home. It can then turn to its neighbours for assistance, next to its regional partners, and finally to the global organisation, the United Nations. In between, it may also seek bilateral assistance as it chooses, from a distant great power or from a foreign state with which it entertains special relations.[121]

This structural approach to sovereignty where states can turn to various layers of assistance when necessary accurately reflects the reality of international disaster responses. In Cyclone Nargis, it took a month until Western relief workers were allowed to assess the stricken areas;[122] during which time Western governments argued over the legally of a military intervention to provide humanitarian assistance. Meanwhile, Indian, Chinese and other Asian neighbours were allowed access to assist the Myanmar relief effort,[123] and there were numerous local initiatives despite government restrictions.[124] Clearly, by delaying much-needed international assistance the Myanmar government failed in their responsibilities as a sovereign state towards persons on their territory. Nevertheless, since 2005, the ASEAN Agreement on Disaster Management and Emergency Response has regulated the regional responses to natural disasters, in a region well-known for its strong views on the importance of state sovereignty and non-intervention, and it was through assistance from ASEAN states that the first international support arrived in Myanmar. Internationally binding regional

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[120] ibid 862.
[121] Rothchild *et al*, *Sovereignty as Responsibility* (n.63) xviii.
[122] Ford, 'Failure to Respond' (n.116) 230-233.
[123] *His master's voice*, M. Jacques, The Guardian, 15 May 2008, available at: <www.guardian.co.uk/commentisfree/2008/may/15/hismastersvoice1> accessed 25 September 2013. See also: *Post-Nargis Joint Assessment*, report prepared by the Tripartite Core Group comprised of Representatives of the Government of Myanmar, ASEAN and the UN, July 2008.
[124] *Comic arrested for Burma aid runs*, BBC News Online, 5 June 2008, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7437251.stm> accessed 25 September 2013.

approaches similarly exist in the Middle East, Americas, Caribbean and Europe[125] while bilateral, trilateral and multilateral disaster response and mutual assistance agreements abound.[126]

Therefore, considering the development of regional and sub-regional regimes in the past 20 years, is a universal multilateral convention still the most effective method of regulating international disaster responses? Often neighbouring countries are the first to respond to natural or human-made disasters. This may be due to geographic proximity but also cultural, religious or linguistic ties that bind neighbouring states across a gamut of sectors of life. At the level of self-interest, a disaster that occurs in one country may have cross-border effects – either as people flee across international borders, as during the 2008 Zimbabwean cholera epidemic,[127] or because the effects of the disaster spread across more than one country, as seen in the Chernobyl nuclear accident in 1986 and feared following the 2011 Fukushima nuclear disaster.

It is pertinent therefore to ask whether regional, rather than universal, approaches may provide a more effective method of ensuring the protection of persons in the event of disasters. After all, the ILC is not the only forum for the codification or progressive development of the law,[128] and there is already a criss-crossing web of binding disaster risk reduction and response mechanisms in place at the regional and sub-regional levels. However, perhaps a more apt question is: what is the appropriate relationship between a universal international law instrument, for example a binding framework convention, and regional and sub-regional legal and institutional arrangements already in place? For every large-scale disaster, such as the 2010 Haitian earthquake, that demands a massive international response there will be numerous smaller-scale disasters such as the Mongolian

[125] For example: Arab Cooperation Agreement Regulating and Facilitating Relief Operations, Arab League Decision No.39 (3 September 1987); Council of Europe, Committee of Ministers, Resolution (87)2, Setting Up a Co-operation Group for the Prevention of, Protection Against, and Organisation of Relief in Major Natural and Technological Disasters (20 March 1987); OAS Inter-American Convention to Facilitate Disaster Assistance (1991); Agreement Establishing the Caribbean Disaster Emergency Response Agency (26 February 1991); Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters (15 April 1998).
[126] IFRC, *Desk Study* (n.17); *Secretariat Memorandum* (n.17).
[127] Davies, 'International Duty to Protect' (n.94).
[128] Pellet, 'Codification and Progressive Development' (n.25) 18.

severe winter, or *dzud*, of 2009-2010,[129] which nevertheless have a devastating impact on those affected.

The Global Humanitarian Assistance Report[130] estimates that nearly US$18 billion was provided in humanitarian assistance in 2012 alone. Much of this assistance represents inter-regional assistance, rather than intra-regional activities. Therefore even from the perspective of regulating a multi-billion global industry, developing consensus around the international legal framework that supports humanitarian actions would be important. Yet the question of whether a universal approach should be taken over a regional or sub-regional approach has not been addressed by the ILC. While there have been discussions on the final form that the draft articles may take, these have been premised on the need for a universal instrument, and the debates that have taken place have focused on whether or not the instrument should be binding or non-binding. Considering that the ILC's examination of the protection of persons in the event of disasters is a work in progress, questions such as these will need to be addressed before the finalisation of any new international legal framework.

D. Proposals for Systemic Oversight of Human Rights in Disasters

The interactions between different frameworks and mechanisms at the national, regional and international levels are fundamental for understanding the rights and duties at play in a disaster setting. So considering the recognition within the ILC draft articles that human dignity and human rights play a central role within international humanitarian responses to disasters, the following section will provide a series of proposals as to how the international community can better monitor the human rights implications of disasters, in particular through promoting the internalisation of humanitarian norms into domestic legal systems. For within an international framework based primarily on sovereign states, international as well as domestic enforcement and accountability mechanisms are required to ensure compliance with international norms.[131] So despite the major operational focus of the UN on

[129] IFRC, *Mongolia: Severe Winter*, Final Report, 1 April 2011. The severe weather killed an estimated 8.4 million cattle, affecting the livelihoods of over 770,000 herders.

[130] Development Initiatives, *Global Humanitarian Assistance Report 2013*, 11. Available at: <www.globalhumanitarianassistance.org/reports> accessed 25 September 2013.

[131] See: Ratner, 'Does International Law Matter' (n.101) 654-658. Plus Martha Finnemore's response to Ratner's article: M. Finnemore, 'Are Legal Norms Distinctive?' (2000) 32 *NYU Journal of International Law and Politics* 699, in particular 702-703. See also: O. Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' (2005) 72 *University of Chicago Law Review* 469, in particular 489-491. For a contrary view, see: H. Koh, 'How is International Human Rights Law Enforced?' (1998-1999) 74 *Indiana Legal Journal* 1397, in particular 1406-1408.

humanitarian responses to crises, it is noticeable that the UN human rights mechanisms have provided limited systemic guidance or examination of the human rights implications of natural or human-made disasters. This raises particular concerns as Oona Hathaway has noted there is little empirical evidence that poorly monitored and enforced human rights provisions positively influence a state's human rights practices, as there are few incentives for signatory governments to match their rhetoric with action. A solution proposed by Professor Hathaway is a stronger system of independent expert monitoring of the human rights practices of states that sign up to human rights treaties, which implies a collective approach to promoting respect for human rights, rather than judicial structures or individual complaints mechanisms.[132]

Yet although key UN agencies, the ILC and non-governmental humanitarian actors have all reaffirmed the applicability and importance of human rights in disasters, the institutional human rights framework has been slow to systematically include victims of disasters within the existing monitoring and enforcement mechanisms.[133] Furthermore, as highlighted by the IFRC, many states lack the necessary domestic legal and regulatory frameworks to support large-scale international humanitarian assistance operations, resulting in delays and the potential denial of life-saving assistance.[134] Therefore, the development of domestic legal provisions and structures is essential to promoting efficient and accountable national and international responses to major disasters.[135] So could a specific process of regular monitoring and reporting by states on their compliance with international and national human rights norms relating to disasters be established?

i. Reform of the UN human rights system

Ever since the UN Secretary-General's call to examine ways of improving the coordination and structure of the UN human rights mechanisms and to create a unified human rights treaty body system, a considerable amount of time and effort has gone into examining a

[132] See: O. Hathaway, 'Making Human Rights Treaties Work: Global Legal Information and Human Rights in the 21st Century' (2003) 31 *International Journal of Legal Information* 312; O. Hathaway, 'Do Human Rights Treaties Make a Difference?' (2001-2002) 111 *Yale Law Journal* 1935.
[133] See for example: A.M. Abebe, 'Special Report – Human Rights in the Context of Disasters: The Special Session of the UN Human Rights Council on Haiti' (2011) 10 *Journal of Human Rights* 99, 103.
[134] D. Fisher, 'International Disaster Relief: A Growing Regulatory Dilemma' (2007) 101 *American Society of International Law Proceedings* 114, 114; IDRL Guidelines (n.12) 3.
[135] For discussion of the internalisation of humanitarian norms at the domestic level, see: D. Cubie, 'Clarifying the "*Acquis Humanitaire*": A Transnational Legal Perspective on the Internalization of Humanitarian Norms', in *The International Law of Disaster Relief* (Cambridge University Press – forthcoming). See also: Koh, 'International Human Rights Law' (n.131).

range of proposals brought forward to improve the institutional and substantive application of international human rights provisions.[136] It is well recognised that the existing monitoring and reporting structures for UN human rights treaties are under considerable strain due to their proliferation,[137] with nine dedicated Human Rights Treaty Bodies, plus a Subcommittee on the Prevention of Torture.[138] So parallel to work undertaken by the Office of the UN High Commissioner for Human Rights, a key impetus for reform came from the November 2009 'Dublin meeting' of current and former UN Treaty Body members, which led to a series of follow-up thematic sessions involving significant actors such as national human rights institutions and non-governmental organisations.[139] Considering the divergent and ad hoc approach taken to date by the various Treaty Bodies to the issue of human rights in disasters, there is clearly a need for a more systematic and coordinated approach to monitoring the human rights implications of disasters.[140] Rather than creating a dedicated human rights instrument and monitoring body for disasters, a state's preparations for and responses to natural and human-made disasters could therefore be examined more comprehensively by the UN Human Rights Council and the individual UN Human Rights Treaty Bodies. Concurrently, there is a need for a more coordinated and systemic approach to the issue across the various human rights bodies with the UN system to reflect the emerging normative system of international law and practice on humanitarian responses to crises.[141] Therefore,

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[136] See: *Strengthening the United Nations: An agenda for further change*, 9 September 2002, A/57/387, para.45-58; *In Larger Freedom: Towards development, security and human rights for all*, 21 March 2005, A/59/2005, para.140-147. For background to the reform process, see: M. O'Flaherty and C. O'Brien, 'Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body' (2007) 7 *Human Rights Law Review* 141; A. Devereux and C. Anderson, 'Reporting under International Human Rights Treaties: Perspectives from Timor Leste's Experience of the Reformed Process' (2008) 8 *Human Rights Law Review* 69.

[137] Rosalyn Higgins identified the risk of proliferation of treaty bodies as early as 1989. See: R. Higgins, 'The United Nations: Still a Force for Peace' (1989) 52 *Modern Law Review* 1, 9. For a more recent analysis of the treaty body reform process, see: F. Hampson, 'An Overview of the Reform of the UN Human Rights Machinery' (2007) 7 *Human Rights Law Review* 7, in particular 12-14.

[138] The Human Rights Treaty Bodies are: Human Rights Committee (HRC); Committee on Economic, Social and Cultural Rights (CESCR); Committee on the Elimination of Racial Discrimination (CERD); Committee on the Elimination of Discrimination Against Women (CEDAW); Committee Against Torture (CAT); Committee on the Rights of the Child (CRC); Committee on Migrant Workers (CMW); Committee on the Rights of Persons with Disabilities (CRPD); Committee on Enforced Disappearance (CED); Subcommittee on Prevention of Torture (SPT). See: <www2.ohchr.org/english/bodies/treaty/index.htm> accessed 25 September 2013.

[139] Full details and copies of the resultant texts from the various meetings are available at: <www.ohchr.org/EN/HRBodies/HRTD/Pages/TBStrengthening.aspx> accessed 17 July 2013. See also: M. O'Flaherty, 'Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement' (2010) 2 *Human Rights Law Review* 319.

[140] For empirical analysis, see: D. Cubie and M. Hesselman, 'Monitoring and Accountability of the Human Rights Implications of Disasters: Proposals for Systemic International Oversight', currently under consideration by the *Netherlands Quarterly of Human Rights* (copy on file with authors).

[141] For discussion of the changing nature of the international legal system as a whole, and the twin processes of integration and fragmentation, see: C. McLachlan, 'The Principle of Systemic Integration and

the following sections will examine the role that component parts of the UN human rights monitoring system play in promoting the protection of human rights in disasters, while simultaneously providing proposals for how to incorporate these issues within the current reform process.

ii. The UN Human Rights Council

a. Reporting via the Universal Periodic Review Process

Following the establishment of the UN Human Rights Council (HRC) in 2005, the Universal Periodic Review (UPR) process[142] created a system whereby all UN member states are obliged to undergo regular examination by other states of measures they have undertaken to fulfil their international human rights obligations and commitments. Rising from the ashes of the discredited Commission on Human Rights, the UPR system has been described as a "breath of fresh air" and "genuinely innovative, positive, and encouraging";[143] while governments have been keen to stress that the UPR is an "additional tool for human rights monitoring, intended to complement and not duplicate the work of the treaty bodies and the special procedures."[144] The UPR involves a three-stage process over a period of 4½ years, which commences with the review of a state, followed by implementation of the recommendations made during the review, before concluding with an assessment of the implementation measures taken by the state during their next UPR review. So far, one full cycle has been completed, with all 193 UN member states presenting reports and undergoing examination between 2008 and 2011.[145]

Article 31(3)(c) of the Vienna Convention' (April 2005) 54(2) *International and Comparative Law Quarterly* 279, 282-286.

[142] Established by UNGA Res 60/251, 15 March 2006.

[143] J. Carey, 'The U.N. Human Rights Council: What Would Eleanor Roosevelt Say?' (2008-2009) 15 *ILSA Journal of International and Comparative Law* 459, 460. See also: F. Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System' (2007) 7 *Human Rights Law Review* 109.

[144] UN Human Rights Council, 8th Session, Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review, Netherland*s, para.9, A/HRC/8/31/Add.1 (16 June 2008). See also: *Tonga*, para.5, A/HRC/8/48 (5 June 2008): "the UPR process is one that should ensure complementarity with existing mechanisms so as to avoid any duplication."

[145] For analysis of the recommendations made to 66 states during the first UPR cycle, see: *Universal Periodic Review: On the Road to Implementation*, UPR Info (2012), available at: <www.upr-info.org/IMG/pdf/2012_on_the_road_to_implementation.pdf> accessed 25 September 2013. However, Israel did not attend its second UPR review in January 2013. See: *Israel Absent from its Own UPR*, UPR Info, 30 January 2013, available at: <www.upr-info.org/+Israel-absent-from-its-own-UPR+.html> accessed 25 September 2013.

Considering the wide range of potential human rights violations arising from natural and human-made disasters, it would be appropriate for a state's actions pre- and post-disasters to be examined as part of the country-specific UPR process. An analogous examination took place after the 2010 Haiti earthquake, when a special session of the HRC debated a human rights approach to the recovery process; although the extent of devastation to the national institutions actually led the HRC to postpone Haiti's planned UPR report scheduled for 2010.[146] However, to reflect the objective of non-duplication, a state's reporting of actions taken to protect human rights in disasters during their UPR examination should complement reporting under the relevant individual human rights treaties[147] and note should be taken of relevant General Comments and Concluding Observations between the HRC and the respective Treaty Bodies.

From the national perspective, a key advantage of including the human rights implications of disasters within the UPR system is the active engagement of civil society in the development of UPR and shadow reports, as most natural and human-made disasters such as flooding, hurricanes and landslides do not affect large sections of a country, but can have devastating impacts at the local level. Meanwhile the requirement for all states without exception to be examined on their disaster preparedness and response activities through the UPR process would help promote the universal application of human rights law in disaster settings. Additionally, the 4½ year nature of the UPR process reflects the cyclical nature of disasters, which requires states to commence preparation for the next disaster event immediately after a disaster strikes.[148] Therefore, reporting on disasters that occur within a state during the UPR cycle would help to promote awareness of the actions needed to minimise the risk of human rights violations in future events, while states would subsequently report back on implementation measures undertaken following recommendations made in previous cycles of the UPR process.

b. Examination via the Special Procedures

To support the work of states and the Human Rights Council in the UPR process, use could also be made of the thematic special procedures, with the establishment of an Independent

[146] See: Abebe, 'Special Report' (n.133).
[147] For example, the implications of disasters for children should also be reported under the procedures set out in the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).
[148] See: Section A(ii)(b), Chapter 3.

Expert or Special Rapporteur on the Human Rights Implications of Disasters.[149] While mindful of the impact of proliferation on the special procedures system, which already incorporates 36 thematic and 12 country-specific mandates,[150] considering both the huge numbers of people affected by disasters each year[151] and the potentially serious violations of human rights which can occur during a disaster, it would be appropriate to provide a central focal point within the UN human rights monitoring system to ensure a consistent application and awareness of the human rights implications of disasters. Indeed, the human rights implications of disasters falls within all four of the purposes identified by Hurst Hannum that may be served by the creation of a specific thematic focus.[152] Furthermore, as noted by the OHCHR,[153] the potential for increased frequency and intensity of hydro-meteorological disasters arising from climate change and the attendant human rights implications reinforces the need for such a focus. One can foresee such an Independent Expert or Special Rapporteur acting in a complementary fashion to the ILC Special Rapporteur on the Protection of Persons in the Event of Disasters, and subsequently providing a targeted focus on the promotion of human rights in disasters once the ILC draft articles have been completed.

Alternatively, the relevant pre-existing thematic mandates within the HRC (which include the right to food, the human rights of internally displaced persons, and the human rights obligations for a healthy and sustainable environment) could be expressly expanded to include the human rights implications of states' humanitarian preparations for and responses to natural and human-made disasters. The Special Rapporteur on Adequate Housing has already conducted a report on the realisation of the right to adequate housing in post-disaster

[149] Such a thematic mandate could fall within the group of mandates that Hurst Hannum classified as "broader subjects that may not yet be specifically articulated in a particular treaty or that encompass concerns that go beyond implementation of a specific right." H. Hannum, 'Reforming the Special Procedures and Mechanisms of the Commission on Human Rights' (2007) 7 *Human Rights Law Review* 73, 76.

[150] For examination of the historical development of the special procedures mechanisms, see: J. Gutter, 'Special Procedures and the Human Rights Council: Achievements and Challenges Ahead' (2007) 7 *Human Rights Law Review* 93. For details of the current special procedures, see: <www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx> accessed 25 September 2013.

[151] An average of 190 million people each year are affected by natural and human-made disasters (excluding armed conflicts), with approximately 120,000 deaths and over US$142 billion in damage to property and infrastructure. Estimated annual average statistics based on years 2003-2012. Information compiled from the International Disaster Database, CERD, available at: <www.emdat.be> accessed 25 September 2013.

[152] The four purposes proposed are: (i) Protection of individual victims; (ii) Promotion of rights already guaranteed by treaty; (iii) Studies of potential new rights or approaches; (iv) Reinforcing concern for issues considered in non-human-rights UN forums. Hannum (n.149) 78-79.

[153] *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, A/HRC/10/61, 15 January 2009, para.8.

settings,[154] following which the HRC encouraged states and relevant actors to respect, protect and fulfil the right to adequate housing as a component of the right to an adequate standard of living in disaster risk reduction, prevention and preparedness initiatives, as well as in all phases of disaster response and recovery.[155] Including the human rights implications of disasters within the existing thematic mandates would help promote the mainstreaming of human rights in disasters and would not require the creation of a new thematic mandate within the HRC, although without additional funding such a move could further stretch the limited resources and time for consideration already available to the existing thematic mandates.

iii. The UN Human Rights Treaty Bodies

In addition to inclusion within the UPR process and the HRC special procedures, the separate UN Human Rights Treaty Bodies should more explicitly consider the specific rights and responsibilities applicable in disaster settings within their mandates under existing international human rights law. For example, the Committee on Economic, Social and Cultural Rights (CESCR) could examine specific breaches of the International Covenant on Economic, Social and Cultural Rights as they apply to disaster risk reduction and humanitarian responses to actual disasters, while the Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child could likewise examine the gender and child specific aspects of disaster prevention and response.

To reduce the burden on states in their reporting requirements, preparation for and responses to disasters could be included in the Core Common Document supplied to all UN Treaty Bodies, while additional issues could then be contained in treaty-specific documents. Furthermore, specific questions regarding disaster preparedness and response could be included by each Committee in the list of issues sent to each state prior to the examination by the Committee. Initially, a state could report on its overall disaster risk reduction plans and actions, and on specific humanitarian responses to disasters that occur during the reporting period. Once the concept and practicalities of monitoring specific rights in disaster settings is

[154] A/66/270, 5 August 2011. The Special Rapporteur has also undertaken a report on the closely related topic of the potential impact of climate change on the right to adequate housing, and the HRC has encouraged other relevant special procedure mandate-holders to likewise give consideration to the issue of climate change within their respective mandates. UNHRC Res 10/4, 25 March 2009: *Human rights and climate change* (A/HRC/10/L.11).

[155] UNHRC Res 19/4, 22 March 2012: *Adequate housing as a component of the right to an adequate standard of living in the context of disaster settings* (A/HRC/19/2).

acknowledged, jurisprudence based on individual complaints and Treat Body practice could develop further, in line with each Committee's existing procedures.[156] Concurrently, as noted by Françoise Hampson, the reformed system should promote governmental accountability via greater monitoring by the UN of the internal remedies system in place for individuals at the domestic level.[157]

Considering the on-going discussions on reform, strengthening and streamlining of the human rights monitoring system led by the UN High Commissioner for Human Rights, developing such monitoring and accountability processes would provide the opportunity for disaster-related human rights issues to be mainstreamed into the current human rights monitoring system,[158] reflecting the key focus on human rights and human dignity set out in the ILC draft articles. Indeed, this could help address concerns raised in the ILC as to the source of the applicable norms underlying the draft articles. Therefore, state reporting should be supported by the conclusion of specific Human Rights Council Resolutions and General Comments, and Recommendations from the relevant Human Rights Treaty Bodies on the human rights implications of disasters. The conclusion of such Resolutions and General Comments would act as an aid to the interpretation of specific treaty provisions as they relate to disasters, thereby promoting a coordinated and universal understanding of how the existing human rights treaties apply in a disaster setting. Current references to disasters in General Comments do not examine the issue of human rights in disasters in a comprehensive manner, and generally only refer to victims of disasters and those living in disaster-prone areas as part of a list of particularly vulnerable persons.[159] Additionally, as UNHCR has

[156] For discussion of the UN and regional jurisprudence relating to the justiciability of the right to development, see: M. Scheinin, 'Advocating the Right to Development through Complaint Procedures under Human Rights Treaties', in B.A. Andreassen and S. Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions* (2nd ed, Intersentia 2010).
[157] Hampson (n.137) 13.
[158] For discussion of the benefits of treaty-based implementation review mechanisms in the field of human rights, see: J. Brunnée, 'International Legal Accountability through the Lens of the Law of State Responsibility' (2005) 36 *Netherlands Yearbook of International Law* 21, 51-52. Professor Brunnée concludes that "treaty-based collective accountability processes appear to generate considerable discursive and social pressure on non-compliance parties, and appear to enable the imposition of non-compliance consequences that are tailor-made to the concerns that animate the regime," 54.
[159] See: UN Committee on Economic, Social and Cultural Rights, General Comments: No.4, *The right to adequate housing* (13 December 1991), para.8, E/1992/23; No.12, *The right to adequate food* (12 May 1999), para.5, 6, 13, 15 and 38, E/C.12/1999/5; No.14, *The right to the highest attainable standard of health* (11 August 2000), para.16, 40 and 65, E/C.12/2000/4; No.15, *The right to water* (20 January 2003), para.16, 22, 34 and 60, E/C.12/2002/11; and the Committee on the Rights of the Child, General Comment No.3, *HIV/AIDS and the rights of the child* (17 March 2003), para.34, CRC/GC/2003/3.

increasingly responded to displacement caused by natural disasters,[160] and as a specialised UN agency falling under the remit of ECOSOC, this could provide a supplementary forum for the oversight of the interconnected responses of the global community to forced population displacements and natural hazards. Finally, these global UN accountability mechanisms should be supplemented through national human rights monitoring processes, as well as relevant monitoring and enforcement mechanisms developed at the regional level, such as those established by the European Union, African Union, Council of Europe, OSCE or ASEAN.[161]

The extensive level of ratification of international human rights treaties and the broadly authoritative nature of pronouncements made by UN Human Rights bodies provide a strong impetus for a more explicit inclusion of the human rights implications of disasters within the existing UN human rights mechanisms. Additional advantages can be found in the active engagement of many local civil society organisations in both the UPR process and the individual treaty reporting structures. So while individuals affected by disasters may face particular challenges in bringing an individual complaint alleging violation of their rights and seeking an effective remedy, obliging states to report on their preparations for and responses to disasters on their territory would promote more consistent human rights-based approaches to humanitarian action, and reflect the express recognition of the applicability of human rights law in the ILC draft articles.

E. Conclusion: Progress and Challenges

As can be seen, over the past few years the international community has undertaken some significant and far-reaching steps towards the development and strengthening of an international legal framework for humanitarian responses to disasters, including the placement and status of any potential rights to humanitarian assistance within this

[160] See: B. Deschamp *et al*, *Earth, Wind and Fire: A review of UNHCR's role in recent natural disasters*, UNHCR Policy Development and Evaluation Service (June 2010); V. Türk, 'IDPs and refugees in the OSCE area' (2011) 2 *Security and Human Rights* 119, 121.

[161] For discussion of regional human rights accountability mechanisms and humanitarian protection, see: Ratner, 'Does International Law Matter' (n.101); S. Ojeda, 'The Kampala Convention on Internally Displaced Persons: Some International Humanitarian Law Aspects' (2010) 29(3) *Refugee Survey Quarterly* 58; F. Giustiniani, 'New Hopes and Challenges for the Protection of IDPs in Africa: The Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa' (2010-2011) 39 *Denver Journal of International Law and Policy* 347; M. Hesselman, 'Regional Human Rights Regimes and Humanitarian Obligations of States in the Event of Disaster', in A. Zwitter et al (eds), *Humanitarian Action: Global, Regional and Domestic Legal Responses to Local Challenges* (Cambridge University Press – forthcoming) (copy on file with author).

framework. Considering the ultimately insurmountable challenges faced by the International Relief Union, and during the attempts at codification in 1980s, the progress that has been achieved so far is remarkable. The international Red Cross Movement has acted as both norm entrepreneur and norm sponsor by consistently promoting the need for national and international disaster response laws. Meanwhile, the International Law Commission, and the Special Rapporteur in particular, has taken a lead by providing a forum for the needs and concerns of states and humanitarian actors to be highlighted and addressed by international legal experts in the context of the UN mechanisms for the codification and progressive development of international law. Yet it is important not to over-emphasise the progress achieved thus far. As will be elaborated in the final section of this thesis, a range of challenges remain, including: the actual implementation and monitoring of the human rights implications of disasters; the final form and function of the ILC draft articles; the relationship between national, regional and international norms and frameworks for humanitarian responses; and finally the on-going question of how best to balance individual rights with state sovereignty. All these issues have a direct impact on the legal status of a right to humanitarian assistance, and the conceptual and practical application of international law in disaster settings.

Chapter 8

Conclusions

At the beginning of this thesis, I identified three questions which I planned to address during the course of my examination of the contested right to humanitarian assistance following natural and human-made disasters, and the emerging international legal frameworks for international humanitarian response operations. These questions were:

1. Does a specific right to humanitarian assistance for victims of natural and human-made disasters currently exist under international law?
2. To what extent do existing international human rights standards, and related monitoring and accountability mechanisms, provide protection to victims of natural and human-made disasters?
3. What are the implications for rights-holders and duty-bearers from the codification of specific rights following natural or human-made disasters through a unified or series of binding international treaties?

From an empirical analysis of existing positive international law, as well as a variety of non-binding normative standards, I concluded that it was necessary to split the "right to humanitarian assistance" into two distinct rights, namely: an individual's right to request and receive humanitarian assistance, and an organisational right to offer humanitarian assistance. While certain rights for individuals and humanitarian organisations exist in the international humanitarian law of armed conflict, I argue that at this present moment in time there is no identifiable unique legal right in general international law for individuals to request or receive humanitarian assistance in natural and human-made disaster settings. However, such a stark finding is tempered by my conclusion that humanitarian organisations do have the right to offer their services to an affected state, subject to the requirement of consent being granted by the affected state prior to the delivery of such assistance.

Moreover, despite my negative finding as to the existence of a specific right to request and receive humanitarian assistance in positive law, it is clear that pre-existing international

human rights law continues to apply in disaster settings. Therefore, it is possible to identify rights-holders and duty-bearers in a disaster context. The protection of the fundamental basic necessities of life, including rights to food, shelter and medical care, as set out in international human rights law provides the basis for adopting human rights-based approaches to humanitarian response operations. It follows that affected states have specific obligations to ensure that the rights of persons affected by natural and human-made disasters are protected, respected and fulfilled. Yet the international institutional arrangements, most notably the UN human rights mechanisms, have been slow to specifically identify the human rights implications of disasters. Building on the non-binding 2011 IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters,[1] the recent UN Human Rights Council decision to conduct research on best practices and main challenges in the promotion and protection of human rights in post-disaster and post-conflict situations,[2] and the explicit inclusion of substantive articles on human dignity and human rights in the ILC draft articles on the protection of persons in the event of disasters,[3] represent the increasing awareness of the need to ensure that individuals' rights as well as needs are addressed in a disaster context.

A. The Human Rights Implications of Disasters

It is therefore incumbent upon the official human rights monitoring and accountability mechanisms, as represented at the global level by the UN human rights bodies as well as those at the regional and national levels, to proactively examine the potential violations of human rights that may occur in a disaster. By clarifying the normative human rights standards applicable in disaster settings and mainstreaming these within existing UN human rights institutions, states and other humanitarian actors will be provided key guidance on how to protect the rights of those affected by disasters, while simultaneously receiving clarity on their own obligations. True and effective accountability towards the victims of natural and human-made disasters therefore requires the setting of standards, for example through examination of various aspects of the human rights implications of disasters with the production of General Comments and Recommendations by UN human rights bodies, and

[1] IASC, *Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*, Brookings-Bern Project on Internal Displacement, January 2011.
[2] UNHRC Res 22/16, 18 March 2013: *Promotion and protection of human rights in post-disaster and post-conflict situations* (A/HRC/22/L.23).
[3] For text of the Commentaries on draft articles 7 and 8, see: Official Records of the General Assembly, Sixty-sixth Session, *Supplement No.10* (A/66/10), Chapter IX, p.255.

the active engagement of Independent Experts and Special Rapporteurs; and the existence of horizontal accountability forums for the exchange of information, such as the reporting mechanisms of the Universal Periodic Review process and individual Treaty Bodies. Such mechanisms can be bolstered by vertical accountability for individuals, for example via existing individual complaints mechanisms of the UN human rights bodies, thereby providing an avenue of sanctions, incentives and redress. The developing jurisprudence of the European Court of Human Rights regarding states' obligations to undertake preventative measures[4] provides just one example of how it is possible for individual complaints to feed into the emerging concept of an *acquis humanitaire* as the body of law and practice relating to the protection of persons facing humanitarian crises.

It follows that if human rights law imposes rights and obligations in the context of disasters, there is a need for legal clarity for humanitarian actors. This includes clarity for affected states so that they ensure adequate preparation for known potential hazards and during their responses to actual disasters, and for third-states, either when acting as transit states for the delivery of humanitarian assistance or as donor states. The provision of humanitarian assistance by third states is not currently premised on legal compulsion but on the basis of international cooperation and solidarity. Nevertheless the wide-spread, if inconsistent, state practice in the provision of humanitarian assistance following natural and human-made disasters, linked to the on-going focus from inter-governmental bodies such as the UN General Assembly, highlights the evolving nature of the transnational interactions and interpretations underway within the international community on the appropriate methods and normative standing of such inter-state assistance. Similarly, it is important that non-governmental humanitarian actors, including UN and other inter-governmental agencies, understand their legal rights (for example in terms of establishing field operations with the consent of the affected government or authorities) as well as their obligations towards those affected by disasters. The introduction of cholera into the IDP camps in Haiti following the 2010 earthquake provides an unfortunate reminder that humanitarian actors can wittingly or unwittingly cause severe harm, as well as good, in their humanitarian responses.[5] Finally,

[4] For example: *Öneryildiz v. Turkey*, Application 48939/99, judgment of 30 November 2004; *Budayeva and others v. Russia*, Applications 15339/02, 2116602, 20058/02, 11673/02 and 15343/02, judgment of 20 March 2008.

[5] See: M. Schuller, 'Haiti's Disaster after the Disaster: The IDP Camps and Cholera' (December 2010) *Journal of Humanitarian Assistance*, available at: <http://sites.tufts.edu/jha/archives/869> accessed 25 September 2013.

individuals affected by disasters need to be aware of their right to have rights.[6] The increasing juridification of humanitarian responses, whereby individuals think of themselves and others as legal subjects, can therefore provide an additional accountability mechanism for accessing rights in disasters.[7]

Nevertheless, it is noticeable that the comprehensive report issued by the UN High Commissioner for Human Rights in June 2012 on strengthening the UN human rights treaty body system[8] only refers to disasters in the context of how they can impact on a state's ability to submit timely reports. The extensive level of ratification of international human rights treaties and the broadly authoritative nature of pronouncements made by UN human rights bodies however provides a strong impetus for the more explicit inclusion of the human rights implications of disasters within existing UN human rights mechanisms. While individuals affected by disasters may face particular challenges in bringing an individual complaint alleging violation of their rights and seeking an effective remedy, obliging states to report on their preparations for and responses to disasters on their territory would promote more consistent human rights-based approaches to humanitarian action, and reflect the express inclusion of human rights in the ILC draft articles.

However, the pressures of workload and limited resources available to the UN human rights institutions may act as a concerted brake on developing any new or additional areas of focus within either the UN-Charter or Treaty-based Bodies. Nevertheless, the recognition of the human rights implications of natural and human-made disasters by the Human Rights Council coincides with a resolute effort by the Office of the High Commissioner for Human Rights (OHCHR) to strengthen the overall monitoring and reporting of states' human rights obligations. Likewise, the key focus on human dignity and human rights within the ILC draft articles reinforces the requirement for a broader debate on how best to embed effective and practical international oversight mechanisms into national and international responses to

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[6] S. Benhabib, 'Is There a Human Right to Democracy? Beyond Interventionism and Indifference', in C. Corradetti (ed), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, (Springer 2012), 194-196.

[7] See: L.C. Blichner and A. Molander, *What is Juridification?*, Centre for European Studies, University of Oslo, Working Paper No.14, March 2005, 5. Available at: <https://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2005/wp05_14.pdf> accessed 25 September 2013. See also: M. Jagannath, N. Phillips and J. Shah, 'A Rights-Based Approach to Lawyering: Legal Empowerment as an Alternative to Legal Aid in Post-Disaster Haiti' (2011-2012) 10 *Northwestern Journal of International Human Rights* 7.

[8] N. Pillay, *Strengthening the United Nations human rights treaty body system: A report by the United Nations High Commissioner for Human Rights*, June 2012.

major disasters. While non-governmental accountability mechanisms established for humanitarian operations, such as the Sphere Handbook, assist in promoting respect for individuals and communities affected by disasters,[9] there is a growing need for a coordinated international approach to recognise and enumerate the rights-holders and duty-bearers in disaster settings, and to provide practical support and guidance to states and humanitarian actors on how best to ensure all human rights are respected in the complex context of disaster preparation and response.

So while many thematic human rights topics demand the attention of the international monitoring bodies, the current OHCHR-led reform and strengthening process combined with the development of the ILC draft articles provides an important opportunity for debate and discussion to occur as to how best to ensure the accountability of humanitarian actors and the human rights implications of natural and human-made disasters. With the ILC draft articles providing a clear and authoritative basis for the requirement to respect the human rights and inherent dignity of all people affected by disasters, the challenge now is to implement such commitments in actual disaster settings. By marrying a state's recognised human rights obligations with regular reporting and monitoring procedures within the UN human rights system, the international community can help to ensure not just the provision of material humanitarian assistance but the application of human rights principles at all stages of disaster preparedness and response.

B. The Emerging International Legal Framework

However, the ILC and state representatives must still decide what the final form and function of the draft articles on the Protection of Persons in the Event of Disasters will be. To date, sixteen draft articles have been discussed and adopted but there is no guarantee that the current wording will be kept by the time the draft articles are concluded. So will the current text provide a formula for the successful merging of humanitarian and human rights principles with operational rules for the efficient delivery of humanitarian assistance? Or will the draft articles focus primarily on providing a set of technical rules of a relatively detailed and specialised nature? Would states be more likely to endorse purely technical rules which do not attempt progressive development of the rights of individuals and responsibilities of states and humanitarian actors in disaster settings? Yet if so, how would the ILC work differ

[9] For description of eight such accountability mechanisms, see: The Sphere Project, *Taking the Initiative: Exploring quality and accountability in the humanitarian sector*, July 2009.

from the UNITAR Model Rules or the IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance?

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, while conscious of the prominence played by state sovereignty in international affairs. 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, states may not move towards the conclusion of a binding international legal framework. Therefore, 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 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 may provide more appropriate models for consideration. 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, not just within the ILC but also within the UN human rights monitoring bodies.

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 binding and non-binding texts relevant to humanitarian responses need to be condensed and formalised. The ILC's examination of 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 a universal 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 multilateral instrument is the most effective means of promoting the protection of persons in the event of disasters is not available. Therefore, 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

outcomes for the victims of a disaster.[10] 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 draft articles, 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.

The conclusion of a multilateral convention that binds states to an agreed legal framework for the provision of international humanitarian assistance would be a major achievement, and could pave the way for the development of future agreements. By developing a framework convention on the protection of persons in the event of disasters, the ILC may be able to balance the conflicting approaches: binding/non-binding, technical/rights-based and universal/regional. The ILC may also be able to provide the compromise required to facilitate international cooperation and so the efficiency of international humanitarian responses to natural and human-made disasters, while simultaneously recognising the inherent dignity of the human person and the human rights of persons affected by disasters. Yet the lessons from history show that achieving agreement between the disparate actors on fundamental questions such as sovereignty and rights is a long-term process and the future conclusion of a Framework Convention on the Protection of Persons in the Event of Disasters must feed directly into other institutional and substantive initiatives aimed at ensuring the effective protection of the human rights of victims of natural and human-made disasters.

[10] As Macalister-Smith argued in 1985: "Relief must above all be effective, and better implementation depends on better planning, law, and organization." See: P. Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff 1985), xii.

C. The Crystallisation of a Right to Humanitarian Assistance

The concept of an *acquis humanitaire* set out in this thesis is introduced as a means of understanding the evolving body of law and practice relating specifically to the protection of persons in times of humanitarian crises, either as a result of armed conflict or natural and human-made disasters, without restrictively elaborating its normative content per se. Nevertheless, as noted by Harold Koh,[11] a transnational legal approach of interactions, interpretations and internalisation across and between national, regional and international actors recognises the normativity of the processes involved, for example whereby humanitarian norms may be developed and accepted, rejected or modified by the international community. Therefore, at the conclusion of this thesis, it is worthwhile to speculate how the evolution of a potential right to humanitarian assistance may progress. Furthermore, it is important to analyse whether or not the emergence of a specific legally enforceable right to humanitarian assistance would be beneficial for states, humanitarian actors or those affected by disasters.

First of all, it is clear from current debates in the ILC and the UN General Assembly Sixth Committee, reinforced by academic commentaries, that there is deep scepticism regarding the existence of a right to humanitarian assistance following natural and human-made disasters at this present moment in time. This is even true regarding a right for humanitarian organisations to offer their assistance, which creates fewer challenges for application and enforcement, than the more contentious issue of an individual's right to request and receive humanitarian assistance. Yet, the increasing focus on the human rights implications of disasters is recasting the debate around disaster response into the language of rights. Therefore, it is conceivable that a right to humanitarian assistance is in the process of crystallisation. A broad range of non-binding sources developed by both inter-governmental and non-governmental actors have proclaimed the existence of such a right, while the African Union's Kampala Convention[12] provides the first binding multilateral convention which expressly provides for a right to humanitarian assistance for internally displaced persons, including those displaced by natural and human-made disasters. It follows that the on-going interactions between states, humanitarian actors and academics on this point will lead to increasing interpretations of what a right to humanitarian assistance may entail for

[11] H. Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181, 184.
[12] African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention") (adopted 22 October 2009, entered into force 6 December 2012).

both rights-holders and duty-bearers. In this case, there is the potential for increased internalisation of the right(s), by individual states or regional mechanisms, and ultimately by the international community. As argued in this thesis, transnational legal process provides the best method of analysing these evolving interactions and interpretations of a right to humanitarian assistance and the type of international legal frameworks required for humanitarian responses to disasters. Furthermore, transnational legal processes can be used to understand and track the internalisation of rights in disaster settings through domestic law and policy, in conjunction with the development of regional and global legal frameworks for humanitarian response and disaster risk reduction.

However, the history of the right to development may give us reason to pause.[13] While the UN General Assembly Declaration on a Right to Development[14] was adopted nearly 30 years ago, despite the extensive work undertaken by academics, practitioners and some states to realise the right, the right to development remains a non-binding or a "non-realisable claim."[15] Indeed, the content of the right to development is still based on specific provisions of international human rights law,[16] and it is recognised that the "right" to development is really a right to a process of development.[17] A potential right to humanitarian assistance may follow a similar trajectory – whereby there is increasing official recognition of the right, for example in UN texts, or at the national or regional level. Yet there is not sufficient consensus at the international level for the right to be classified as a universal binding right and part of the corpus of international human rights law. As reflected in the attempts at elaboration of the right to development, there is a difference between a claimed "right" and the enforceability of international norms.[18]

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[13] See: S. Marks, 'Obstacles to the Right to Development', François-Xavier Bagnoud Center for Health and Human Rights, Harvard School of Public Health, Working Paper Series No.17, 2003.
[14] *Declaration on the Right to Development*, UNGA Res 41/128, 4 December 1986.
[15] See: A. Sengupta, *Second Report of the Independent Expert on the Right to Development*, E/CN.4/2000/WG.18/CPR.1, para.8.
[16] F. Kirchmeier, *The Right to Development – Where do we stand? State of the debate on the Right to Development*, Friedrich-Ebert-Stiftung, Occasional Papers Series No.23, July 2006; A. Sitta, 'The Role of the Right to Development in the Human Rights Framework for Development', paper prepared for the Human Development and Capabilities Approach Association (copy on file with author); A. Vandenbogaerde, 'The Right to Development in International Human Rights Law: A Call for its Dissolution' (2013) 31(2) *Netherlands Quarterly of Human Rights* 187.
[17] Sengupta, *Second Report* (n.15) para.15-25.
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Considering the on-going emphasis placed on state sovereignty, it is extremely unlikely that a majority of states will accept a legally enforceable right for individuals to request and receive humanitarian assistance in the near future, and will even resist attempts to recognise a right of humanitarian actors to offer their assistance. Nevertheless, states are engaged in the development of an international legal framework that will elaborate the conditions for the commencement, acceptance and termination of international humanitarian responses between an affected state and key humanitarian actors. The lack of explicit references to a right to humanitarian assistance in the current text of the ILC draft articles is not to be lamented, as any concerted attempt to include such a contentious aspect into the draft articles would most likely sound the death knell for the overall project. Yet, inclusion of operative articles on human dignity and human rights serves as a timely reminder to states and humanitarian actors that the protection of persons in the event of disasters should be premised on existing international human rights frameworks and legal provisions. Ensuring this focus is maintained and implemented would appear to be a more fruitful means of promoting the rights of persons affected by disasters than relying upon the contentious and untested concept of a right to humanitarian assistance.

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