

Disaster Law

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1 The Fragmented Nature of Disaster Law

A wide range of legal and regulatory issues arise in crises that are precipitated by natural and technological disasters. These include the determination of the role and responsibility of States in offering and/or accepting assistance, the free movement of relief workers, goods and equipment, as well as ensuring that the range of actors involved in humanitarian assistance is accountable to beneficiary governments and communities.

Despite the central importance of law to the management of natural and technological disasters, the existing body of law is relatively fragmented when compared with the regime for armed conflict provided by international humanitarian law (IHL). This fragmentation is characterised by the varied geographic scope of the legal instruments that govern disasters (bilateral, regional and universal); these legal instruments often either leave gaps or create overlaps. It is also quite fragmented in terms of the mode of instrument in which this area is primarily regulated; while IHL is highly codified, disaster law relies heavily on a range of soft law instruments in addition to the existing hard law instruments.

2 Definition and Scope of Application of Disaster Law

Disaster law refers to the legal provisions that govern the range of challenges that arise from natural and technological disasters occurring in peacetime. Until relatively recently, the scope of the field was generally considered to be limited to legal

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provisions concerning the disaster response phase of the disaster management cycle.¹ However, this chapter conceives of disaster law more broadly to include legal provisions concerning not only disaster response but also other disaster management phases, including disaster risk reduction and preparedness. The rehabilitation and reconstruction phases are governed by the general rules of international law and therefore are not addressed in this chapter.

There are a wide range of definitions of disaster in disaster law instruments.² Most of the existing *hard law* norms in the field deriving from treaties and other sources of international law relate to disasters with transboundary impacts, i.e. disasters that require international assistance. However, recently a range of norms, soft law in nature, have been created by the international community that also address recurrent, smaller-scale disasters that do not necessarily require international assistance as part of the response but that nonetheless cumulatively impose considerable costs in terms of human lives and property.³ This chapter will thus also address those norms that have been developed by the international community that, although not legally binding, do nonetheless inform domestic disaster management regimes.

3 Emergence and Early Development of Disaster Law

A possible explanation for the relative fragmentation and underdevelopment of disaster law *vis-à-vis* IHL is that historically natural and technological disasters, unlike armed conflicts, have not generally been considered a core concern of the international community.⁴

The League of Nations produced a Convention establishing the International Relief Union in 1927. The Convention aimed, according to its preamble, ‘to render aid to each other in disasters, to encourage international relief by a methodical co-ordination of available resources, and to further the progress of international law in the field’.⁵ However, the International Relief Union had a limited impact, and its work ended with the onset of World War II.

The immediate post-war development of disaster law was chiefly characterised by the adoption of bilateral treaties on disaster assistance.⁶ Another attempt to create a comprehensive and universal disaster law instrument came with the submission in 1984 by the UN Secretary General of the text of a Draft Convention

¹See, for example Hoffman (2003), pp. 13–20.

²Fisher (2007), p. 23.

³Concerning soft law, see van Hoof (1983).

⁴It should be noted, however, that as early as 1758 the Swiss diplomat and legal scholar Emer de Vattel noted the duty of States to come to the assistance of others experiencing famine, as ‘*assisting in such a dire situation is so central to humanity that no civilized nation would fail entirely to do so*’. Cited in Fisher (2007), p. 25.

⁵Fidler (2005), pp. 458–473 at 464.

⁶Fischer (2003), pp. 24–44 at 24–25.

on Expediting the Delivery of Emergency Assistance to the Economic and Social Council.⁷ Ultimately, however, the text failed to receive sufficient support and remained in draft form.

4 Bilateral, Regional and Global Disaster Law Mechanisms

Contemporary disaster law remains highly fragmented in the absence of a universal and comprehensive instrument and thus relies on a range of mechanisms concluded at different levels of governance (bilateral, regional and global) that address a wide range of issues relating to disaster management.

4.1 *Bilateral Disaster Law Treaties*

Bilateral treaties that regulate disaster management form the bulk of the existing international instruments relating to disasters.⁸ For the most part conceived in terms of the provision of mutual assistance, such treaties, with a few exceptions,⁹ are generally concluded between neighbouring States.

De Guttry provides a typology of disasters regulated by bilateral treaties.¹⁰ The first category of treaties regulates all types of major natural and technological disasters. The second category of treaties relates to specific kinds of disaster, for example forest fire control. A further category of treaties has an even narrower scope of application and regulates disasters occurring in a predefined geographic area, for example disasters occurring in a mountainous border region or maritime disasters occurring in waters adjacent to an international border.

Bilateral treaties can address a range of disaster management issues, including the management of requests and offers of assistance, risk assessment and reduction, damage and loss assessment, monitoring systems, education and training, emergency management and planning, engineering and social problems, and technological information exchanges.¹¹ It has been asserted that the general trend in terms of the content of the various bilateral disaster law treaties is from agreements concerning particular hazards and/or narrow aspects of disaster management towards the pursuit of more general frameworks for mutual assistance.¹²

⁷Office of the UN Disaster Relief Coordinator, Convention on Expediting the Delivery of Emergency Assistance (Draft), UN Doc. A/39/267/Add.2 E/1984/96/Add.2, of June 18, 1984.

⁸Fisher (2007), p. 80.

⁹See, for example Italy and Russia.

¹⁰de Guttry (2012), pp. 11–12.

¹¹*Id.*, p. 12.

¹²Fischer (2003), p. 24.

4.2 *Regional Disaster Law Mechanisms*

Arrangements for disaster management at the regional level have proliferated in recent years. An advantage that regional organisations in disaster management possess is the trust and familiarity that these fora provide for the member States concerned. Such an advantage can facilitate the agreement of effective common policies that are tailored to the particular needs of the regions concerned.¹³ The form of cooperation varies greatly across regions and ranges from political dialogue through information exchange to harmonisation, training and joint operations. Ferris and Petz have investigated the forms of cooperation engaged in by 13 regional organisations.¹⁴ All thirteen of the organisations investigated have held regional intergovernmental meetings concerning disaster risk management and a regional DRR framework or convention. Twelve of the 13 organisations have ratified a regional disaster management framework convention. A lesser but not insignificant number of organisations have developed regional disaster relief insurance and other financial mechanisms, operational response capacities and agreed military protocols. Despite considerable cooperation across a range of disaster-management-related issues, only two regional organisations (the European Union and the Organisation of American States) have developed either a treaty mechanism or a set of guidelines for facilitating and regulating disaster response.

4.3 *Global Multilateral Disaster Law Instruments*

There are few instruments at the global level that regulate disaster management in peacetime; those that do exist tend to be sectorial in the sense that they merely form part of broader international regimes (for example, customs or civil aviation regimes), address only particular disaster threats or address only a particular type of actor or aspect of a relief operation.

¹³Haver and Foley, <https://www.humanitarianoutcomes.org/sites/default/files/Backgroundpaper2RegionalandInternationalInitiatives.pdf>.

¹⁴Ferris and Petz, http://www.brookings.edu/~media/Research/Files/Reports/2013/02/regional%20organizations%20disasters%20ferris/REGIONAL_DISASTER_MECHANISMS_2013.pdf.

The thirteen regional organisations are: the African Union; Economic Community of West African States; Southern African Development Community; Organisation of American States; Central American Integration System; Caribbean Community and Common Market; the Andean Community; the League of Arab States; South Asian Association for Regional Cooperation; Association of Southeast Asian Nations; European Union; Council of Europe; and the Secretariat of the Pacific Community.

4.3.1 Broad International Regimes Addressing Disaster Issues

There are a number of established international regimes that address disaster relief in an incidental manner. Although these regimes often have counterparts at the bilateral and regional levels, only the global regimes are outlined here.

Obstacles to the free movement of relief items, goods and equipment, either through delays caused by customs procedures or the costs incurred by customs taxes and duties, can hamper an international relief effort. Such obstacles often arise in the context of the inundation of the customs offices of disaster-affected States by such relief items, goods and equipment. The broad international regime governing customs has striven to address this.

The 1970 World Custom Organisation (WCO) Recommendation to Expedite the Forwarding of Relief Consignments in the Event of Disasters recommended States to allow the 'admission free of import duties and taxes'¹⁵ of relief consignments intended as gifts to victims of a disaster. A temporary admission regime is also recommended for equipment used in a relief effort, provided that such goods are subsequently re-exported.¹⁶ Paragraph 6 of Annex J.5 to the Kyoto Convention contains similar provisions to those provided by the WCO Recommendation. However, few States have participated in the Annex, which, even within the framework of an international treaty, is formulated in terms of a recommendation.¹⁷ The same lack of State participation characterises annexes B.3 and J.5 to the revised 1999 International Convention on the Simplification and Harmonisation of Customs Procedures, which simplify customs procedures and waive fees. Despite the range of initiatives undertaken at bilateral and regional levels, as well as at the universal level, to facilitate cross-border movement of relief material, it has been asserted that States retain considerable discretion in practice in introducing legislation and regulation to facilitate foreign relief consignments.¹⁸

The broad international regimes governing civil aviation and maritime transport also contain disaster-related norms. In terms of civil aviation, the Convention on International Civil Aviation provides that States parties shall facilitate relief flights undertaken by civil aircraft.¹⁹ Regarding civil maritime transport, the Annex to the

¹⁵WCO doc. T2-423, 8th June, 1970, para. 5.

¹⁶*Id.*, para. 6.

¹⁷Adinolfi (2012), p. 539.

¹⁸*Id.*, p. 546.

¹⁹Chapter 8.8 of Annex 9 to the Convention on International Civil Aviation (Chicago, 7th December 1944) additionally provides that: '*Contracting States shall facilitate the entry into, departure from and transit through their territories of aircraft engaged in relief flights performed by or on behalf of international organisations recognised by the UN or by or on behalf of States themselves and shall take all possible measures to ensure their safe operation. Such relief flights are those undertaken in response to natural and man-made disasters which seriously endanger human health or the environment, as well as similar emergency situations where UN assistance is required. Such flights shall be commenced as quickly as possible after obtaining agreement with the recipient State.*'

1965 Convention on the Facilitation of Maritime Traffic has been amended to provide in Sections 7.8–7.10 for the facilitation of the arrival and departure of ships engaged in disaster relief work, including the facilitation of the entry and clearance of persons, cargo, material and equipment required to deal with disaster situations.

4.3.2 Mechanisms Addressing Specific Hazards

Although a comprehensive and universal legal regime does not currently exist at the global level, a number of regimes have developed that are directed towards addressing particular natural and technological hazards. Such hazards include infectious diseases, nuclear accidents, industrial pollution, civil transport and maritime/aviation accidents. It can be asserted that these hazards have the potential to create negative externalities for neighbouring States, thereby generating incentives for States to regulate.²⁰ The regime governing nuclear accidents and infectious diseases are outlined in more detail below.

The threat posed by nuclear accidents has obvious cross-border implications. However, apart from the instruments that establish the International Atomic Energy Agency, some bilateral treaties and some agreements entered into by international organisations and member States, there was no universal instrument that strove to regulate this threat until 1986.²¹ The Chernobyl nuclear accident precipitated the adoption by the international community of two treaties relating to nuclear safety and to emergency preparedness and response, respectively.²² A range of other treaties provide further regulation concerning preparedness and response, safety and security, and liability for nuclear damage.²³

The transboundary nature of infectious diseases and other threats to public health has resulted in the development of a body of legal norms given effect by treaties, the regulations of a number of international organisations, as well as soft law instruments.²⁴ Under its constitution, the World Health Organization (WHO) is given considerable powers to ‘take emergency measures within the functions and financial resources of the organisation to deal with events requiring immediate action’.²⁵

²⁰Fidler (2005), p. 460.

²¹Gioia (2012), pp. 85–102, at p. 86.

²²Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Vienna, 26 Sept. 1986); Convention on Early Notification of a Nuclear Accident (Vienna, 26 Sept. 1986).

²³Gioia (2012), pp. 85–102.

²⁴Venturini (2012), pp. 45–64, at p. 57.

²⁵Art. 28(i) WHO Constitution, http://www.who.int/governance/eb/who_constitution_en.pdf.

In 2005, the World Health Assembly adopted a new version of the International Health Regulations (the Regulations), which entered into force on 15 June 2007.²⁶ The Regulations provide that States parties must notify WHO of any event that may constitute a public health emergency. The WHO Director General is given the power to determine the existence of an international emergency and to issue recommendations.

4.3.3 Mechanisms Addressing Particular Aspects of Disaster Relief

A final category of universal disaster law instruments contains those instruments that address particular aspects of disaster relief or govern the activities of particular relief actors. One of the few examples within this category and one of the only dedicated global disaster law treaties to have been adopted in the latter half of the twentieth century is the Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations.²⁷ The convention details the procedures for offering and requesting telecommunications assistance.²⁸ It also details the privileges and immunities that telecommunication providers enjoy, including immunity from arrest, detention and legal process and exemption from taxation and other charges.²⁹

4.3.4 The International Law Commission's Draft Articles on the Protection of Persons in the Event of Disaster

Looking to the future, the UN International Law Commission (ILC), which is mandated to promote the progressive development of PIL and its codification, has issued a set of draft articles concerning the protection of persons in the event of disaster.³⁰ Although the concrete consequence of the Draft Articles remains unclear, they can contribute to confirming the content of the rules and principles of international law in this regard.³¹ Human dignity in disaster settings is given prominence in Draft Article 5, and although international human rights law has

²⁶The 2005 International Health Regulations are the successor to the preceding 1969 International Health Regulations.

²⁷Fidler (2005), p. 465.

²⁸Art. 4, Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (Tampere, 18th June 1998).

²⁹*Id.*, Art. 5.

³⁰Report of the International Law Commission on the work of its sixty-eighth session, 2 May–10 June and 4 July–12 August 2016, UN Doc. A/71/10 chap. IV, paras 38–49.

³¹Boyle and Chinkin (2007), pp. 160–162.

always been applicable in disaster settings,³² Draft Article 6 makes this explicit.³³ The draft articles also address the rights and duties of States to seek and provide assistance.

5 Soft Law Instruments

As mentioned above, disaster law is not only fragmented in terms of its geographic scope. It is also fragmented in terms of the various types of instruments contained within this body of law. Therefore, there are a significant number of soft law instruments that provide guidance of non-legally binding nature. These instruments strive to regulate the humanitarian sector as a whole or particular actors engaged in disaster management.

5.1 *Soft Law Instruments Addressed to States*

A range of soft law instruments have been adopted that are addressed to States.

Recognising the fragmented nature of disaster law as outlined above, the International Disaster Response Law Guidelines of the International Federation of the Red Cross (IFRC) has drawn on the wide range of existing standards and has supplemented these with novel elements to create a comprehensive but non-legally binding guidance document known as the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (the IDRL Guidelines).³⁴ Guidance is provided to governments concerning how to ensure legal preparedness for an international relief effort. The IDRL Guidelines seek to address both obstacles to the provision of humanitarian relief (in sectors including customs, immigration, transport), as well as potential quality and accountability shortfalls.

Another important initiative has been the Hyogo Framework for Action³⁵ and its successor instrument, the Sendai Framework for Disaster Risk Reduction

³²Kent (2011), pp. 137–138.

³³See Report of the International Law Commission on the work of its sixty-eighth session, 2 May–10 June and 4 July–12 August 2016, UN Doc. A/71/10 chap. IV, para 48.

³⁴The IDRL Guidelines were unanimously adopted in 2007 by States parties to the Geneva Conventions and Red Cross and Red Crescent actors at the 30th International Conference of the Red Cross and Red Crescent. See Resolution 4, 30th International Conference of the Red Cross and Red Crescent 30IC/07/R4. The IDRL Guidelines have also been endorsed several times in UN General Assembly resolutions.

³⁵UNISDR, Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters. Extract from the final report of the World Conference on Disaster Reduction (A/CONF.206/6), Geneva 2007.

2015–2030.³⁶ The latter's overarching priorities are to galvanise UN member States in better understanding disaster risk, strengthening disaster risk governance to manage disaster risk, investing in disaster risk reduction for resilience, enhancing disaster preparedness for effective response and to *Build Back Better* in recovery, rehabilitation and reconstruction.

The conditions under which military and civil defence assets may be deployed are detailed in the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (the Oslo Guidelines). The deployment of military assistance is governed by the principle of complementarity; only if civilian and/or humanitarian resources are insufficient should military assistance be provided.³⁷ Military assistance ought to be provided at no cost to the receiving State or party.³⁸ In principle, military and civil defence personnel deployed on disaster relief missions will do so unarmed and in national uniforms,³⁹ and such personnel ought to have a clearly defined legal status.⁴⁰

5.2 *Soft Law Instruments Addressed to Other Humanitarian Actors*

A wide range of technical standards exist that serve to guide the relief activities of humanitarian actors, including UN agencies, the Red Cross Movement and non-governmental organisations (for example, the Sphere Project⁴¹). Codes of conduct for relief personnel have also been created (for example, Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations in Disaster Relief). The Core Humanitarian Standard, which was published in December 2014, strives to consolidate a number of key guidelines in the humanitarian sector through the detailing of a set of nine commitments to communities and people affected by crisis.⁴²

³⁶UNISDR, Sendai Framework for Disaster Risk Reduction 2015–2030 (A/CONF.224/CRP.1), Geneva 2015.

³⁷Guidelines on the Use of Foreign Military and Civil Defence Assets, in: Disaster Relief, p. 24.

³⁸*Id.*, p. 27.

³⁹*Id.*, p. 29.

⁴⁰*Id.*, pp. 30–31. A wide range of bilateral status of forces agreements (SOFAs) and visiting forces agreements (VFAs) exist, which sometimes have specific provisions with regard to disaster relief assistance. See Fisher (2007), p. 80.

⁴¹Walker and Purdin (2004), pp. 100–111; Tong (2004), pp. 176–189; Darcy (2004), pp. 112–123; Gostelow (1999), pp. 316–325.

⁴²The Foreword to the Core Humanitarian Standard states that '[i]t is the intention of the boards of HAP International, People In Aid and the Sphere Project that the CHS will replace the 2010 HAP Standard in Accountability and Quality Management, the People In Aid Code of Good Practice in the Management and Support of Aid Personnel and the Core Standards section of the Sphere Handbook'.

6 Conclusion

Similar to many other bodies of international law, disaster law is characterised by considerable fragmentation. Although it may well be unlikely, and possibly undesirable, that a universal and comprehensive disaster law treaty is concluded, the prospects for building consensus among the international community concerning key disaster law issues have been increased by recent initiatives such as the ILC Draft Articles and the development of the Common Humanitarian Standard. The increasing engagement of regional organisations with disaster issues is to be welcomed, as are efforts to ensure coherence between regional and global humanitarian and disaster management regimes. Disaster law may still be regarded as in its infancy, and challenges undoubtedly remain in ensuring the necessary legal preparedness to support efficient and effective disaster management. Nonetheless, the international community is increasingly resorting to a range of legal and policy instruments in various multilateral fora to address the growing challenges posed by natural and technological disasters.

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