

Chapter 9

The ILC Codification Project on the “Protection of Persons in the Event of Disasters”

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9.1 Introduction

Disasters frequently occur in all regions of the world and affect large numbers of individuals. They may have a disruptive impact on people, infrastructure and economies. Disasters in times of peace or war endanger life, health, and the physical integrity of human beings. They have disproportional consequences in vulnerable poorer societies because they deepen their poverty. In 2006, the UN counted 227 natural disasters resulting in over 23,000 deaths worldwide.¹ The 2004 Indian Ocean Tsunami was one of the worst disasters of the last century. It manifested the shortcomings of the international reaction concerning international protection of persons in critical situations. Disasters like cyclone Nargis that struck Myanmar in 2008 or the earthquake in Haiti in 2010 exposed a range of problems relating to domestic and international response. The legal dimension depends on the severity of the humanitarian crises that the disaster has caused. However, there is no international consensus “on how great a catastrophe has to be in order to be considered a disaster for legal purposes, nor is there any agreement on what criteria should be used to measure its scale” (Focarelli 2013, para. 7). This has important consequences because the question arises whether there is an obligation or entitlement for the international community to have access to the victims and to offer or even enforce humanitarian assistance. Some authors argue that humanitarian assistance is “nowadays . . . a necessary element to reach, in the words of the UN Secretary General, ‘Global Peace’, which requires the solution of social, economic, cultural and humanitarian problems. Therefore, any obstacle to the delivery of aid is

¹ UN Doc. A/62/323, para. 3.

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correctly considered a danger to international peace and security” (Giuffrida 2013, p. 294).

Even if one does not share the far reaching interpretation of the UN practice concerning obstacles to the delivery of humanitarian assistance by Giuffrida, there is no doubt that the victims of natural and man-made disasters need immediate help. Thus, their protection has been a subject of concern since time immemorial. De Vattel observed as early as 1758 that all those who have provisions to spare should assist nations suffering from famine as an instinctive “act of humanity” (de Vattel 1758, paras. 4–5). This humanitarian assistance covers both the help provided from the affected State itself as well as the assistance coming from abroad. The non-action of states can, in such emergency situations, amount to a violation of international law, the principle of humanity and fundamental human rights. Therefore, very often the question of an international involvement arises which entails fundamental legal problems. The assistance to victims of disasters occurs according to the principle of humanity and the lack of a major multilateral treaty on this issue is somehow contradictory since there is an extensive body of international humanitarian law applicable to victims of armed conflicts. Several codification attempts have been made in the 1980s without success. In 1990 the UN assessed that donors, recipient governments and international organisations have expressed their opinion “on the desirability of new legal instruments in order to overcome the obstacles in the way of humanitarian assistance.”² However, some non-governmental organisations argued that such an initiative carries the risk of weakening the progress already achieved over the years in providing humanitarian assistance. These organisations assumed that some governments would reinforce the insistence on the concept of national sovereignty and thus render a codification counterproductive.³ The proposal of a convention on the deployment and utilisation of urban search and rescue teams was subsequently drafted, but in 2002 it was replaced by the General Assembly Resolution A/57/150 which contains the Guidelines for the International Search and Rescue Advisory Group. Thus, the entire discussion on the issue has been dominated by the insistence of some governments on the principle of non-interference in their internal affairs. The work of the private International Law Association, too, in the 1980s did not tackle the big problems of sovereignty, especially the question as to whether States have a duty to undertake or accept relief (International Law Association 1980, p. 530). Recent developments in the field of human rights law like R2P pose challenges to the principles of State sovereignty and non-interference and raise the question as to whether States are entitled to refuse to admit and facilitate international assistance despite severe human suffering.

Against this background the Codification Division of the Office of Legal Affairs of the United Nations Secretariat submitted proposals on ‘International Disaster Relief Law’ (IDRL) to the International Law Commission (ILC) in 2006. The UN

² UN Doc. A/45/587, para. 41.

³ *Ibidem* para. 44.

identified the need for the systematisation of international law in the context of disaster relief for responding to such tragic calamities and to overcome obstacles to the provision of effective assistance. The ILC is an organ of the UN General Assembly and its Statute provides that the “Commission shall have for its object the promotion of the *progressive development* of international law and its codification.”⁴ Progressive development means 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, and codification includes the more precise formulation and systematisation of rules of international law, in fields where there already has been extensive State practice, precedent and doctrine. The ILC represents the latest attempt to define the obligations of States “to accept disaster relief without going so far as to justify forced humanitarian intervention” (Benton Heath 2011, p. 423).

9.2 Framework of the Codification by the International Law Commission (ILC)

The ILC decided in 2007 to include the topic in its current program of work and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur.⁵ Upon his appointment, the Special Rapporteur undertook efforts to establish contacts with interested governmental and non-governmental organisations, including the Representative of the Secretary-General on the human rights of internally displaced persons, the Assistant Secretary-General for Humanitarian Affairs and Deputy Emergency Relief Coordinator, Office for the Coordination of Humanitarian Affairs, and officials of what is now called the Disaster Law Programme of the International Federation of Red Cross and Red Crescent Societies (IFRC).

The Commission requested the UN-Secretariat to prepare a background study, initially limited to natural disasters, on the topic, “Protection of persons in the event of disasters”.⁶ The detailed study provides an overview of existing legal instruments and texts applicable to a variety of aspects of disaster prevention and relief assistance. Furthermore, the study analyses the rules on the protection of persons in the event of disasters and confirms that no generalised multilateral treaty exists on the topic. The only universal multilateral treaty directly related to disaster response was the Statute of the International Relief Organization of 1927 which is no longer in force.⁷ However, a number of relevant rules have been codified in some specialised multilateral treaties as well as in over 150 bilateral treaties and memorandums of understanding. Among them the “Tampere Convention on the

⁴ UN Doc. A/CN.4/325, para. 102. Author’s italics.

⁵ UN-Doc. A/62/10, para. 375.

⁶ UN Doc. A/CN.4/590 and 1–3.

⁷ UN Doc. ECOSOC Res. 1268 (XLIII) of 4 August 1967.

Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations” of 18 June 1998⁸, this is significant because it provides legal rules on the use of telecommunication for humanitarian assistance activities during disasters. The Convention deals with the coordination of the assistance and especially with the overcoming of bureaucratic restrictions. The second treaty to be mentioned in that connection is the “Framework Convention on Civil Defence Assistance” which entered into force in 2001. From other sources of law, there are over 100 national laws directly concerning the topic.⁹

Humanitarian assistance was often addressed by the UN. In 1971 the Secretary-General emphasised in a report on Assistance in Cases of Natural Disaster that the primary responsibility of the affected government was to protect the life, health and property of people within the frontiers and to maintain essential public services. Humanitarian assistance from the international community can only be supplementary. The concept of ‘primary responsibility’ was endorsed in several UN General Assembly Resolutions.¹⁰ The UN General Assembly discussed the issue again in 1991 and adopted the Resolution 46/182, which reflects the conservative approach of the world organisation.

The document underlines that:

- Humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality;
- The sovereignty, territorial integrity and national unity of States must be fully respected. Thus 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;
- Each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organisation, coordination, and implementation of humanitarian assistance within its territory; and
- The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws.

The UN resolution concludes by emphasising its central and unique role in providing leadership and coordination of the efforts of the international community to support the affected countries.

Other documents deal with measures to expedite international relief. The body of these instruments justifies the assessment of an expanding regulatory framework. At the centre are the principles of sovereignty and non-intervention. Therefore, any

⁸ UNTS 2296, No. 40906.

⁹ See the list of these documents in the annex of UN Doc. A/CN.4/590/Add.2.

¹⁰ Res. A/36/225 of 17 December 1981.

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. A relatively recent development is the recognition of the need for disaster prevention, mitigation and preparedness.

9.3 Challenge of the ‘Sovereignty’ Concept and Politicisation

Sovereignty is a cornerstone of international law. The sovereign State exercises exclusive jurisdiction over matters within its territory. Other States are not allowed to interfere in the internal affairs of sovereign States. If they intervene they commit a violation of international law and the affected State can react by proportional sanctions. However, the intervention to protect human beings in emergencies from their sovereign is an old concept first mentioned by the father of modern international law, Hugo Grotius (Valek 2005, p. 1223). The recent discussions about humanitarian interventions and the concept of the Responsibility to Protect (R2P) seek to offer a solution in cases of massive human rights violations and the sovereignty claim of a State. The access to victims in disasters may also involve conflicts with the sovereignty entitlements of the affected State because the respect for State sovereignty is a central principle applicable to relief actions. However, sovereignty is subject to the obligation to comply with international law. Therefore the principle of sovereignty does not constitute a legal barrier which inhibits international humanitarian assistance, but “a necessary pre-condition for the exercise of meaningful cooperation within the community of States” (Macalister-Smith 1985, p. 56). Indeed, international humanitarian assistance describes the new law of cooperation and solidarity among nations which means also a kind of rediscovery of the ethical and religious foundations of public international law. Solidarity is a value-driven principle with a strong ethical underpinning (Wellens 2010, p. 5). Human rights as well as humanitarian assistance are parts of that ethical underpinning. Thus, the questions arise in which way these rights can be implemented in the event of natural disasters. Practice and theory offer different answers.

In the 1980s some French health practitioners who founded Médecins Sans Frontiers in 1971 and other experts introduced the concept of the *droit d'ingérence* (right of interference) or even the duty of interference. The central tenet was that humanitarian actors have a right of access to victims of humanitarian emergencies, whether man-made or natural, including a right to innocent passage through humanitarian corridors. The duty of interference was understood as a moral obligation of third parties to provide assistance to victims. The duty should be applied if the affected State proves unable or unwilling to supply adequate protection to its own people: “It was assumed that in humanitarian crises the focus should shift from classical reciprocal inter-State obligations to the right of the victims

themselves to be assisted, from within or from without if need be” (Focarelli 2013, para. 2).

However, this new approach was only reflecting a concept of some non-governmental organisations with some support of the French government. The international community was reluctant as Resolution 43/131 proves. The UN General Assembly adopted Resolution 43/131 on 8 December 1988 upon a proposal by France. The Resolution on humanitarian assistance to victims of natural disasters and similar emergency situations repeats the sovereignty-friendly approach that the first and foremost obligation of the State is to take care of the victims of natural disasters occurring on its territory. The original French draft went much further by mentioning the right to assistance as a right of any individual. This approach was not accepted by the majority of States because of its neo-colonialist implications. Thus, the final text of the resolution only mentioned that “the abandonment of the victims of natural disasters . . . without humanitarian assistance constitutes a threat to human life and an offence to human dignity”.

This statement allows different interpretations and some uncertainty in legal terms. Nevertheless, some commentators argue that the primary role of the affected State amounts to an obligation to respect and protect certain fundamental rights, such as the right to life and to implement other basic needs. Focarelli argues that the failure of the affected State to do so has been assumed to entitle third parties to exercise their right of interference and of access to victims and he supports his argument with reference to the practice of the UN Security Council (Focarelli 2013, para. 3). Paragraph 3 of Resolution 688 (1991) reads: “The Security Council . . . insists that Iraq allows immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq and make available all necessary facilities for their operations.”

The UN Security Council followed suit, but exclusively in respect to armed conflict situations because humanitarian assistance in armed conflicts is guided by the so-called humanitarian principles of impartiality and neutrality, which have their legal basis in Art. 70 of Additional Protocol I to the Geneva Conventions (1977)¹¹ and respective customary international law (Spieker 2013). This legal basis is only applicable in armed conflicts and not in cases of natural or man-made disasters. Therefore, it is at least controversial for one to use this obligation in armed conflicts as a justification to enforce humanitarian assistance in situations other than armed conflicts. In the case of the cyclone Nargis that struck the southern part of Myanmar with devastating force on 2 May 2008, the UN Security Council failed to take action under Chapter VII of the UN Charter, despite a French proposal for a resolution authorising the delivery of aid to the people in Myanmar without the government’s consent (Focarelli 2013, para. 28). Frustrated by the government of Myanmar’s the refusal to accept international assistance, the French government invoked R2P as the basis to impose the delivery of aid. However, the international

¹¹ 1125 United Nations Treaty Series, p. 3.

community was able to find non-coercive ways for a co-ordinated humanitarian response (Barber 2009, p. 4).

The example of cyclone Nargis and the French attempt to enforce humanitarian assistance reflects that aid is not divorced from politics. After all, besides the humanitarian organisations, a range of other actors such as government representatives, UN organisations or multinational forces are also involved in the provision of aid, all of whom pursue political interests.

A key factor in the politicisation of humanitarian aid is that when major disasters occur, cooperation between the aid agencies and assisting countries is unavoidable. In such cases, the mandate governing the operation, which is decided at political level, invariably clashes with the principles of independence, impartiality and neutrality that govern the work of humanitarian non-governmental organisations.

Furthermore, the mass media also have a politicising effect, since politicians and non-governmental organisations are keen to show themselves in a good light. Aid agencies are heavily dependent on donations to carry out their relief operations and rely on the media to broadcast their appeals and reach their target audience. Indeed, humanitarian assistance is popular with the general public in countries that provide relief, and the public offers generous emotional and financial support for “humanitarian” operations. When it comes to securing a share of the available funds, however, there are no holds barred: all the humanitarian agencies attempt to exert influence and compete to raise their profile via the mass media. This makes it almost impossible to present a more detailed, critical and nuanced picture.

Natural disasters in States governed by military dictatorships should not be seen as an opportunity to voice criticism of conditions in these countries. The cyclone which caused devastation in Myanmar (USAID 2008, p. 1), for example, became a vehicle for a political campaign against the country’s leaders, who had brutally crushed opposition to the regime the previous year. After the cyclone, the country’s military leaders refused to allow international aid organisations to operate freely in the country. This prompted sharp criticism from the Western countries, with French Foreign Minister Bernard Kouchner even calling for the R2P to be invoked as the basis for the delivery of humanitarian aid, if necessary against the will of the military government. As a consequence of this campaign, the real issue, namely the relief operation itself, largely faded from view. In fact, humanitarian organisations were able to deliver their aid as far as the—albeit completely overstretched—airport in Rangoon. From there, it was transported into the affected areas by local staff, with whom the aid agencies had been cooperating very effectively for many years (IFRC 2011). Humanitarian aid workers from Australia said that local staff in Myanmar were getting some aid through to people but complained that western specialists and cargo planes had been unable to land and to unload supplies (McLachlan-Bent and Langmore 2011, p. 41).

The Western political approach did not encourage the Myanmar military leaders to warm to the idea of external assistance. Moreover, the colonial history of the West and their intervention in Iraq did not improve its credibility in the eyes of the paranoid dictators (Selth 2008, p. 385). The politically motivated campaign against Myanmar’s leaders tended to disrupt the provision of aid. The fact that the country’s

leaders used the relief operation to gain the goodwill of the people and therefore concealed the actual origin of the goods by re-labelling them (International Crisis Group 2008, p. 8) did not alter the fact that aid did arrive in the country and that it was inappropriate to use the crisis as an opportunity to voice criticism of its leaders. The outcome of the political campaign against the military leaders was a regrettable decline in the willingness to donate on the part of the public in the donor States, who had gained the impression that the aid was not reaching the victims.

Politicians must resist the temptation to link humanitarian aid for victims of a natural disaster with political demands for regime change or improvements in the human rights situation. Access to the media must be used solely to draw attention to the humanitarian crisis and thus encourage the general public to give the requisite support to the relief operation. However, besides the issue of politicisation, one has also to take in consideration that a natural disaster like Nargis would be extremely difficult for even the most prepared States to respond to effectively (McLachlan-Bent and Langmore 2011, p. 38).

9.4 Right to Humanitarian Assistance

Disasters have a human rights dimension because their consequences can influence the enjoyment of rights by those affected. Disasters have effects on the right to life and on social and cultural rights. Issues like access to assistance, relocation and property restitution arises. The most important question is that of the right to humanitarian assistance.

The UN considers the right to humanitarian assistance to be part of a new international humanitarian order.¹² The authors of a UN study argue that reference to the right to humanitarian assistance is made in Article 25 of the Universal Declaration of Human Rights of 1948 (UDHR) as well as in Article 11 of the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR).¹³ Moreover a number of human rights treaty norms apply to natural disaster situations, especially those protecting the right to life, the right to food, the right to health services and, more generally, the right to meet the victims' basic needs.

According to the UDHR everyone has the right to a standard of living adequate for the health and well-being of the person and the family. The ICESCR recognises the right of everyone to an adequate level of living, including food, clothing and housing and the continuous improvement of living conditions. The General Comment 12 of the Committee on Economic, Social and Cultural Rights (CESCR) expressly stipulates that "this obligation also applies for persons who are victims of natural or other disasters" (para. 15).

¹² UN Doc. A/61/224, para. 5.

¹³ 993 UNTS 3.

States are obliged under Article 2 ICESCR to take appropriate measures to ensure the realisation of this right. Basically, three different kinds of obligations concerning economic, social and cultural human rights can be identified: duties to avoid depriving, duties to protect from deprivation and duties to aid the deprived. The duty to respect requires States not to take measures which are incompatible with human rights. In contrast, the duty to protect requires positive measures by States to ensure that individuals or groups behave consistently with human rights. The duty to fulfil requires States to proactively engage in activities intended to strengthen compliance. This demands an active role of the State in the form of administrative, judicial, budgetary and other measures (Riedel 2009, p. 133). The implementation may be resource related, however the State has to utilise all appropriate means and is entitled to international cooperation on a voluntary basis: “The right to humanitarian assistance depends entirely on the timely and careful identification and evaluation of actual needs. The assistance itself should be designed and monitored regularly, following a thorough assessment of needs, which should be comprehensive and multi-sectoral, and must be based on the participation of all involved parties as well as external experts recruited from the global research.”¹⁴

As yet there is no general human rights instrument devoted specifically to the protection of victims of natural disasters. An exceptional universal provision constitutes Article 11 of the Convention on the Rights of Persons with Disabilities of 30 March 2007 stipulating that contracting States shall take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including the occurrence of natural disasters.¹⁵ The regional African Charter on the Rights and Welfare of the Child of 11 July 1990¹⁶ provides that contracting States shall take all appropriate measures to ensure that internally displaced children, including in situations of natural disaster, shall receive appropriate protection and humanitarian assistance.

Without doubt, States are under the obligation in cases of disaster to take care of the victims. They have in particular a duty to take the necessary measures to prevent the misappropriation of humanitarian assistance and other abuses (Institute de Droit International 2004, p. 263). This raises the question of whether third States or organisations may provide assistance to prevent gross violations of human rights in cases in which the affected State is not going to protect victims of natural disasters. A way out of this impasse is offered by the 2001 R2P concept of the International Commission on Intervention and State Sovereignty. The concept applies also in a “situation of overwhelming natural or environmental catastrophes, where the State concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened” (at para. 4.20). This is the only

¹⁴ UN Doc. A/61/224, para. 6.

¹⁵ Available under: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>, accessed 6 October 2014.

¹⁶ OAU Doc. CAB/LEG/24.9/49 (1990).

reference where R2P deals with natural disasters. However this reference is doubtlessly important, because the concept allows military intervention on the part of the international community to protect human beings, should the affected State be unwilling or unable to prevent and to protect its own people.

This constitutes quite a far reaching consequence. Thus, many States were reluctant to accept the concept of R2P although it is referred to as an emerging guiding principle and not a legal norm.¹⁷ China and Russia have always been afraid of giving too much power to the international community (Evans 2012, p. 17). This becomes obvious in the 2005 World Summit Outcome Document. The R2P doctrine indeed appears, but only in relation to genocide, war crimes, ethnic cleansing and crimes against humanity. Natural disasters are left out. The Secretary-General gave the explanation that “[t]he 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” since “[t]o 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”.¹⁸

Nevertheless, some authors argue that R2P should apply to natural disasters, because its approach is in line with the ICJ judgment in the *Corfu Channel Case* of 1949. The Court identified a duty to warn of an impending disaster in order to mitigate its consequences.¹⁹ Other authors consider that refusing to let international humanitarian aid enter in cases of natural disasters, like the cyclone Nargis that resulted in the death of 140,000 people, as a crime against humanity and plead that the R2P principle is applicable. They understand the reluctance of the Myanmar government’s fear of foreign intervention, but do not accept it as an excuse for denying foreign presence: “this should not be accepted as an excuse for denying lifesaving foreign aid in the critical days following the cyclone” (McLachlan-Bent and Langmore 2011, p. 59).

This argument constitutes little more than wishful thinking, since there is hope involved that R2P can be used to enforce humanitarian assistance. However, foreign humanitarian assistance cannot be executed within ‘days’ after a natural disaster that brought absolute devastation to a State with an underdeveloped and destroyed infrastructure. The first aid has to be provided by local actors and the international community has no other choice than to support them. The example proves that it is an unfair expectation to enforce humanitarian assistance by recourse to R2P. Thus, the reluctance of States to apply the R2P concept with respect to natural disasters is no surprise. The 2005 Hyogo Declaration of the World Conference on Disaster Reduction underlined that “States have the primary responsibility to protect the people and property on their territory from hazards”. Thus they should conduct a national policy consistent with their capacities and the

¹⁷ International Commission on Intervention and State Sovereignty (ICISS), fn. 18, p. 15.

¹⁸ UN-Doc. A/63/677, para. 10.

¹⁹ ICJ Rep. 1949, The Hague 1949, p. 23.

resources available to them. The issue of an intervention by other States on behalf of the international community in case of unwillingness or inability to ensure protection is not mentioned in this document. It seems the document does reflect the state of the art of the discussion of the right to humanitarian assistance.

9.5 Humanitarian Assistance and Failed States

The earthquake which befell Haiti on 12 January 2010 was caused by one of the natural events which are by no means uncommon in this region of the world. However, its appalling impacts were exacerbated by Haiti’s status as what the literature commonly terms a “failed State.” Throughout its history, Haiti has been beset by political instability. The last unrest before the earthquake took place after President Aristide rigged the vote in the 2000 elections. By 2004, almost half the country was under rebel control, and Aristide was forced into exile. In order to support Haiti’s reconstruction, the UN Security Council voted to deploy various (military) missions. The United Nations Stabilization Mission in Haiti (MINUSTAH), established by Security Council Resolution 1542 on 30 April 2004, should be mentioned in particular. MINUSTAH was deployed after Aristide’s departure, because the Security Council deemed the situation in Haiti to be a threat to peace and security in the region. It was also responding to an official request from acting President Boniface Alexandre asking for a multinational peacekeeping force for Haiti. MINUSTAH’s mandate was to restore a secure and stable environment, to promote the political process (democratic elections, decentralisation), and to monitor the human rights situation. At operational level, all the activities of the various UN agencies were coordinated by MINUSTAH (Langholtz et al. 2007, pp. 404 et seq.). In the early days, this innovative mission faced great difficulties in stabilising the situation.

It was only after coercive measures were taken to create a secure and stable environment that improvements were achieved. Nonetheless, the security situation remained fragile, and attempts to disarm the militias and criminal gangs were unsuccessful. Measures to set up a functioning police force and establish the rule of law also faltered (Leininger 2006, p. 517). The Security Council has regularly extended MINUSTAH’s mandate, most recently with the adoption of Resolution 2012 on 14 October 2011. While welcoming the fact that some progress has been achieved after the earthquake, the Security Council has determined on each occasion that the situation in Haiti still constitutes a threat to international peace, and it therefore continues to act under Chapter VII of the United Nations Charter.

Natural and man-made disasters can endanger or claim human lives and do not stop at national borders. A theoretical and practical distinction is often made between the provision of emergency relief in response to natural disasters, and humanitarian assistance in the context of wars and conflicts (Vukas 2013). In Haiti’s case, however, this distinction does not apply. Here, both forms of assistance are required, for the natural disaster has simply exacerbated—albeit dramatically—the

existing conflicts. In such a situation, the humanitarian dimension must, as a matter of principle, be the priority. This raises the question of the obligations of the affected country and the international community under international law (Wellens 2010, p. 17). A key issue to be addressed is to what extent the sovereignty of a failed State poses an obstacle to international engagement: “By its very nature, cooperation is likely to appear in conflict with the sovereign prerogatives in the recipient State.”²⁰ Therefore, Article 9 of the ILC draft on the protection of persons in the event of disasters places the affected State, by virtue of its sovereignty, at the forefront of all assistance and limits other actors to a complementary role.

In the case of Haiti, for example, President René Garcia Préval expressed frustration that the Haitian government had been bypassed in the coordination of the relief effort, while Ecuador’s President Rafael Correa lambasted what he saw as “imperialism among the donors” (ZEIT Online Zeitgeschehen 2010). A particular criticism was that most of the money donated goes back to the donor countries. This criticism raises further questions: to what extent can and should the government of a failed State be involved in humanitarian relief operations? And where should the goods distributed as part of the relief effort come from? Legally, even failed States are sovereign States. Thus the UN Security Council, in the preamble to its Resolution 1892 (2009) states explicitly that it reaffirms “its strong commitment to the sovereignty, independence, territorial integrity and unity of Haiti. . .”.

This implies that aid must be coordinated, as a matter of principle, with the (national) government of the failed State concerned. However, this responsibility is likely to overwhelm the government, since it does not exert effective control over the entire national territory. Furthermore, the country’s rudimentary government institutions are invariably discredited in the eyes of the populace due to mismanagement, corruption and criminal associations. Therefore the strengthening of the institutions was one of the most urgent tasks of the international community (International Crisis Group 2010, p. 18). A further factor undermining the State’s capacities to deal with the aftermath of the earthquake was that large numbers of Haiti’s local police were victims of the disaster. Therefore, one of the most serious problems affecting the relief effort, besides the collapse of Haiti’s infrastructure, proved to be the total absence of public security.

Against this background the traditional UN approach of cooperation with the Haitian government and donor conferences did not meet the challenges. It was estimated that the country needs around 11.5 billion US dollars in aid for comprehensive reconstruction and development over the next 10 years. The donor conference in March 2010 secured pledges of around 9.9 billion US dollars, far surpassing expectations. The EU is the largest donor to Haiti and intends to contribute 1.6 billion US dollars. Motivated by a desire to exert political influence, countries such as Venezuela have pledged substantial sums as well. However, pledges are all very well, but the actual provision of funds is quite another matter. Furthermore, the willingness to donate invariably wanes once the disaster and its tragic individual

²⁰ UN-Doc. A/CN.4/652, para. 21.

fates have vanished from the headlines. This happens in all natural disasters once the initial shock has abated and in Haiti’s case, is reinforced by the public’s mistrust of the government agencies supposedly responsible for reconstruction. In that sense, even the financing of emergency relief could pose problems in Haiti. A further concern is that some potential donors will argue that the Haitian government is not a partner who can be trusted to make appropriate use of donated funds.

The international community’s emergency relief operation in Haiti moved into the reconstruction phase in 2010, which required close cooperation with the government and other local agencies. In view of the massive extent of human suffering, there was no time available to test whether this cooperation worked. Therefore, one of the lessons of the Haiti disaster is that other forms of international assistance must be considered.

There are various possible options. Haiti faced a crisis comparable to the situation in East Timor in 1999. The UN had established a mission in East Timor in June 1999 whose mandate was to organise and monitor a referendum on the future of this former Portuguese colony, which was occupied by Indonesia. When the referendum produced a clear majority in favour of independence, pro-Indonesian militias embarked on a campaign of violence and terror, murdering and displacing the people of East Timor. The East Timorese elite in particular fell victim to the massacres.

There was a complete collapse of law and order, and infrastructure was destroyed. The UN mission was also attacked, forcing staff to flee. The Indonesian armed forces, which the government was powerless to control, not only tolerated the situation, which was in effect a civil war; it was apparent that they were implicated from the start. Finally, after lengthy prevarication, the Indonesian government agreed to the deployment of an international peacekeeping force for East Timor in September 1999.

One persistent criticism levelled at the UN was that this deployment came far too late, as the violence perpetrated by the Indonesian militias had been predicted well in advance. After Indonesia renounced all its claims to East Timor in October 1999, its officials were withdrawn, leaving the country without any civil administration. The UN Security Council then adopted Resolution 1272 (1999), establishing a United Nations Transitional Administration in East Timor (UNTAET). It was endowed with overall responsibility for the administration of East Timor and was empowered to exercise all legislative and executive authority.

It was mandated to provide security and maintain law and order, to establish an effective administration, to assist in the development of civil and social services, and to ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance. The mission was headed by a Special Representative, who was empowered to amend and repeal laws. The original 16-month mandate was extended twice. Thus for the first time, a new State was born under the UN’s administration. Without the UN to act as ‘midwife’, this State-building process would have been impossible. Some authors evaluated the role of the UN as an agent for a *sui generis* self-determination unit for of East Timor (Wilde 2008, p. 188). The question is whether this example could provide some useful ideas to

help consolidate the situation in Haiti as well. The scale of the complex emergency in Haiti is such that it exceeded the Haitian government's capacities. Already a failed State prior to the disaster, Haiti needed intensive support from the international community in order to stabilise the situation. In particular, after such a crisis in a failed State, security and protection must be provided for the local population and international aid workers. The economy must also be rebuilt. With a view to facilitating the requisite coordination and to establish the administration on a secure footing, it would be helpful to consider whether, with the consent of the Haitian government, a temporary international administration for such a fragile State like Haiti should be put in place. Thus one can argue that an international administration should act as the UN in East Timor: as the self-determination unit for the people of Haiti. This would be an expression of international solidarity (Boisson de Chazournes 2010, p. 109).

9.6 ILC Draft Articles

Against the background of the experiences of the international community in cases like Myanmar or Haiti, the ILC codification project inspired expectations. The title of the codification calls for a rights-based approach concerning the treatment to which the victim of a disaster is entitled: "The rights based approach deals with situations not simply in terms of human needs, but in terms of society's obligation to respond to the inalienable rights of individuals, empowers them to demand justice as a right, not as a charity, and gives communities a moral basis from which to claim international assistance when needed."²¹ This point of origin enables 'victims' to become rights holders and respects the dignity of the individual which is a customary rule of international law (Patnaik 2011, pp. 129–141).

The ILC project was able to build on the activities of the International Federation of Red Cross and Red Crescent Societies (IFRC) which undertook an evaluation of the existing international and national norms relating to disaster relief by implementing its International Disaster Response Laws (IDRL) project.²² This project dealt with the legal basis of the laws, rules and principles applicable to the access, facilitation, coordination, quality and accountability of international disaster response activities in times of non-conflict related to disasters.

²¹ UN-Doc. A/CN.4/598, para. 12.

²² International Federation of the Red Cross and Red Crescent Societies (ed.), *Law and legal issues in international disaster response: a desk study*, Geneva 2007.

9.6.1 *The R2P Issue*

The preliminary report of 2008 dealt with the limitations of the scope of the project *ratione materiae* and the ILC agreed to exclude armed conflicts from the subject matter.²³ The idea was put forward of limiting the topic to two phases: the disaster response and the post disaster phase. The ILC gave also attention to the concept of R2P (Winkelmann 2010). However, the relevance in the context of disasters remained unclear for some members. Therefore the Rapporteur decided, in the light of the approach of the UN Secretary-General, to omit this issue. In paras 138 and 139 of the 2005 World Summit Outcome the report of Secretary-General explains that “the responsibility to protect applies . . . 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”.²⁴ Therefore natural disasters were not included in the 2005 World Summit decision. However, if the treatment of the people in connection with natural disasters meets the criteria of a crime against humanity as defined in the 1998 ICC statute, R2P applies again (Thakur and Weiss 2009, p. 48). Against this background it is hard to understand the ILC decision to eliminate any discussion of the R2P.

9.6.2 *Definition*

After reviewing several definitions of disasters, the Special Rapporteur came to the conclusion that the definition of the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations constitutes a good point of departure for a broader definition of a disaster. His draft definition in article 2 adopts a basic characterisation and reads:

‘Disasters’ means a serious disruption of the functioning of society, excluding armed conflict, causing significant, widespread human, material or environmental loss.²⁵

The advantage of this definition is that it does not distinguish between natural and man-made events and does not demand that the event overwhelm a society’s response capacity. Otherwise the definition would shift the attention from the persons in need of protection. The definition applies in natural and man-made disasters because disasters often arise from complex sets of causes. They include

²³ UN-Doc. A/CN.4/615, para. 6.

²⁴ UN-Doc. A/63/677, para. 10 (b).

²⁵ UN-Doc. A/CN.4/615, para. 45.

natural and man-made elements. Therefore it is very often impossible to identify a single cause. This broad definition was well received by States.²⁶

9.6.3 Cooperation

The moral and legal fundament of international humanitarian assistance is the principle of cooperation. The UN Secretary-General argued that “the belief in the dignity and value of human beings as expressed in the preamble of the Charter of the United Nations is and must be the prime motive for the international community to give humanitarian assistance.”²⁷ Rudi Muhammad Rizki, the UN nominated independent expert on human rights and international solidarity held that “international assistance and cooperation . . . must be oriented, as a matter of priority, toward the realization of all human rights, in particular economic, social and cultural rights, and . . . must respond swiftly and effectively to grave situations such as natural disasters.”²⁸

The duty to cooperate is one of the basic principles of international law and can be found in the UN-Charter Art. 1(3). According to Art. 55 the UN shall promote “solutions of international economic, social, health, and related problems; and international cultural and educational cooperation” with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations. Cooperation consecrates the solidarity among nations. Solidarity is a value driven principle and according to Macdonald it constitutes an international legal principle distinct from charity (Macdonald 1993). Solidarity has a legal dimension “because it is increasingly ensuring the cohesion and consistency of the legal order across various branches” (Wellens 2010, p. 36). Therefore it is gradually becoming a cornerstone of international law.²⁹ Against this background the ILC draft art. 3 determines a “duty” to cooperate:

- For the purposes of the present draft articles, States shall cooperate among themselves and, as appropriate, with:
- a) competent international organizations, in particular the United Nations;
 - b) the International Federation of Red Cross and Red Crescent Societies; and
 - c) civil society.

The existence of such obligations means a restriction of the sovereignty of States. Thus, on the one hand the viewpoint of China that cooperation is “a moral value only” does not surprise.³⁰ Poland on the other hand argued that the duty to cooperate refers to a formal framework of protection of persons, solidarity refers to its substance.³¹

²⁶ UN-Doc. A/CN.4/629, para. 10.

²⁷ UN-Doc. A/45/587, para. 5.

²⁸ UN-Doc. A/HRC/9/10, para. 7.

²⁹ UN-Doc. A/CN.4/629, para. 11.

³⁰ UN-Doc. A/C.6/64/SR.20, para. 24.

³¹ UN-Doc. A/C.6/64/SR.21, para. 77.

9.6.4 *Principles of Protection*

The principles that inspire the protection of persons in response to disasters must comply with the interests of the affected State and the assisting actors. The humanitarian principles of humanity, neutrality and impartiality meet these requirements. These principles are critical to ensuring the distinction of humanitarian action from other activities, “thereby preserving the space and integrity needed to deliver humanitarian assistance effectively to all people in need.”³² The principles were first codified in international humanitarian law and are now accepted in many international instruments on disasters (Zwitter 2011, p. 60). The International Disaster Response Law Guidelines of the IFRC (Mehring 2010, para. 3) refer to the principles and underline that aid priorities are only calculated on the basis of need alone. In *Nicaragua v. United States*³³ the ICJ stated that the activities of the Red Cross based on the principles are only aimed to protect life and health and to ensure respect for the human being.

Neutrality is being described as non-engagement in hostilities or taking sides in the controversies of a political, religious or ideological nature. Valencia-Ospina argues that such an approach applies not only in armed conflicts but also in other disasters in a modified manner. Humanitarian actors should abstain from any activity which might be considered as interference in the interests of the affected State.³⁴ It is an operational instrument to implement the idea of humanity. All in all it means that humanitarian assistance must not be guided by, or subject to, political considerations.³⁵

Impartiality means that the humanitarian assistance is guided only by the needs of the victims. The rights of the affected persons are respected and priority is given to the most urgent cases of distress. Therefore the principle includes the observation of the norms of non-discrimination and proportionality.

Humanity means that human suffering must be addressed wherever it is found. Particular attention must be given to the vulnerable groups and the dignity and rights of all victims must be respected.

In the light of the forgoing draft article 6 reads:

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality.

It goes without saying that the principle of humanity is intimately linked to human dignity. Therefore the ILC draft article 7 claims that the competent international organisations and other relevant actors shall respect and protect human dignity. For the first time, human dignity appears as an autonomous provision in the body of an ILC draft convention.

³² UN-Doc. A/64/84.

³³ ICJ Rep. 1986, para. 243.

³⁴ UN-Doc. A/CN.4/629, para. 29.

³⁵ Regulation (EC) No. 1257/96.

9.6.5 *Responsibility of the Affected State*

States are sovereign entities. Sovereignty covers the whole body of rights and attributes which a State possesses in its territory to the exclusion of all other States, and also in its relations with other States.³⁶ Disasters do not abolish sovereignty, thus, other actors are not entitled to interfere into the domestic affairs of the affected State. The primary responsibility to organise humanitarian assistance in the event of a disaster is borne by the affected State. It is responsible for protecting disaster victims and has to facilitate, coordinate and oversee the relief operations in its territory. Any external assistance is therefore subject to the consent of government of the affected State. Draft article 8 reads:

1. The affected State has the primary responsibility for the protection of persons and provision of humanitarian assistance on its territory. The State retains the right, under its national law, to direct, control, coordinate and supervise such assistance within its territory.
2. External assistance may be provided only with the consent of the affected State.

Many States praised the ILC for striking the proper balance between the protection of victims of disasters and the respect of State sovereignty and non-interference. China underlined that the ILC activities should always be based on full respect for the sovereignty of the affected State and should not allow humanitarian assistance to be politicised or be made an excuse for interfering in internal affairs.³⁷ However, Finland argues that the responsibility of the affected State should not remain exclusive.³⁸ Therefore additional consideration should be given to the affected State's duty towards the international community since inaction could have effects on the territories of its neighbours.

9.6.6 *Duty to Seek Assistance*

The affected State has doubtless the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory. Nevertheless the question arises when the magnitude or duration of a disaster overwhelms its national response capacity. By way of example an analysis of human rights implicated in the context of a disaster is helpful. Attention is warranted in this regard to the human right to food which is codified in the International Covenant on Economic, Social and Cultural Rights (CESCR) of 1966.³⁹ The CESCR-Committee notes in General Comment No. 12 that if a State party maintains that resource constraints

³⁶ Corfu Channel Case, ICJ Rep. 1949, p. 43.

³⁷ UN-Doc. A/CN.4/652, para. 13.

³⁸ UN-Doc. A/C.6/66/SR.21, para. 60.

³⁹ UNTS 993, No. 14531, p. 3.

make it impossible to provide access to food to those in need: “the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. . . . A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.”⁴⁰

This comment of the CESCR-treaty body underlines that recourse to international help may be an element in the implementation of the obligations of a State party to persons under their jurisdiction where it considers that its own resources are inadequate to meet protection needs.⁴¹

The International Disaster Response Law Guidelines of the IFRC share that approach by stating: “If an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons.”⁴² The ILC Draft article 10 reads:

The affected State has the duty to seek assistance, as appropriate, from among third States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations if the disaster exceeds its national response capacity.

9.6.7 External Assistance

There is, in general, in cases of disasters a willingness of the affected States to invite external assistance. They agree that international actors have access to the victims, particularly if the authorities are unable to cope with the disaster situation. Even if there are many such cases, one cannot conclude that this practice can be considered as a legal obligation to allow external assistance. Such cases cannot overrule the power of State sovereignty and therefore the consent of the affected State is still needed. According to the sovereignty principle the State is free to refuse the offer of humanitarian assistance.

However, sovereignty is not unlimited because it includes also obligations *vis-à-vis* the victim of such disasters. It has to be exercised in the way that best contributes to the protection of persons under the jurisdiction of that state. In conclusion, the rule on consent to humanitarian assistance must be seen in line with human rights obligations of the affected state. Therefore humanitarian assistance should not be rejected arbitrarily. Art. 11 reads:

⁴⁰ UN-Doc. E/C.12/1995/5, para. 17.

⁴¹ UN-Doc. A/CN.4/643, para. 33.

⁴² International Federation of Red Cross and Red Crescent Societies, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance 2007, guideline 3(2).

1. Consent to external assistance shall not be withheld arbitrarily if the affected State is unable or unwilling to provide the assistance required.
2. When an offer of assistance is extended pursuant to draft article 12, paragraph 1, of the present draft articles, the affected State shall, without delay, notify all concerned of its decision regarding such an offer.

9.7 Conclusion

Literature and State practice offers evidence of the international community's great interest in the topic of humanitarian assistance in the event of disasters. Therefore one has to welcome the attempt of the ILC to codify legal principles applicable in natural and man-made disasters. The undertaking will help to improve the efficiency and quality of humanitarian assistance and mitigate the damages of the disasters. Many States praised the ILC draft for striking the proper balance between the protection of the victims and the respect of State sovereignty and non-interference. The importance of international solidarity was also emphasised by many States. Indeed, the draft convention does reflect the viewpoints of the States and does not meet all the demands of non-State actors being involved in humanitarian assistance. However, the topic is now on the agenda and the draft articles are a starting point for further discussion and new interpretations of the obligations of affected States, the right to offer assistance and the duty of the affected State not to arbitrarily withhold its consent to external help.

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