

CONSIDERATION OF THE PROTECTION OF PERSONS IN THE EVENT OF DISASTERS BY THE INTERNATIONAL LAW COMMISSION

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Recent disasters of epic proportions, such as the Asian Tsunami of 2004, and the accompanying response by the international community, have given rise to renewed interest in the legal aspects of disaster relief activities. The idea of developing an international legal framework for disaster relief activities is not, however, a new one. Such efforts stretch back at least as far as the International Relief Union, which was established in 1927,¹ and have been the subject of numerous recommendatory texts adopted by a variety of entities since then. A proposal for the negotiation of an international convention on expediting the delivery of emergency assistance was presented to the United Nations Economic and Social Council (ECOSOC) in 1984, but did not gain traction.

In more recent times, the International Federation of the Red Cross (IFRC) commenced a study into what was called “International Disaster Response Law” (IDRL), which culminated with the adoption at the International Conference of the Red Cross and Red Crescent in 2007 of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.² This instrument constitutes the most significant pronouncement on the topic to date.

A further initiative was started in 2006 when the International Law Commission, established by the United Nations, included the topic of

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1. Convention Establishing An International Relief Union, 35 L.N.T.S. 249 (1927).
2. Int’l Fed’n of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, 30IC/07/R4 annex, available at <http://www.ifrc.org/docs/pubs/idrl/guidelines/guidelines.pdf> (last visited Feb. 23, 2009).

“protection of persons in the event of disasters”³ on its work programme. This paper will seek to introduce the reader to the work being undertaken by the International Law Commission, while undertaking a brief review of the legal issues that arise, and providing preliminary reflections on some of the characteristics of the development of international law in this area.

I. WORK BEING UNDERTAKEN IN THE INTERNATIONAL LAW COMMISSION

In 2006, the Secretariat of the International Law Commission proposed the inclusion of the topic on the list of possible future topics to be considered by the Commission.⁴ The initial proposal, which was accompanied by a feasibility study, was entitled “international disaster relief law” and tracked, in part, the approach taken by the International Federation of the Red Cross in the area of international disaster response law. During the process of review and subsequent acceptance of the topic, the Working Group on the Long-term Programme of Work decided to modify the title of the topic to “Protection of persons in the event of disasters.” This was done ostensibly to bring the aspect of protection into sharper relief. The topic was formally added to the work programme of the Commission in 2007, and a Special Rapporteur was appointed.

At its sixtieth session, in 2008, the Commission considered the Special Rapporteur’s preliminary report⁵ which dealt with the basic question of the scope and orientation of the project. For example: whether to limit the topic to natural disasters; whether to exclude humanitarian assistance in the context of armed conflict; which individuals to cover within the scope (only victims or also humanitarian assistance personnel); which phases of assistance to consider (i.e., whether to also consider aspects of prevention in anticipation of the onset of a disaster) and whether to limit the study of the topic to issues arising in the theatre of the disaster (in other words, to consider activities at the point of departure or transit of humanitarian assistance goods). The Commission further considered the extent to which a human-rights based approach should be followed, and how a possible right to humanitarian assistance might be handled. It is expected that the Special Rapporteur will present a further report to the Commission in 2009.

3. U.N. Int’l Law Comm’n, *Report on the Work of Its Fifty-Eighth Session*, U.N. Doc. A/61/10, annex C (2006).

4. *Id.*

5. U.N. Int’l Law Comm’n, *Preliminary Report on the Protection of Persons in the Event of Disasters*, 5, U.N. Doc. A/CN.4/598 (May 5, 2008) (prepared by Eduardo Valencia-Ospina).

II. ISSUES FOR CONSIDERATION

It is useful to keep in mind the kinds of legal issues to be addressed, as well as the policy considerations that are implicated, when embarking on the elaboration of legal rules in a new area.⁶ For example, it is common in many of the non-binding texts developed in the area for there to be an elaboration of the applicable general principles (such as humanity, neutrality, impartiality, non-discrimination, sovereignty, and non-intervention). While most of these lie at the heart of all international cooperation, they inform the basic policy-approach to disaster-relief activities in specific ways. For example, the principle of humanity plays a significant role in the recognition of the link between disaster prevention, response and protection, and broader development activities and goals. Disasters, particularly those of a catastrophic dimension, have the potential to dramatically set back hard-earned gains in human development. Likewise, the principles of sovereignty and non-intervention are operationalized through the requirement of the consent of assistance receiving states, which serves as the cornerstone of most relief-related activities. The latter two principles thus provide the context in which certain claims are to be understood. Such claims include, the existence of a right to humanitarian assistance and a commensurate obligation on disaster-affected states to accept international assistance, including an outcome of a broader “droit d’ingérence,” are to be understood.

Beyond these broader concepts lie a plethora of specific legal questions arising out of the various phases of assistance activities, ranging from disaster prevention and mitigation to the actual response and provision of assistance. With regard to the former, a number of bilateral (and some multilateral) treaties exists where states have established a variety of mechanisms in advance of the onset of a disaster. For example, search and rescue agreements, standby capacity arrangements, the establishment and maintenance of early warning mechanisms, as well as agreement to cooperate in risk identification and management, and contingency planning (including the regular exchange of information and the sharing of knowledge of risk).

A range of legal issues arise at the level of response and the provision of assistance. These can be grouped, even if somewhat generally, into a series of clusters including:

6. See, e.g., U.N. Int’l Law Comm’n, *Protection of Persons in the Event of Disasters, Memorandum from the Secretariat*, U.N. Doc. A/CN.4/590 (Dec. 11, 2007). See also DAVID FISHER, INT’L FED’N OF THE RED CROSS AND RED CRESCENT SOCIETIES, *LAW AND LEGAL ISSUES IN INTERNATIONAL DISASTER RESPONSE: A DESK STUDY* (2007), available at <http://www.ifrc.org/Docs/pubs/idrl/deskstudy/113600-idrl-deskstudy-en.pdf> (last visited Feb. 23, 2009).

- a) the *legal aspects of the initiation of disaster assistance*, particularly around consent, notification, requests and offers of assistance;
- b) the *conditionality of assistance*, as relating, for example, to the retention of national control, as well as compliance with international and national rules and standards;
- c) *issues of access*, including the facilitation of entry of humanitarian assistance and other personnel (visas, work permits, recognition of professional qualifications) as well as the legal issues that pertain to the importation of humanitarian goods and materials (temporary admission, identification requirements, re-exportation requirements, exemption of taxes, customs clearance, financial limitations);
- d) *issues relating to movement of personnel and goods*, including questions of transit, over flight rights, freedom of movement and access within the receiving state;
- e) *issues relating to status*, including identification requirements (use of symbols and identity cards), privileges and immunities, and the distinction between United Nations officials and other humanitarian relief personnel;
- f) *issues pertaining to the mechanics of the provision of relief*, including the requirement of the exchange of information, telecommunications, and the use of civil and military defence assets, as well as questions concerning the quality of relief assistance, costs, liability and compensation for inter-State relief (as well as compensation for victims);
- g) *issues concerning protection*, relating both to the protection of humanitarian relief personnel as well as that of victims of disasters (who may be rendered internally displaced), including a consideration of the legal content of protection and the potential "right to humanitarian assistance";
- h) *the termination of assistance* (the date of legal termination of assistance being relevant, for example, for the triggering of re-exportation requirements, for the ascertainment of cost estimates, for the expiration of special dispensations for access by humanitarian assistance personnel, etc.).

III. SOME REFLECTIONS ON THE DEVELOPMENT OF INTERNATIONAL LAW IN THIS AREA

Although disaster relief assistance activities have been the subject of a significant amount of legal development, especially in recent years, the topic is still, in its infancy, comparable to the prevailing status of the set of international rules regulating the impact of human activities on the environment in the late 1960s and early 1970s; prior to the onset of the normative phase

which gave rise to the system of international treaties which anchor the contemporary rules of environmental law at the international level today. Notwithstanding such relative immature stage of legal development, it is possible to ascertain certain specific, if not unique, characteristics of the work on the development of the legal aspects of the topic (in comparison to similar work on other topics). To the extent that such specificities serve as constraints on attempts to more fully develop and codify the law in this area, they may be worth considering.

The first such characteristic is perhaps the most obvious, namely that *legal work in this area is but one—relatively minor—aspect of disaster relief assistance activities, and is accordingly built on a constantly shifting foundation of practice.* This poses particular challenges in terms of the relevance of the law to practice, as well as risks in regards to the possibility of the law impeding new developments in practice. For example, on the question of scope, it was common for a distinction to be drawn between natural and man-made disasters. However, there has been a shift in the thinking on this, as highlighted by the 2005 Hyogo Conference on Disaster Reduction, which adopted a different approach focusing on the element of risk posed by so-called “hazards” which may be natural or man-made.⁷ The onset of “disasters” are, accordingly, best viewed as a function of exposure to risk. The difference between an earthquake in the middle of the ocean and one in the proximity of human populations is thus one of difference in risk. Viewed in such terms disaster relief assistance is also a function of risk reduction and management. This poses particular challenges for law-making, especially at the international level where it is still rare to find international treaties encapsulating risk-management models, and necessitates some imaginative thinking as regards to the role of law in this process. At the same time, this is not necessarily an unprecedented situation. There are aspects of other areas of international law, such as that of the regulation of the environment, which have also involved an element of tailoring law to practice. The difficulties there did not prove insurmountable; instead what was needed was the willingness to think creatively in order to find solutions that best reflected practice. It is submitted that a similar approach is a requirement for the legal regulation of disasters. In fact, recent limited examples already exist of states negotiating international bilateral and regional disaster risk management agreements, and a growing number of states have made risk reduction a core component of their national strategies and laws.

7. World Conference on Disaster Reduction, Jan. 18–22, 2005, *Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disaster*, U.N. Doc. A/CONF.206/6 (Mar. 16, 2005).

A further characteristic of the development of rules in this area is the *existence of a significant undertow of skepticism among the intended recipients of legal rules that may be developed in this area*. Recipients range from relief-receiving states that are concerned about being constrained by rules requiring them to allow intervention in their domestic affairs under the guise of relief assistance, to humanitarian practitioners who are interested in establishing a humanitarian “space” unduly unencumbered by legal “red-tape,” to non-governmental organizations who are suspicious of a codification of rules which would necessarily be statist in nature by confirming the traditional consensual basis of humanitarian relief efforts. Such skepticism is matched only by the perceived need to put contemporary disaster relief assistance activities on a sound legal footing. It is somewhat unusual to find such a level of antipathy so early in the stages of development of legal rules on a topic, and it is not without its challenges in terms of having to continuously justify the purpose of the exercise, while keeping a clear sense of the potential benefits of developing legal rules in this area.

Furthermore, *international disaster relief law is not (yet) a distinct field of law*, in the sense that one can somewhat safely speak of “international humanitarian law” as being a distinct field of international law. It is, rather, a collection of disparate rules covering a broad range of issues, some of which are directly related to relief assistance (for example, the regulation of assistance personnel and goods), while others are more indirectly related (for example, some countries maintain special tax exemptions for goods procured for relief assistance purposes). A group—to the extent that one can call it that—of rules that arise from an equally disparate set of sources, range from international treaties, to national laws, to a burgeoning body of non-binding norms. Nor are the boundaries of this emerging field yet fully defined. Asking different people reveals the discrepancies in this field: that it is about response in the immediate aftermath of a disaster, or that it is about taking a risk reduction approach which would include prevention and mitigation activities before the onset of a disaster, or rehabilitation actions after a disaster; while still others view the topic as being essentially one about human rights protection. All of these are equally plausible. There is also currently no clarity on the extent to which the various areas of the topic relate to each other. For example, under the same topic discussion there are such disparate questions regarding visas, border-crossings, the status of humanitarian personnel, and arguably more fundamental issues of the protection of victims, including that arising from the legal protection of internally-displaced persons, and ideas emerging from such notions as the “*droit d’ingérence*” and the responsibility to protect. Issues of the more mundane intermingle freely with the fundamental and even controversial, which poses difficulties from the perspective of understanding what the topic is actually about and at what level of generality the rules should be developed.

Lastly, it should be added that *caution needs to be used when understanding the prevailing resort to non-binding law, so-called "soft law," as the preferred form for rules developed in this area.* As already alluded to, there exist a significant number of non-binding pronouncements from a host of entities, not the least of which being the 2007 guidelines adopted by the IFRC. It is somewhat understandable that the development of non-binding texts in this area should be the preferred approach: it minimizes the risks inherent in complex political negotiations; the chances are greater that the texts in questions will be more acceptable to reluctant addressees if they are depicted as being non-binding; and non-binding texts are generally less rigid and more amenable to future modification or revision in light of new developments in practice, which is not typically the case with hard-law instruments. There may be other reasons for a preference for non-binding texts.

Nonetheless, it should be recalled that there actually is a significant amount of hard law in this area. While there are a few multilateral treaties typically devoted to specific aspects of relief, there are some, particularly at the regional level, that are cast in general terms and which anchor international cooperation efforts leveling that region. The most recent example is a regional treaty adopted under the auspices of Association of Southeast Asian Nations (ASEAN) following the Asian Tsunami.⁸ There are other examples in Europe and Latin America.⁹ All of these provide specific legal obligations for state parties. Furthermore, there exists a significant number of bilateral assistance treaties, particularly in Europe but also in Latin America, which also contain a number of specific obligations, many of which are common to a vast majority of such treaties. Indeed, it may even be possible to speak of some obligations having a customary law status, even if only at the regional level. Furthermore, there is an even larger body of national law. While not many countries have specific disaster-related legislation, almost every country in the world has legislation on the books which include some provisions relating to disasters. Provisions have been featured in tax codes providing exemptions to disaster-relief assistance, in import and export legislation waiving customs requirements for relief assistance, in immigration laws providing special visas, or waiving visa requirements for humanitarian assistance personnel, etc. All of these are relevant sources of rules in this area.

The question then is how to understand the soft-law instruments against this background of hard-law. Here the concern is that the subtle interplay

8. Ass'n of Southeast Asian Nations, *ASEAN Agreement on Disaster Management and Emergency Response*, July 26, 2005, <http://www.aseansec.org/17579.htm> (last visited Feb. 23, 2009).

9. U.N. Int'l Law Comm'n, *Protection of Persons in the Event of Disasters, Memorandum from the Secretariat, Addendum*, U.N. Doc. A/CN.4/590/Add.2 (Mar. 31, 2008) (list of contemporary legal instruments).

between non-binding and binding is not always fully understood or properly conveyed by the “soft-law” form of rule-making. There is legal complexity in including hard-law rules in ostensibly soft-law texts. While it is fine to have a set of guidelines which are merely recommendatory, it needs to be understood that for some states, some of those guidelines are actually binding on them as a matter of either treaty law or under their own national law. It may not be entirely correct to portray to a state the status of a particular instrument as being “non-binding” when some of its provisions may actually be binding on it at the international level, either by virtue of an existing treaty arrangement or a customary rule, or binding internally by virtue of its domestic law. Some of the provisions of the IFRC guidelines are based on provisions in international treaties or reflect domestic legal practice. There is also difficulty with the inclusion in some non-binding instruments, in a recommendatory fashion, of specific rights such as the right to life, the prohibition on discrimination, and the right to the safety and security of the person. These are not recommendatory but are binding on states either as a matter of treaty law or of customary law. Indeed, including such provisions in non-binding texts may actually contribute to the watering-down of their legal force.

It could also be said that the problem might lie with the somewhat superficial equation of soft-law texts as being simply non-binding. The fact is that while there certainly are examples of soft-law instruments that are intended to be non-binding, there are also other “flavours” of instruments which straddle the soft-hard divide by taking on soft-law forms while having some “hard” normative content. For example, there are texts which usefully present, in an expository manner, a set of norms, some of which may be reflections of existing hard-law whether treaty or customary based, while others may be more of a recommendatory nature, even perhaps leading to progressive development of the law. As regards the former, an analogy might be drawn from the United States (U.S. Restatement of Law)¹⁰ which does not enjoy a formal legal standing of its own, but nonetheless is considered as an authoritative source, in an expository manner, of rules of international law. It may be that some of the texts that have been developed, or that may be developed, in the disaster assistance area could serve a similar function.

Furthermore, while one might, at this point in time, ascribe the preference for non-binding texts in this area to being a function of the immaturity of the field, at some point in the future there might arise a need for a general pronouncement made in more explicitly binding terms. It should be recalled that large swaths of international rules pertinent to the regulation of disaster-relief assistance activities are already regulated by international treaties, even

10. RESTATEMENT (THIRD) OF FOREIGN LAW OF THE UNITED STATES (1987).

if primarily sectoral in nature (and not always labeled as pertaining primarily to disaster relief).

IV. CONCLUSION

In concluding it is worth recalling that the impulse to further develop the legal regime relating to the provision of disaster relief assistance is, as has already been alluded to, driven, in part, by the perceived need to regulate an increasingly prevalent activity, undertaken at the international level, which increasingly involves the mobilization of large sums of money, resources and technical expertise and which is either unregulated or regulated in a very inconsistent manner. In doing so, the work in developing new legal rules in this area should be guided by the overriding need to make them work in practice, i.e., to facilitate rather than to impede assistance activities on the ground.