

5^E COMMISSION

NATURAL DISASTERS AND INTERNATIONAL LAW

CATASTROPHES NATURELLES ET DROIT INTERNATIONAL

RAPPORTEUR : SIR KENNETH KEITH

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**LETTER SENT BY THE RAPPORTEUR TO THE MEMBERS
OF THE COMMISSION ON 26 JANUARY 2023**

Chères consœurs and confrères,

I do apologise at the outset for my great delays in being in touch with you all.

I attach the note I sent to you in advance of our discussions in The Hague in 2019 along with the preliminary note I prepared for the Tokyo session. I have not included the Bruges resolution and the final text of the ILC draft articles. Both are easily available to you.

Plainly much has happened since then. The world, particularly its poorest and most vulnerable populations, has been and continues to be devastatingly and grievously affected by the COVID 19 pandemic which was the subject of the Resolution prepared by the 12th Commission (confrere Murase), adopted on line in 2021, Epidemics, Pandemics and International Law, negotiations within the WHO and beyond for an update of the International Health Regulations 2005 or a new treaty. The world has also been subjected to major climate events, including flooding, drought, coastal storms, erosion and bush fires, which experts attribute to the impacts of climate change.

Action or perhaps it is to be seen more as talk at the intergovernmental level has accelerated and taken various forms, including notably the Paris Agreement, but too often with limited if any results from the 27 Conferences of Parties which have been held since, most recently in Egypt. The last did achieve what some see as a breakthrough agreement to provide loss and damage funding for vulnerable countries hit hard by climate disasters.

The UN General Assembly has adopted three resolutions, among many, bearing on the broader topic, in the last four years. In 2018 it adopted resolution 73/230 headed Effective global response to address the impacts of the El Niño phenomenon. It noted with concern the 2015/16 event heavy rains, floods and, conversely, cold waves and heat waves, wild fires, coral beaching and drought adversely affected countries and peoples, in particular in Latin America, Eastern and Southern Africa and South-East Asia and the Pacific, including by increasing the spread of diseases and the number of people displaced, affecting food security and infrastructure and hampering the ability of those countries and peoples to achieve sustainable development. It recognizes the role of various parts of the UN system, particularly the World Meteorological Organization and the UN Office for Disaster Risk Reduction.

Second, in 2021 the Assembly adopted resolution 76/119 on the ILC text on Protection of persons in the event of disasters. That resolution decides that there will be an examination of the recommendation of the Commission that a convention be elaborated or any other course of action to be taken in respect of the draft articles by a working group of the 6th Committee over four full days at the 78th and 79th sessions of the Assembly. The resolution refers to two documents which set out the positions of governments on the choices to be made- A/73/229 and A/?5/214.

Third, in 2022 the Assembly adopted resolution A/77/164 on Disaster risk reduction (recall the various calculations that have been made, for instance by the World Bank, the UNDP and businesses, about the proportions advantaging reduction over response by 7 or even 10 to one). That lengthy resolution recalls the Sendai Declaration and the Sendai Framework for Disaster Risk Reduction 2015-2030, notes with concern the findings contained in the special report of the IPCC and among many other things reaffirms its decision to hold a midterm review of the implementation of the Sendai Framework in 2023.

In the attached papers I give some account of newspaper stories I had noticed. To them I could add a Nicholas Kristof column from the NYT of 21 January 2023 on Somalia, What we know about how to save kids' lives.

An earlier one which I have just uncovered is by Gillian Tett in the Financial Times of 19/20 May 2018, Are we prepared for the next pandemic? She recounts a visit to Dartmoor with a daughter to revisit the ruins of old villages, villages which had been wiped out by the Black Death which had swept through Europe killing between 30 and 60 % of the population. She mentions a speech by Bill Gates in which he estimated that a flu like that of 1919-20 were to occur again 33 million would die within six months. Consider what happened in what were considered to be the two best prepared states to deal with a pandemic! See also the FT of 3 December 2017 on Risk and rewards, estimating the property value of metro areas across the world, with risks from earthquakes, flooding, fire and cyclones being assessed.

In terms of more substantive scholarly studies, in 2018 I noticed a review article published in Nature, entitled Broad threat to humanity from cumulative climate hazards intensified by greenhouse gas emissions. It identifies six different impacts-health, food, water, infrastructure, economy and security. An accompanying paper extends to ten climate hazards.

Meanwhile, publishing on disasters continues at a rapid pace, with new journals being established as well as many articles and books.

All this is a long way of saying that the field of disasters or catastrophe is vast, with many interlocking parts. Because of that interlocking character the Commission could consider emphasising climate change. But with a new Rapporteur. I have not met my responsibilities and the years continue to pass!

I am sure that good work can be done, with an emphasis on climate change, on the four Rs- reduction, readiness, response and recovery and then back to the beginning to inform the other three.

I would be grateful for responses to this note and the attached papers by the end of May.

I hope to see you all in Angers later in the year.

All the very best

Ken Keith

**NOTE SENT BY THE RAPPORTEUR TO THE MEMBERS
OF THE COMMISSION ON 9 AUGUST 2019**

1. This Commission was formed by the Bureau some time after the Tokyo session (2013), at which there was a special meeting concerned with this matter. I attach the preliminary note I prepared at the request of President Owada on that occasion (Annex I). The Annuaire for that session has other relevant material, including a note by President Owada and a paper by Confrere Caflisch. Part 3 of my note needs updating in the light of much additional experience. The IFRC annual reports on disasters, for instance, provide much relevant material as does the work of the UN Office of Disaster Risk Reduction (the UNDRR). The Hyogo Framework for Action 2005-2015 has now been updated by the Sendai Framework 2015-2030 and there is a related intergovernmental expert working group (see e.g. a report A/71/644 adopted in terms of GA Resn 69/284). See also para 7 below.

2. The appointment of members, other than the first (me) was delayed to enable account to be taken of the progress of the work by the UN International Law Commission on the Protection of persons in the event of disasters. A number of members of our Commission (then 10 members) had informal discussions in Hyderabad (2017) on which I draw in this paper.

3. The ILC completed its draft articles in 2016 and recommended to the General Assembly the elaboration of a convention on the basis of the draft (Annex II). The General Assembly has twice considered that recommendation, has taken note of the draft articles, and has invited Governments to submit comments on the recommendation. My general reading of those debates, including being in the 6th Committee room in 2016, and of the written comments by States (including A/C, 6/73/SL 28 and A/73/229) is that the prospect of a convention being drafted is slight.

4. As my note recalled, the Institute had recently adopted a resolution on Humanitarian Assistance (Cracow 2003; see the commentary prepared by Robert Kolb in 2006). It refers back to the resolutions adopted in 1975 and 1989 (Annex III).

5. Scholarly interest has grown remarkably; see in particular two recent books - David Caron and others (eds), *The International Law of Disaster Relief* (2014) (papers presented at a joint meeting of four societies of international law summarised in the Tokyo Annuaire) and Katya Samuels and others (eds), *Cambridge Handbook of Disaster Risk Reduction and International Law* (2019) (based on a seminar held at the University of Reading and organised by members of the Disaster Law Interest Group of the American Society of International Law). A committee of the International Law Association is addressing sea rise and that matter has recently been added to the agenda of the ILC. This June an International Disaster Law course was held in San Remo. See also e.g. *Catastrophic Events*, *International Review of the Red Cross*, No. 866, June 2007; Gian Luca Burci and Jakob Quirin, "Implementation of the International Health Regulations" 22(13) *MYM Research Forum Registration* (discussing the 2014-2016 West African Ebola Outbreak: Review article in *Nature Climate Change* (19 November 2018)

“Broad threat to humanity from cumulative climate hazards intensified by greenhouse gas emissions”; and many many more papers in many disciplines, as evidenced in the work of the IPCC.

6. As well as the scholarly work, many international organisations, including the specialised agencies, regional organisations and neighbouring States have disaster programmes, some in treaty form, as, of course, do States and regions within them. It is, after all, the State where the disaster occurs which has the primary responsibility.

7. A primary question for this Commission and for the Institute itself is what value are we able to add? There is already much activity. Given what appears to be major increases, even since 2013, in the nature and severity of disasters and probably in the resulting deaths, casualties, property damage and economic loss, we should try to do that and in a practical way. In a non-systematic way, I have noticed over the past year or so accounts of floods (e.g. Economist 2-8 September 2017 – Hurricane Harvey in Houston, a below average monsoon in Bangladesh, India and Nepal; Houston in 50 years has had three "500 year" floods); wildfires in California (NYT 7 June 2019) and on the next day a story about fewer home owners insuring against flooding); an alert on a New Zealand site from WHO about its concern that an avian influenza and a human influenza virus might mix –the new strain might transfer easily from one person to another around the world, causing a pandemic; the attribution of heatwaves (notably those in Europe in 2003 and there and in the US this year) to greenhouse gas emissions (Economist, 27 July 2019); a quarter of humanity facing a looming water crisis (NYT 8 August 2019)...

8. I give a brief tentative positive answer to the question stated at the beginning of para 7, in particular in two respects

- (a) We should be able to take a more comprehensive view of the subject
- (b) We should be able to elaborate on some practical elements.

I deal with the matters briefly.

In respect of the first we could take in sequence the "4Rs" and provide some details of each

- (1) Reduction of risk
- (2) Readiness to respond
- (3) Response in the immediate aftermath
- (4) Recovery-a more long term matter, which should lead to improvements in the first three Rs. The four should be seen as a circle.

9. Reduction of risk includes such matters as not allowing building in flood prone areas and building standards to counter earthquakes or other risks such as fire. Those actions may be taken by individuals, businesses and other organisations, local government, central government or where the risk is transnational, regional or international organisations, non- governmental and inter-governmental. The Cambridge Handbook provides much relevant material.

10. Readiness includes timely notice of hazards (e.g. tsunami, radiation or pandemic warnings – the latter possibly under the International Health Regulations), preparation for evacuation and availability of shelters, stores, food and health care. Again the action is to be taken by those mentioned at the end of the preceding paragraph. Other work of the ILC is relevant to obligations of notification.

11. Response is the aspect that has been most studied, at least by the lawyers. It is the sole focus of the Bruges resolution and of the IFRC's excellent 2007 publication. Those documents along with the ILC text highlight the challenge of sovereignty to humanitarian action. I need not elaborate on these matters at this stage but I come back to one aspect later.

12. Recovery presents a very wide range of different challenges - compare areas devastated by floods, by drought, by tsunamis, by cyclones, by earthquake, ... with deaths, destruction of property and infrastructure ... Much law does, of course, govern reconstruction but my sense is that it is principally national and subnational? Is that right?

13. I turn to the second matter raised earlier- para 8(b)-the elaboration of practical matters.

14. In respect of reduction, consider first the roles of those identifying areas in which building should be prohibited. This might be achieved by prohibitions or restrictions imposed by governmental land planning, by actions of lenders or insurers. Consider also building rules. We should draw on the extensive information now available, for instance, from the Sendai process and the Cambridge Handbook. That is also the case with other measures such as building requirements.

15. Readiness measures include those directed at transnational matters such as those covered by the International Health Regulations (which have just been invoked again in respect of the eastern DRC) or under the ASEAN Disaster Management arrangements (March 2019). Consider too the deployment of ocean warning devices following the Boxing Day 2004 earthquake and tsunami in South East Asia. There is extensive national practice.

16. An array of proposals for responses appears in the 2007 IFRC study. There is much related national, regional and international practice. For a Commonwealth Survey, see a valuable paper by Mary Picard in 43, Nos. 3-4, September-December 2017 Commonwealth Law Bulletin 403; she refers, for instance, to the work of the World Customs Organisation in establishing building rules for the expedited management of relief consignments. For States which have not implemented the IFRC guidelines, the IFRC and the UN Office for the Coordination of Humanitarian Affairs (UN- OCHA) have prepared a Model Emergency Decree. One issue which we might consider, in respect of the power of the affected State to reject offers of assistance, is whether it should be required to give reasons and to engage in discussions. A reciprocal obligation could be for the authority offering assistance to follow broadly agreed processes and principles.

17. Again, recovery will take many forms. The principal point I would make here (apart from referring back to the measures mentioned in para 14 - for after the

fourth "R" there should be reassessment of R1-3) is that the human rights and the recognition of dignity emphasised in the Annexed documents and the 2007 IFRC study apply at each stage, not just at the response stage. A feature of that may be an insurance scheme benefiting all.

18. In my 2013 paper, I question the adjective “natural” (paras 3-8). See also the scientific review article mentioned earlier (para 5). Is not the need of those affected completely independent of the initial cause? The 2003 and 2016 texts are all about the consequences in human terms of a disaster, not about its nature. A headline in The Washington Post on 19 September 2017 reads “Why it's time to stop calling the hurricane disasters natural”.

19. Some questions

- (1) Do we go ahead on the basis broadly indicated in this paper?
- (2) How can we best make use of the vast array of material?
- (3) In that respect what contact might we make with the wide range of bodies and individuals engaged with disaster issues?
- (4) How do we best address the rapidly changing situation both on the ground and at the governmental, intergovernmental and NGO levels? The UN General Assembly, for instance, holds a Climate Action Summit on 23 September next. It will relate to the Paris Agreement, the SDGs and the upcoming COP in Chile.
- (5) Particular issues will include
 - (a) the definition of (natural) disasters (paras 3-8 of 2013 Note)
 - (b) natural disasters connected with man-made disasters
 - (c) the emphasis on human needs arising from disasters (para 18 above)
 - (d) the extent of the factual material to be included
 - (e) the relative roles of national, binational, regional and international rules, binding and non-binding, the role of standard forms, drawing on the work, among others of the IFRC and the UNOCHA.
 - (f) on reduction, it would be possible to list some of the many steps which have been taken or proposed and related national law and policies and their relationship to the Hyogo and Sendai Frameworks.
 - (g) on readiness, the binding international law (some mentioned in para 19 of the 2013 Note) and much practice following major disasters could be assembled.
 - (h) on response, the issue of whether arbitrary should be elaborated and a reciprocal issue is raised in para 16; see also (e) above
 - (i) on recovery many issues arise but how far will be able to take them?
 - (j) The role of other parts of international law which I have largely omitted in the above list, cf para 10 above and paras 24-27 of the 2013 paper.

I trust that this will help facilitate discussion at the meeting of the Commission on Monday, 26 August at 1 p.m. and throughout the week.

See you in The Hague.

K.J. Keith
9 August 2019

**PRELIMINARY NOTE PREPARED BY SIR KENNETH KEITH
(TOKYO, SEPTEMBER 2013)**

1. This topic is increasingly the subject of study and action, by governments, international organizations both public and private, and by scholars individually and collectively. It is also a very large topic of huge practical importance, as I will briefly illustrate. The action includes treaties, universal, regional and bilateral; non-binding frames of action or guides to action; and national legislation and action. I have to be very selective, drawing particularly on the research of the *Institut de Droit international*, the International Federation of Red Cross and Red Crescent Societies¹ and the International Law Commission, their proposals and the texts they have adopted.

2. I begin with definitions of “natural disaster”, second, I mention some recent instances and their cost in terms of life, damage and money and, third and principally, I consider a range of actions designed to deal with natural disasters and the law relating to those actions. I will conclude with comments about the ways in which the law in this critical area might be clarified and developed.

A. “NATURAL DISASTERS” DEFINED

3. A critical question concerns the scope of the disasters which are to be the subject of the law. Should the application of the law be limited by the use of the word “natural”? Can it be in practice? Human action may well be a major cause of natural disasters. That is often said, for instance, in respect of particular famines and floods. Amartya Sen is frequently quoted “famines do not exist in democracies ... no substantial famine has ever occurred in a democratic country - no matter how poor.” And, in any event, should the applicable law distinguish on the basis of such a limit? The Institut in its Bruges resolution 2003 did not see itself as confined by reference to a purely natural criterion. It explicitly includes within its definition of “disaster” man-made disasters of technological origin and disasters caused by armed conflict or violence. The definition provisionally adopted by the ILC is similarly not confined to natural disasters:

“Disaster” means a calamitous event or series of events resulting in widespread loss of life, great human suffering or distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society (Article 3).

4. That definition is to be related to the purpose of the draft articles. It is a functional definition. The purpose, according to Article 2,

is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

¹ A valuable source is IFRC, *Law and Legal Issues in International Disaster Response: a desk study* (2007). David Fisher prepared the study. See also his more recent article, “The Future of International Disaster Response Law” (2012) 55 German YBIL 87.

(Notice the balanced reference to 'rights' and 'needs'.) The extent of the disaster which is to be covered is emphasized by the adjectives in the definition: calamitous, widespread, great and large scale, and by the concluding phrase - seriously disrupting the functioning of society.

5. The commentary to Article 3 stresses that the draft articles are not to apply to other serious events such as political or economic crises which may also undermine the functioning of society. The Commission also undertook a narrower approach than that taken in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1988, in the 2005 Hyogo World Conference on Disaster Reduction and the 2007 IFRC Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance: those documents conceptualise disaster as the consequence of an event (its emphasis).

6. Another important issue of definition concerns disasters caused by armed conflict. The ILC text addresses the matter in this way

The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable. (Article 4)

The purpose was to give precedence to those rules while not making a categorical exclusion as the IFRC text does. Such an exclusion would be counter-productive, it said, particularly in situations of "complex emergencies" where a disaster occurs in an area where there is an armed conflict. "While the draft articles do not seek to regulate the consequences of armed conflict, they can nonetheless apply in situations of armed conflict to the extent that existing rules of international law ... do not apply".

7. I have already noted that the Bruges resolution extends to disasters caused by armed conflict. It includes the qualification that the resolution is without prejudice to the principles and rules of international humanitarian law applicable to armed conflict, in particular the 1949 Geneva Convention for the Protection of War Victims and the 1997 Additional Protocols.

8. The above definitions – others could be added – tend to be limited in one other respect. They focus on the event itself. While the substantive provisions of the various texts, as will be seen, do not have that strict temporal limit - in the nature of things they cannot, since they concern the consequences of the event and steps to be taken after the event - they do not have that emphasis. In particular they give limited, if any, attention to actions which should have been taken in advance of possible disaster. I return to that critically important period later in this paper.

B. SOME FACTS

9. I briefly review some of the facts about natural disasters, their impacts, their causes and changes over recent times. I am greatly helped in that by the publications of the IFRC (especially its World Disasters Reports which began in 1993) and the United Nations Office for Disaster Risk Reduction (UNISDR). (See also a paper given by Helen Clark, Administrator of UNDP in August 2012

at Burnside High School, Christchurch, New Zealand; Christchurch was the site of major earthquakes in 2010 and 2011). According to the estimates of the second, over the past 20 years 1.3 million people have been killed and 4.4 billion have been affected by disasters caused by natural hazards. 95% of the deaths occur in developing countries; by contrast, only 2% of deaths from cyclones occur in highly developed countries. The UNISDR calculates that over the past 10 years, the economic losses caused by floods, earthquakes and drought amount to \$2.5 trillion. That figure is an increase on earlier estimates.

10. The number of natural disasters fluctuates in each year as do the number of deaths and people affected. One increasingly significant factor is the 'unprecedented' series of weather extremes over the first decade of the century from Hurricane Katrina in the US, the Russian heat waves, Amazonian drought and Pakistani floods (WMO, *The Global Climate 2001-2010: a decade of climate extremes* (July 2013) its emphasis). The WMO report highlights the record global temperature increase since comparable measurements began in 1850, the CO₂ concentration reaching the highest value for at least the past 10,000 years, and the dramatic and continuing ice declines in the Arctic. The number of deaths in recent years has tended to drop but the 2004 Indian Ocean tsunami killed about 250,000 people and the 2010 Port au Prince earthquake in Haiti almost as many. There has not, however, been the same fall in the numbers of people affected – with real consequences for economic costs. One fact bearing on the last point is that there have been increases in populations well above average in flood plains and cyclone threatened coastal areas, driven in part by investment decisions leading to developments around ports and for tourism, business investments which take no account of increases in risk, including the risk of economic loss which will often not be borne by the initial developer.

11. Contrasting illustrations of that relationship appear from experience in recent years in Japan and New Zealand. Toyota suffered losses of \$1.2 billion as a result of the shortage of parts following the dislocation of supply chains caused by the effects of the Great East Japan Earthquake. In New Zealand, Orion, an electrical network operator, spent \$6 million on seismic strengthening and considers it avoided \$65 million in losses which would otherwise have been a consequence of the 2010 and 2011 earthquakes. One World Bank figure is that every dollar spent on prevention saves seven lost.

12. Those instances and many others, including Hurricane Sandy in 2012, the Thai floods in 2011, the steps taken by Mexican fishermen ahead of a recent hurricane and the impact of the 1995 earthquake on the port at Kobe, are considered in the latest Global Assessment Report prepared by the UNISDR. That Assessment makes the business case, very strongly, I think, for disaster risk reduction being integrated into investment decisions. Such actions will lead to more resilient, competitive and sustainable economies and societies. Such business decisions have to be supported, or in some cases directed, by public sector regulation, financing and insurance. The public sector regulation might, for

instance, address such matters as building standards, land use controls and forestry regulation. That emphasis on the role of the business sector provides an important addition to the roles of governments, international organizations and NGOs in dealing with natural disasters. Moreover it emphasizes action in advance of the disaster rather than by response after the event. It provides a wider temporal scope.

C. LEGAL REGULATION

13. The word “legal” or “law” in this context presents several choices - between national or international law which, in the latter case, might be bilateral, regional or universal, made by governments or by private interests (as through insurance contracts) or not made at all. Practice in respect of natural disasters illustrates those choices being made. A choice not to prepare binding rules was made in two major instances. The first sentence of the Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance (IDRL Guidelines) reads "These Guidelines are non-binding." It continues by expressing the 'hope' that States will use them to strengthen their laws, policies and procedures but makes it clear that the Guidelines have no direct effect on existing rights or obligations under domestic law.

14. A second instance of a deliberate choice not to prepare a legally binding text is provided by the Hyogo Framework for Action 2005-2015. It describes and details the work required from various sectors and actors to reduce disaster losses. The text was prepared by governments, international agencies, disaster experts and others; it outlines priorities for action within a system of coordination. Its goal is to build resilience of nations and communities to disasters. It was endorsed by the General Assembly of the UN in 2005. The IDRL Guidelines were similarly endorsed in 2011 by the General Assembly following approval by the International Conference of the Red Cross and Red Crescent, a conference which includes all 193 State Parties to the Geneva Conventions. It is striking that the Administrator of the UNDP in the address mentioned earlier says that one of the strengths of the Hyogo Framework is that it is a voluntary arrangement.

15. The earlier discussion in this paper recognizes an emergency or disaster continuum - mitigation (prevention) - > preparedness - > response - > recovery, returning to mitigation, adjusted in the light of experience. As indicated earlier, most or even the sole attention, as far as binding international law is concerned, focusses on the response, that is on action which is taken in the period immediately following the event and which continues only until the emergency ends. Thereafter, relevant general law applies.

16. I begin with that mitigation/prevention phase to which, as already indicated, increasing attention is being given. The Hyogo Framework for Action is not binding as a matter of international law but, as reporting by many States shows, the situation is otherwise in national law, in many particular respects, as a result of national legislative and policy action relating to such matters as those noted earlier: building regulations, land use planning, etc.

17. This year the ILC has begun to give attention to the reduction of risk, with its Special Rapporteur recalling that, although its earlier work emphasizes the response phase, the intention had always been to include the preparedness/ mitigation phase. In his detailed 2013 Report, the Special Rapporteur develops "prevention as a principle of international law" by reference to human rights law and environmental law (due diligence and the precautionary principle), reviews the very large number of bilateral, regional and multilateral instruments and summarises national policy and legislative action of a great number of countries, in many cases by reference to the Hyogo Framework for Action. On the basis of that extensive review, he proposed two draft articles which, with amendments, have been provisionally adopted by the Commission. The first provides that cooperation was to extend the measures intended to reduce disaster risk. The second takes this broad form:

Draft article 16: Duty to reduce the risk of disasters

1. *Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.*
2. *Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.*

18. As the detail of the myriad of treaties, legislative measures and other State actions reviewed by the Commission, the Secretariat, the IFRC and the UNISDR show, the duty proposed in that draft article is implemented, and no doubt will continue to be implemented, in greatly varying ways. Much depends on the relevant geological, geographical, demographic, economic and other circumstances of particular States and on the development of relevant technology. This appears to be an area in which often little will turn on whether the rules are seen as legally binding or not. That is subject to one general qualification and other specific ones. The general qualification is that the prohibition on the arbitrary taking of life declared in Article 6 of the International Covenant on Civil and Political Rights has been read as requiring States to prevent certain life-threatening and foreseeable disasters, a position also taken by the European Court of Human Rights in relation to the parallel provision in the European Convention on Human Rights.

19. The specific qualification to the proposition that a legally binding character of texts like draft article 16 is of no consequence relates to the array of legally binding obligations in specific areas of prevention, particularly obligations of notification. The ILC work refers, for instance, to the Framework Convention on Civil Defence Assistance, the Tampere Telecommunications Convention mentioned earlier, conventions on industrial accidents and the conventions on assistance and notification in the case of nuclear accidents, on nuclear safety, and several environmental treaties. Significant obligations relating to prevention, early warning, consultation and other steps also appear in the International Health Regulations which were substantially revised in 2005 and which, unlike some of the conventions just mentioned which have very limited participation, apply worldwide.

20. That wide array of very different international, regional and national responses – and I have barely scratched the surface – demonstrates two things at least. The first is that one size does not fit all. The second, which may appear contradictory, is that general principles are at work and that much can be learned from looking at areas of law and policy which appear at first to be completely distinct. From my own experience over 20 years ago as the President of the New Zealand Law Commission when the Commission was preparing a major report on all types of emergencies, I can certainly attest to the value of dealing, at one and the same time, with the general principles and the detailed situations by reference to the wide range even then of national and international studies, laws, experiences and practices, national and international, relating to greatly different situations. The timing of that work meant that the Commission was able, for instance, to draw on the early work of the UN Disaster Relief Coordinator.

21. The next temporal phase, the response, is the one most studied, at least by the lawyers, and the most regulated by international law, potentially at least. It has several controversial aspects, which appear not to be resolved. There are major issues of principle about sovereignty, humanity, the right of the affected populations to receive assistance, the obligation of the affected State and others to provide it and the obligations of the affected State to admit external assistance and to facilitate its distribution on a principled basis. There are also critical practical questions about the access of external aid providers to the affected populations and about the coordination of that effort (with more than 200 external agencies operating in Aceh after the 2004 Indian Ocean tsunami and 400 in Haiti to take two recent instances).

22. In summing up the ILC discussion on his most recent report, the Special Rapporteur said that if there was one principle which unquestionably informed the Commission's entire project it was the principle of sovereignty. In terms of draft Article 9 it was the affected State that by virtue of its sovereignty had the duty to ensure the protection of persons and provision of disaster relief and assistance over its territory and under draft Article 11, the provision of external assistance requires the consent of the affected State. The Bruges resolution similarly places the primary responsibility on the affected State, but it too recognizes that the affected State might refuse to consent to the provision of external aid.

23. Both texts attempt to place limits on that power of refusal. The ILC states that consent to such assistance should not be withheld arbitrarily and the Bruges resolution would oblige affected States not to arbitrarily and unjustifiably reject a bona fide offer; in particular they may not reject an offer if the refusal is likely to endanger fundamental human rights or violate the ban on starvation of civilians as a method of warfare. The Bruges resolution also contemplates follow-up action in the UN including the possibility of Chapter VII action. That reference may suggest a link to the Responsibility to Protect doctrine.

24. That opposition between sovereignty and the fundamental human rights of the affected populations will no doubt continue to be debated in the work of the ILC and in comments on that work by governments and others. I do no more than

call attention to the related exchanges concerning the positions taken by the Myanmar authorities in 2008 when Cyclone Nargis struck Myanmar. Although there was massive humanitarian need, the authorities strictly controlled the entry of external relief. French Foreign Minister, Bernard Kouchner, proposed that the Security Council should authorize the forcible delivery of assistance over the government's refusal, in terms of the Responsibility to Protect. Many rejected that proposal, including the UN Secretary-General who, in 2009, stated that to try to extend the concept to other calamities such as HIV/AIDS, climate change or the response to natural disasters was to undermine the 2005 conclusions and stretch the concept beyond recognition or operational utility. The ILC has also adopted that position.

25. Is there an obligation on States which are able to provide assistance to do that? The IFRC Study traces the statement of such an obligation all the way back to the middle of the 18th century in the writing of the great Swiss scholar Emer de Vattel: assisting those facing famine is so central to humanity that no civilized nation would fail entirely to do so. The Committee on Economic Social and Cultural Rights has somewhat similarly stated that States parties to the International Covenant on Economic Social and Cultural Rights "should take steps to respect the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required". It has also said that States have a responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency – a proposition which can be related to the ILC draft articles about cooperation.

26. A related disputed question is whether there is a right to humanitarian assistance in emergency situations. The International Conference of the Red Cross and Red Crescent (including the State parties to the Geneva Conventions as well as National Societies, the ICRC and the IFRC), meeting in 1995, provides support to those would find such a right in the human rights instruments by declaring that it "... is a fundamental right of all people to both offer and receive humanitarian assistance". The *Institut* resolution similarly declares that the victims of disaster are entitled to request and receive humanitarian assistance. In practice the lack of a clear answer to that question and the others discussed in the preceding five paragraphs may not matter except in rare cases such as that in Myanmar. There are other issues of principle which do not appear to create the same difficulty and issues of practical operations which can create different difficulties and to both of which I now turn.

27. On the issues of principle, general human rights law remains applicable even in times of disaster or emergency subject to the power of an affected State to notify a derogation under the relevant human rights treaty – a power which has only very occasionally been exercised in response to natural disasters and which may not suspend certain fundamental rights including the right to life and the prohibition of discrimination on the listed grounds. The ILC text says simply in draft Article 8 that persons affected by disasters are entitled to respect for their human rights and in draft Article 7 that the inherent dignity of the human person is to be

respected and protected. That text, like the Bruges resolution, supported by Red Cross/Red Crescent principle, also requires that the response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality and on the basis of non-discrimination, while taking into account the needs of people who are particularly vulnerable. While there has been some suggestion that the rights might be spelled out more fully the question can be asked whether, given the existing generally applicable instruments, there is any need for such elaboration.

28. The practical operational problems of the delivery of assistance have been the subject of very close attention over a lengthy period by the IFRC and others. The Desk Study by David Fisher, published in 2007, on which I have been drawing heavily, begins with the striking sentence

.. legal barriers can be as obstructive to effective international disaster relief operations as high winds or washed out roads.

In developing the international disaster response laws, rules and principles (IDRL), the Federation has proposed the Guidelines which, as mentioned earlier, were adopted by the International Conference of the Red Cross and Red Crescent Movement in 2011 and endorsed by the UN General Assembly.

29. The Guidelines are essentially concerned with two issues – access of assistance and the quality of the delivery of the assistance. The first of these matters is addressed in rather general terms in draft Article 14 which is before the ILC:

Article 14: Conditions on the provision of external assistance

1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular,

a) Civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

b) Goods and equipment, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

The cautious wording of that text and the even more cautious response of the ILC members to it in 2012 provide an indication of the challenges presented by the formulation of such a text in a document which might become legally binding. That caution may provide real support to the non legally binding approach adopted in the Guidelines and the Hyogo Framework for Action of encouraging appropriate national action in respect of the matters listed in the draft article. The greater detail in the Guidelines relating to those matters and which run over 5 pages plainly provides much greater assistance than the ILC list to national authorities to determine how best to modify their laws, policies and practices to facilitate and coordinate the provision of external assistance taking account of their own particular circumstances.

D. THE WAYS THE LAW MIGHT BE CLARIFIED AND DEVELOPED

30. The foregoing discussion and, even more, the sources on which it is based demonstrate the existence of an extensive body of law, policy and practice directed at disasters and emergencies, in particular those qualified as natural disasters. It probably is the case that that material is not very well known by those who should be familiar with it and by the wider international law community. The comment has been made, for instance, that it is only recently that the protection of human rights in disasters has become the subject of study; systematic study of the protection of human rights in armed conflict can, by contrast, be traced back to the late 1960s and indeed much earlier.

31. Beyond that matter of wider dissemination, the material reviewed also demonstrates that there is no single method of addressing the complex of issues presented by natural disasters and the hazards which might lead to them. What is required is a mixture of law (national, bilateral, regional, multilateral), policy and practice. Certain general principles are undoubtedly applicable and can be usefully elaborated but, as in so many areas of law and life, the devil is in the detail.

ATTACHMENTS:

**I. INSTITUT DE DROIT INTERNATIONAL —
BRUGES RESOLUTION ON HUMANITARIAN ASSISTANCE**

Available on the website of the Institute:

https://www.idi-iil.org/en/sessions/bruges-2003/?post_type=publication

**II. INTERNATIONAL LAW COMMISSION —
DRAFT ARTICLES ON THE PROTECTION OF PERSONS
IN THE EVENT OF DISASTERS PROVISIONALLY ADOPTED TO DATE**

Available on the website of the International Law Commission:

https://legal.un.org/ilc/guide/6_3.shtml