Chapter 2
International Disaster Response Law in Relation to Other Branches of International Law

Gabriella Venturini

Abstract This chapter examines the relationship between international disaster response law (IDRL) and some other branches of public international law that variously contribute to shape its form and substance. It is argued that IDRL should be construed and implemented along the lines of Human Rights Law, International Humanitarian Law, Refugee Law, Global Health Law, International Environmental Law, and the Law of International Development. The IDRL rules stem from traditional sources of public international law, such as custom and treaties, however, general principles and soft law play a major role in its gradual development. Under IDRL, the traditional principle of State sovereignty is being challenged by the duty of cooperating to assist disaster victims. Human Rights Law, as a corpus of basic rules applying to all situations, provides a catalog of non-derogable rights. International Humanitarian Law extensively stipulates how persons in need of assistance are to be treated. It is also the basis of the fundamental principles governing humanitarian assistance, i.e., humanity, impartiality, and neutrality. Especially, humanity prompts the expansion of the scope of the principle of non-refoulement to persons forced to migrate in the wake of disaster. State obligations regarding public health and environmental protection contribute to the avoidance of health emergencies and environmental harm, thus making disaster prevention and disaster response easier. Disaster Risk Reduction is a critical component of both IDRL and the Millennium Development Goals set by the international community in order to take decisive steps against poverty and to boost development.

G. Venturini (✉)
Università degli Studi di Milano, Via Conservatorio 7, 20122, Milan, Italy
e-mail: gabriella.venturini@unimi.it

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2.1 Introduction

Since the second half of the twentieth century, international law has progressively evolved from the legal regulation of coexistence among sovereign States, to a system of co-operation covering the entire range of international relations. Bilateral and multilateral treaties have been concluded in all fields of State competence, and international organizations have been established in order to bring about institutional co-operation.[1] Under customary law, however, States do not have a general duty to co-operate. Rather, they freely choose their partner States as well as the object of co-operation. Yet, treaty law often stipulates obligations to co-operate in the subject matter of the agreement. This equally applies to disaster situations, either natural or man-made, where a great number of treaties provide for rights and obligations relating to assistance and relief between or among the parties.[2] As a consequence, both domestic and international response to disasters must be organized in accordance with international law as far as it is applicable. Under customary law, the State in whose territory a disaster occurs is bound to respect a number of obligations (e.g., those concerning human rights and the treatment of aliens) in carrying out relief and recovery. It is also entitled to demand respect for

[1] Dupuy 1998, Abbott and Snidal 2004.

[2] For a review of the existing treaty law concerning IDRL see Chap. 1 by de Guttry in this volume.

its own rights (e.g., in terms of access to territory or imports of goods and services) by foreign States, intergovernmental, and non-governmental organizations providing assistance. Bilateral and multilateral treaties establish other relevant obligations and corresponding rights. Therefore, international disaster response law (IDRL) largely builds upon the existing customary and conventional law. The IFRC Desk Study[3] identifies several areas related to IDRL, i.e., human rights, armed conflicts, refugees and internally displaced persons, privileges and immunities, customs, transport, telecommunications, donations, civil defense, health, the environment, weapons control, outer space, and humanitarian personnel.

Further discussion on most of the above-mentioned topics may be found in subsequent chapters of this volume. The scope of this contribution is to consider a number of rules, principles, and procedures already existing in the realm of public international law that inspire and influence the development of IDRL. For the sake of clarity, a distinction should be made between customary international law, treaty law, general principles, and soft law. While it is undisputed that the first two categories establish the legal regulation of States' behavior, the meaning of general principles is often ambiguous, and the nature of soft law is still questioned. For the purposes of IDRL, general principles may be relevant either in the procedural sense (as 'a method of creating rules of international law') or in the material sense (as 'the intrinsic value or the substantive content of a given rule').[4] Soft law has been described as a 'grey area' of international law 'between the white space of law and the black territory of non-law.'[5] Given their considerable importance in the making of IDRL, due attention should be paid to both general principles and soft law, with a view to explaining how they work and interact with positive rules.

This contribution first examines the principle of State sovereignty together with the related principles of non-intervention and consent that must be respected while carrying out international response to disasters. The following sections concisely discuss the relevant aspects of human rights law (HRL), international humanitarian law (IHL), and the principles of humanitarian assistance. There follows an appraisal of soft law. The author then focuses on refugee law, health law, environmental law, and the law of international development with a view to detecting those rules and principles that are essential in shaping IDRL and ensuring its effectiveness.

2.2 State Sovereignty, Non-Intervention, and Consent

At the turn of the twentieth century, public international law is firmly grounded on the principle of State sovereignty, which implies that every sovereign State has the right to conduct its affairs without interference from foreign States. As a consequence, the prohibition of intervention in domestic affairs is recognized as a

[3] IFRC 2007, Law and Legal Issues in International Disaster Response, 34–52.

[4] van Hoof 1983, 148–150.

[5] Id. at 188.

customary rule having general application. This has been reflected in a number of well-known declarations and resolutions adopted by the United Nations bodies and international conferences,[6] as well as in the jurisprudence of the International Court of Justice.[7] In principle, the exercise by a State of any elements of sovereignty in the territory of a foreign State is a wrongful act. Only valid consent may preclude such wrongfulness.[8]

The sovereignty principle clearly suggests that disaster response falls within the jurisdiction of the State in whose territory the catastrophic event has occurred. Whenever assistance from foreign States or international organizations (IOs) is needed, it has to be requested. Consent could arguably take the form of acquiescence, i.e., acceptance of relief provided without a request. In any case, States and IOs providing assistance must keep within the limits of the consent given. Current treaties dealing with co-operation in the event of accidents and disasters are constantly based on those principles.[9] All the more so if assistance is offered by non-governmental organizations (NGOs) or other private foreign entities: the territorial State is free to admit them or to refuse entrance; admission entails their duty to abide by the laws and regulations of that State.

Nevertheless, contemporary international law presents a number of situations where a State may be under obligation to accept assistance from abroad. On the one hand, a duty to accept assistance is established by a number of treaties, either bilateral or within the framework of regional organizations. On the other hand, the Security Council could authorize or even mandate an intervention with the purpose of providing assistance to disaster victims. This should require that the consequences of the catastrophic event (e.g., a massive flow of refugee toward and across international borders) might be qualified as a threat to international peace and security in a given region.[10]

More generally, it should be considered that the principle of non-intervention aims to preclude those policies that essentially endanger the sovereignty and political independence of States, such as recourse to the threat or use of force, aggression, military occupation, the escalation of the military presence or intimidation. Clearly, assistance to disaster response falls short of those situations. Rather, it corresponds to the duty of States to co-operate with one another, called for by many resolutions and declarations. The principle of co-operation covers,

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[6] Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, A/RES/2131(XX) of 21 December 1965; Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, A/RES/36/103 of 9 December 1981.

[7] Case concerning the military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America) Judgment of 27 June 1986, ICJ Rep. 1986, paras 202–209.

[8] Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session (2001), ILC Yearbook 2001 II Part Two, Article 20.

[9] See Chap. 1 by de Guttry in this volume.

[10] See Chap. 10 by Costas Trascasas in this volume, Sects. 10.3 and 10.4.

inter alia, such matters as economic stability and progress, the general welfare of nations, human rights, and fundamental freedoms.[11] The Convention Establishing the International Relief Union (IRU) has adopted that perspective ever since 1927.[12] More recently, the International Law Commission draft articles on the Protection of persons in the event of disasters took the same approach. Article 5, as provisionally adopted by the ILC Drafting Committee, states the duty of States to co-operate among themselves, and with the UN and intergovernmental and non-governmental organizations. Article 10 lays the obligation with the State affected by a disaster to seek assistance if the situation exceeds its national capacity. Finally, Article 11, while restating the requirement of consent to external assistance, recognizes that such consent shall not be refused arbitrarily.[13] As a consequence, IDRL puts sovereignty back in its right perspective and commits States to effectively co-operate whenever the dimension of a disaster so requires.

2.3 IDRL and Human Rights Law

Human rights law (HRL) sets out the general legal framework for disaster response as being primarily incumbent upon the territorial State, but equally binding on States providing assistance. HRL incorporates customary rules as well as a great number of treaty commitments in the field of civil, political, social, economic, and cultural rights. A catalog of human rights obligations of the greatest importance in IDRL includes (although it is not limited to) the right to life, liberty, and security of persons, the right to personal identity, the right to humane treatment, the right to food and water, and the right to health. Those rights must be respected in accordance with the fundamental principle of non-discrimination, i.e., with no adverse distinction based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status. Non-discrimination is also a core principle of IDRL and it shapes the rules of conduct for those providing assistance and relief in disasters.

Human rights, however, are subject to limitations and derogations. Limitation clauses allow States to restrict the exercise of certain civil and political rights (CPR) in the interest of national security or public safety, public order, public

[11] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/2625(XXV) of 24 October 1970; Strengthening of the co-ordination of humanitarian emergency assistance of the United Nations, A/RES/46/182 of 19 December 1991, 5–7; Article 5 as provisionally adopted by the Drafting Committee of the International Law Commission on Protection of Persons in the Event of Disasters A/CN.4/L.758 of 24 July 2009.

[12] Preamble to the 1927 Convention Establishing an International Relief Union. See Macalister-Smith 1981.

[13] A/CN.4/L.758 of 24 July 2009, A/CN.4/L.794 of 20 July 2011. See Chap. 3 by Zorzi Giustiniani in this volume.

health or morals or the protection of the rights and freedoms of others. Examples of rights that may be restricted are the liberty of movement, the freedom to manifest one's religion, the freedom of expression, the right of assembly, and the freedom of association.[14] Furthermore, in a time of public emergency threatening the life of the nation the international instruments concerning civil and political human rights allow States to derogate from their obligations. Derogations must be temporary and non-discriminatory; they are subject to the requirement of proportionality, and States willing to avail themselves of derogation must abide by some procedural requirements.[15] In order to mitigate the effects of derogations, HRL has established a set of non-derogable rights including among others the right to life, the right to humane treatment, and the right to juridical personality.[16]

Economic, social, and cultural rights (ESCR) may be limited by law 'only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.'[17] But under the ICESCR, States' obligations regarding the rights covered are subject to an inherent limitation insofar as they are to be realized 'progressively' and 'to the maximum of available resources.'[18] Therefore, derogations from ESCR may arguably be justified in times of emergency.[19]

As a matter of fact, when a catastrophic event strikes a country, the ability of a government to ensure full respect of a number of CPRs and ESCRs may be seriously impaired. To cite an example, the liberty of movement or the right of assembly may sometimes prove incompatible with the management of assistance and relief. In extreme cases, floods of persons forced to abandon a disaster area could even threaten the life of a weak State. In situations such as these, restrictions or derogations based on emergency laws are likely to be implemented by the affected State.[20] For this reason, IDRL should build its own discipline of non-derogable rights taking into account the rules contained in human rights treaties as well as their implementation. Since a number of social, economic, and cultural rights are particularly relevant for the victims of a disaster, the core of non-derogable rights in IDRL should be expanded to include obligations to ensure the basic needs of human beings in terms of food, water, health, and the protection of vulnerable groups.

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[14] 1966 International Covenant on Civil and Political Rights (ICCPR) Articles 12 para 3, 18 para 3, 21 and 22 para 2.

[15] 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Article 15 para 1; ICCPR Article 4 para 1; 1969 American Convention on Human Rights (ACHR) Article 27 para 1. See Oraá 1992, 96; Svensson-McCarty 1998, 371; Beyani 2000, 131–144; Viarengo 2005, 983; de Schutter 2010, 513.

[16] ECHR Article 15 para 2; ICCPR Article 4 para 2; ACHR Article 27 para 2.

[17] 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 4.

[18] ICESCR Article 1 para 1.

[19] Cotula and Vidar 2002, 6.

[20] See Chap. 14 by Sommario in this volume, Sect. 14.3.

2.4 IDRL and International Humanitarian Law

As the IFRC Desk Study argues, 'it is instructive to look to IHL by way of analogy where it addresses the same issues confronted by IDRL, particularly in light of the fact that some of the origins of IDRL can be traced to the rise of IHL.'[21] Certainly, IHL gives a fundamental contribution to the development of IDRL. Except for combat law, which applies to the material conduct of armed hostilities, the remaining corpus of IHL includes plenty of principles and rules that meet the needs of individuals affected by disaster. In effect, like the victims of armed conflict, disaster victims are wounded, sick, displaced, in danger, and in need of protection.

The application of IHL and IDRL to situations where a disaster occurs during an armed conflict will be discussed in a separate chapter in this volume.[22] Here some general considerations will be made regarding the IHL principles and rules that are of particular interest to IDRL.

A significant set of such rules concerns the protection of the wounded and sick. The Geneva Conventions (GCs) I and II of 1949, as well as the two Additional Protocols (APs) of 1977 include a great number of provisions on this subject.[23] The fundamental principle of non-discrimination applies as expressed by Article 9 of Additional Protocol I. The wording is in line with HRL, but in IHL (as well as in IDRL) distinctions founded on medical grounds are particularly relevant. Detailed IHL provisions related to the respect and protection of medical personnel, material and transports, offer a blueprint for the safeguarding of those providing disasters assistance and relief, as well as of humanitarian units and transports.[24]

Generally, IHL rules pertaining to the protection of civilian persons in time of war, such as those on the protection of the whole of the population, place obligations, and bestow the corresponding rights on belligerent States.[25] Some stipulations, however, are more precisely drafted in terms of individual rights, e.g., the exchange of family news, that 'all persons' … 'shall be enabled to give', the application to relief organization that protected persons 'shall have every facility for making' and the right of aliens to leave the territory.[26] Those provisions

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[21] IFRC 2007, Law and Legal Issues in International Disaster Response, 36.

[22] See Chap. 11 by Venturini in this volume.

[23] 1949 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Articles 12–18; 1949 Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Articles 12–21; 1977 Protocol Additional to the Geneva Conventions (Protocol I), Articles 10–11; 1977 Protocol Additional to the Geneva Conventions (Protocol II), Articles 7–12.

[24] GC I Articles 24–37, GC II Articles 36–40, AP I Articles 12–17.

[25] GC IV Articles 13–46. E.g., the duty to allow the free passage of consignments of medical and hospital stores (Article 23), to take the necessary measures to ensure child welfare (Article 24) and to facilitate enquiries made by members of dispersed families (Article 26).

[26] GC IV Articles 25, 30, 35.

demonstrate how IHL directly benefits individuals. For this reason, they provide useful reference for IDRL.

IHL applicable to occupied territories also embraces a number of principles appropriate to IDRL, such as the prohibition of forcible transfers (except when evacuation is required for the security of the population), the delivery of food and medical supplies to the population, and the maintenance of medical and hospital services, public health and hygiene 'with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics.'[27] Furthermore, the regulations for the treatment of internees offer clear patterns for IDRL in terms of accommodation, medical attention, administration, and relief.[28]

Clearly, the above-mentioned standards may not be applied as such in IDRL. Disaster is different from armed conflict, and the basic rationale for the rules pertaining to the law of international armed conflict, i.e., the opposition between the duty bearers (belligerent States) does not exist in disaster situations. The law of non-international armed conflict as codified by Article 3 common to the GCs and by Additional Protocol II may seem to be closer to IDRL. Most regrettably, it offers little contribution to this end. On the one hand, the fundamental guarantees established by the said instruments are far weaker than those provided by HRL. On the other hand, they lack the precision of the provisions pertaining to the law of international armed conflict, whereas detailed rules of conduct are acutely needed in troublesome situations such as disasters. Therefore, the development of IDRL should mainly be pursued by taking into account the principles underlying the protection of victims of international armed conflict.

2.5 Principles of Humanitarian Assistance as Applicable to Disaster Response

It is widely recognized that humanitarian assistance, as outlined by IHL instruments, is based on three main principles: humanity, impartiality, and neutrality. Since these principles are inferred from treaty provisions, their content is often poorly explained. Among the most convincing definitions are those given by the twenty-fifth International Conference of the Red Cross included in the preamble of the Movement's Statutes. The principle of humanity is understood as demanding respect for the human being in all circumstances, protecting life and health as well as 'mutual understanding, friendship, co-operation, and lasting peace amongst all peoples.' Impartiality requires that assistance make no discrimination among the

[27] GC IV Articles 79, 55, 56.

[28] GC IV Articles 79–135. The Commentaries to the Geneva Conventions and their Additional Protocols provide explanations and further elaboration of the rules cited in the text (http://www.icrc.org/ihl.nsf/CONVPRES?OpenView, accessed 16 February 2012).

victims on grounds of nationality, race, religion, class, or political ideology, always giving priority to the most urgent cases of distress. Neutrality applies to those providing assistance, which must abstain from taking sides in hostilities or in controversies of a political, racial, religious, or ideological nature.[29]

Since the paramount purpose of disaster response is the provision of relief to victims, arguably the principles of humanity, impartiality, and neutrality are inherent in IDRL. Humanity is deeply rooted both in HRL and IHL and it inspires most of their basic rules. Impartiality is the preliminary condition for non-discrimination and as such it obviously must govern any assistance and relief.[30] As regards neutrality, its precondition is the existence of an armed conflict where it prevents support being given to one party to the detriment of the other. Therefore, this principle fully plays its role whenever disaster assistance occurs during armed conflicts. The question is, what might the meaning of the principle of neutrality in IDRL be in peacetime? On the one hand, when assistance to the affected State is provided by another State, the principle of consent implies that the public interest of the recipient State should not be harmed. On the other hand, where non-State entities are involved, they are bound to respect the laws and regulations of the territorial State. In both cases, the government clearly has the power to control and to direct assistance. Is this consistent with neutrality in tensions of a political, racial, religious, or ideological nature that may oppose the government to groups of its own citizens? In such situations, neutrality plays more like an attitude, or a state of mind that could hardly generate legal rules.

Be it as it may, the principles of humanity, impartiality, and neutrality actually represent the common denominator of HRL, IHL, and IDRL. As such they offer guidance to States, IOs, NOGs, and emergency workers alike when conducting disaster response. For this reason they are recurrently restated by numerous soft law instruments existing on this subject matter.

2.6 The Role of Soft Law

Soft law designates a number of non-binding instruments aimed at directing the conduct of international actors such as States, governmental, and non-governmental organizations, and other private entities, in fields where customary or treaty-based rules are not established or where, for various reasons, binding agreements may not be accepted. Soft law includes declarations and resolutions, action plans, codes of conduct, guidelines, and principles adopted by intergovernmental bodies or conferences as well as NGOs and other private associations.

[29] See ICRC 1965, Pictet 1985, 61–71.

[30] Impartiality and non-discrimination are referred to separately by the current ILC draft: see Article 6 as provisionally adopted by the Drafting Committee of the International Law Commission on Protection of Persons in the Event of Disasters A/CN.4/L.7576 of 14 July 2010. See Chap. 3 by Zorzi Giustiniani in this volume.

Though not binding, and therefore not supplemented by systems of sanctions, soft law is deemed to have a legal scope and indeed it has practical effects based on voluntary compliance. There appears to be broad consensus that the complex character of contemporary international relations justifies increasing resort to soft law for creating international norms.[31] First, soft law as an alternative to treaties facilitates the wording of more detailed provisions and it enables States to eschew the lengthy and often unpredictable ratification process. Second, revising or replacing a soft law instrument is easier than amending a treaty.[32] Finally, soft law may initiate a law-making process gradually leading to a formal agreement or even to the development of customary law.[33] That said, it should be mentioned that a minority of scholars question the usefulness of the concept of soft law arguing that it may encourage arbitrariness on the part of institutions, and unduly stretches the limits of international law.[34]

A discussion of the merits of those opposing opinions falls beyond the scope of this work. Suffice it to say that IDRL extensively relies on soft law, but this label refers to various different kinds of instruments.

Of primary interest are those instruments adopted by the bodies of international organizations or by intergovernmental conferences with a view to influencing the behavior of States. A number of important resolutions on humanitarian emergency assistance and disaster-related issues were passed by the United Nations General Assembly, especially recognizing the responsibility of States to protect their populations in the event of disaster, but also stressing the principle of consent and respect of the territorial sovereignty of the State receiving assistance from abroad.[35] In these resolutions, soft law coexists with the restatement of existing rules belonging to customary law. Furthermore, as a result of international conferences, a number of strategies and frameworks have been endorsed by States concerning the prevention of natural disasters and disaster risk reduction.[36] These programs are innovative in nature inasmuch as they devise new rules that impact on both international relations and State's domestic activities.

A second group of soft IDRL instruments consists of guidelines and codes of conduct also adopted by intergovernmental bodies and directed at regulating the practical organization of relief and assistance in the field. To cite but a few examples, since 1998 the United Nations Economic and Social Council has

[31] See Boyle 1999, Hillgenberg 1999, Chinkin 2000, O'Connell 2000, Boyle and Chinkin 2007, 211–212.

[32] Boyle 1999, 903.

[33] Chinkin 2000, 31–32.

[34] Klabbers 1998, d'Aspremont 2008.

[35] The archetype resolution being that on Strengthening of the Co-ordination of Humanitarian Emergency Assistance, A/RES/46/82 of 19 December 1991. See Chap. 15 by Creta in this volume, Sect. 15.2.4.

[36] Such as the 1994 Yokohama Strategy for a Safer World, the 2005 Hyogo Declaration and the 2005–2015 Hyogo Framework for Disaster Reduction. See Chaps. 8, 9 and 15 by Nicoletti, La Vaccara and Creta in this volume, Sects. 8.3, 9.3.2.1 and 15.2.4, respectively.

established a normative framework for the protection of persons displaced within a country's territory, including disaster situations.[37] The Inter-Agency Standing Committee (IASC, a co-ordination forum involving UN as well as non-UN humanitarian partners) has laid down procedures on co-ordination in the use of military and civil defense assets in response to natural and man-made disasters and in complex emergencies.[38] IASC has also recently adopted guidelines to assist aid workers in implementing a rights-based approach to assistance in situations of natural disaster, including protection of vulnerable groups.[39]

Finally, IDRL guidelines and codes of conduct have been, and are being set out by NGOs in co-operation with States. Those are the most interesting and innovative IDRL instruments that closely resemble voluntary self-regulation or co-regulation by transnational associations and networks. Hence the development of standards for water, sanitation and hygiene, food security and food aid, nutrition and health services.[40] In addition, model guidelines have been issued to regulate the system of legal facilities for disaster relief personnel,[41] and procedures for making use of civil and military defense assets in emergency situations have been provided.[42]

The advantages and disadvantages of the soft law approach to IDRL may be roughly summarized as follows. UN resolutions and programs are worthy of merit since they coalesce consensus by States and direct their course of action. Spontaneous observance of guidelines and codes of conduct by governmental as well as by private actors ensures implementation notwithstanding the non-binding nature of those instruments. Soft law, however, may jeopardize the status of certain obligations and rights that are already established by customary or treaty law. For example, including the prohibition of discrimination based on sex in a soft law instrument runs the risk of downgrading the rank of that rule (that is positively binding upon States and individuals) in the perception of the recipient subjects. For this reason, soft law on disaster response should be resorted to only in those areas where customary or treaty rules of international law either do not exist or need to be specified. IDRL may then be seen as a legal laboratory where customary law, treaty law, and soft law coexist and intermingle in order to achieve the best regulation for international disaster response.

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[37] United Nations Economic and Social Council, Commission on Human Rights, Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2 of 11 February 1998.

[38] Civil-Military Relationship in Complex Emergencies, An IASC Reference Paper (2004). See Chap. 24 by Calvi Parisetti in this volume, Sect. 24.3.1.

[39] IASC (2011). On the IASC Guidelines and similar non-governmental instruments see Chap. 16 by Bizzarri in this volume, Sect. 16.2.3.

[40] The Sphere Project was launched in 1997 by a group of humanitarian NGOs and the Red Cross and Red Crescent Movement. See Chap. 16 by Bizzarri in this volume, Sect. 16.3.3 and Chap. 20 by De Siervo, Sect. 20.3.3.

[41] IFRC (2007) Guidelines. See Chap. 23 by Silingardi in this volume, Sect. 23.3.2.

[42] Such as the Oslo Guidelines (1994) and the MCDA Guidelines (2003). See Chap. 24 by Calvi Parisetti in this volume, Sect. 24.3.1.

2.7 Disaster-Induced Migration: The Case for Non-Refoulement

The hundreds of natural or man-made disasters that occur every year around the world cause the forced movement of millions people. Either these are displaced within their own country, or they migrate across international borders to seek shelter in foreign territory.[43] In both cases, their situation is critical and often desperate since they have limited or no access to food, education or health care.

In principle, internal displacement falls within the domain of a State's domestic jurisdiction, and it must be dealt with in the context of human rights. Whenever internal displacement is triggered by a disaster, the related responsibility rests with national governments; it is not an international concern. The works of the Human Rights Commission and of the UN Special Representative on internally displaced persons (IDPs) have devised standards for the treatment of IDPs,[44] but these have seldom been included in international treaties and are not universally accepted as customary law. International responses to internal displacement have mainly been considered in relation to conflict-induced displacement and sovereignty issues.[45]

Regarding cross-border migration, the 1951 Refugee Convention and its 1967 Protocol that removed its geographic and temporal limitations[46] protect those persons who are outside their country of nationality 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.'[47] Persons fleeing their country due to a natural or man-made disaster do not fall into those categories.[48] As a consequence, they might not avail themselves of the rule of non-refoulement that constitutes the fundamental component of international refugee protection applying both to persons within a State's territory and to those who arrive at its borders.[49] Nevertheless, established State practice has given extra-Convention refugees various forms of so-called complementary or subsidiary protection preventing involuntary return, while not creating a status recognized in domestic law.[50] Although the topic has been primarily discussed with reference to the protection of persons fleeing

[43] The terms 'environmental refugees' or 'environmentally displaced persons' are often used to refer to those people who have been forced to leave their traditional habitat because of an environmental disruption, either natural or man-made (de Moor and Cliquet 2009, 8).

[44] Luopajärvi 2003, 706–712; OCHA (2004); Phuong 2005, 56–65. See also Chap. 16 by Bizzarri in this volume, Sect. 16.2.3.

[45] Luopajärvi 2003, 687–691, Phuong 2005, 117–141.

[46] 1951 Convention Relating to the Status of Refugees (CRSR); 1967 Protocol Relating to the Status of Refugees.

[47] CRSR Article 1 para A (2).

[48] Unless their government willfully deprived them of assistance on one of the grounds set out in the refugee definition: see Kolmannskog and Myrstad 2009, 314 n 8.

[49] CRSR Article 33 para 1.

[50] Mandal 2005, 31–60, Betts 2010, 219 and 223.

conflict areas or serious violations of human rights,[51] there are no legal reasons not to extend at least the basic protection to individuals for whom a disaster is the cause for their displacement.

It is widely recognized that nowadays the principle of non-refoulement corresponds to a rule of customary international law. Recent practice demonstrates that when a major catastrophe occurs, States are prepared to temporarily accept the displaced persons and to delay their return to the affected regions in the aftermath.[52] This paves the way for the application and interpretation of the principle of non-refoulement as a fundamental component of IDRL. Further guidance could be offered by soft law, which might develop specific frameworks for the temporary protection of people fleeing from natural disasters.[53]

2.8 IDRL and Global Health Law: A Parallel Development

Disasters have a serious impact on public health. Besides death and injuries, natural catastrophes often bring about the outbreak of infectious diseases, in addition to the immediate and long-term consequences of man-made disasters.[54]

Contemporary globalization has increased awareness about the international character of public health issues.[55] As a consequence, a body of legal norms labeled either 'global health law' or 'international health law' has been established through treaty commitments, regulations issued by a number of international organizations, and soft law instruments. The purpose of these norms is to foster the worldwide growth of health with the participation of public and private actors, with a view to building a system of global health governance.[56] The World Health Organization (WHO), one of the main agencies of the United Nations, is expanding its activities accordingly. Indeed, the constitution of the WHO empowers the board of the organization to 'take emergency measures within the functions and financial resources of the organization to deal with events requiring immediate action' as well as to 'authorize the director-general to take the necessary steps to combat epidemics, to participate in the organization of health relief to victims of a calamity…'[57] and in 2005 the IASC designated the WHO as the lead agency for the

[51] McAdam 2006 n 9 and accompanying text.

[52] See Kolmannskog and Myrstad 2009, 322 with reference to the UNCHR call for the suspension of return to the areas affected by the 2004 tsunami.

[53] Betts 2010, 211 and 226.

[54] World Health Organization (2006); see Keim 2011.

[55] Fidler 1998, Jost 2004, 146.

[56] Gostin 2008, 240; Acconci 2011, 8–10.

[57] 1948 Constitution of the World Health Organization, Article 28(i).

Global Health Cluster.[58] In the same year, the World Health Assembly adopted the new International Health Regulations (IHR) designed 'to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.'[59]

Although IHR do not explicitly address disaster issues, they are strictly connected with disaster response. States commit themselves to develop, strengthen, and maintain the capacity to detect, assess, notify, and report public health events occurring in their territory that may constitute a public health emergency of international concern; they also undertake to develop, strengthen, and maintain the capacity to respond promptly and effectively to public health risks and public health emergencies of international concern.[60] On the basis of relevant information provided by member States, WHO bodies make recommendations on the appropriate health measures to be implemented.[61] Clearly, good governance in public health is critical for reducing disaster impact and delivering effective response in disasters.[62]

The IHR and other relevant international agreements should be interpreted as compatible without affecting the rights and obligations of States parties deriving from other international agreements.[63] However, the public health measures States may adopt, e.g., on the basis of Part V of IHR might possibly hinder access to their territory by emergency workers in the event of disaster. For this reason, it is essential that Global Health Law and IDRL concurrently develop within domestic legislation as well as in international practice, implementing IHR and disaster response.

2.9 IDRL and Environmental Law: A Synergy for Disaster Prevention

The frequency and intensity of environment-related hazards has been constantly increasing during the past two decades, and their relationship with climate change

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[58] See Fidler and Gostin 2006; Acconci 2011, 352–354. On the UN Cluster Approach see Chap. 20 by De Siervo in this volume, Sect. 20.2.3.

[59] World Health Organization, International Health Regulations (2005) Second Edition, Article 21. According to the WHO Constitution, regulations adopted by the Health Assembly are binding upon all WHO members except for those that notify rejection or reservations. The 2005 IHR entered into force on 15 June 2007 and they have since then acquired universal acceptance. See http://www.who.int/ihr/legal_issues/states_parties/en/index.html. Accessed 10 February 2012.

[60] IHR (2005) Articles 5 and 13. See Gostin 2008, 245–254, Rodier 2008, and Acconci 2011, 170–172.

[61] IHR (2005) Articles 15, 16.

[62] Sixty-fourth World Health Assembly, Strengthening national health emergency and disaster management capacities and resilience of health systems WHA64.10, 24 May 2011.

[63] IHR (2005) Article 57 para 1.

has been strongly highlighted in international fora.[64] Therefore, national activities and regulations aimed at preventing environmental harm, as well as States' international commitments in environmental matters are very closely associated with disaster response.

International environmental law (IEL) consists of a multitude of instruments, such as treaties and agreements, declarations, recommendations, guidelines, and codes of conduct focusing on the interactions of humans and the natural world.[65] While the existence of customary rules is still debated, a number of general principles are widely recognized as inspiring States' activities in environmental matters, such as the prevention principle, the 'polluter pays' principle, the principle of sustainable development, the principle of common but differentiated responsibilities, and the precautionary principle.[66]

The prevention principle is deep-rooted in a number of treaties aimed at preventing environmental harm such as, *inter alia*, the 1979 Geneva Convention on long-range trans-boundary air pollution and related protocols, the 1989 Basel Convention on the trans-boundary movements of hazardous wastes, the 1992 UN Convention on climate change, and the related 1997 Kyoto Protocol, the 1994 UN Convention to combat desertification, and the 2001 Stockholm Convention on persistent organic pollutants.[67] With these instruments playing a fundamental role in averting natural and man-made disasters, the prevention principle is the very foundation of disaster risk reduction.[68]

The 'polluter pays' principle underlies domestic regulations requiring polluters to bear the real costs of their pollution. Several treaties dealing with the civil liability for hazardous activities are based on the principle of the owner's responsibility, while the Council of Europe has promoted a convention on the protection of the environment through criminal law for harmonizing member States' legislation in the field of environmental offenses.[69] The fact that the latter Convention is not yet in force suggests that the civil liability approach may better

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[64] Recently, the Nansen Conference on Climate Change and Displacement in the Twenty-first Century of 6–7 June 2011 focused on vulnerability, resilience and capacity for adaptation of communities in areas prone to disaster due to climate change as well as on the protection of displaced people. See http://www.nansenconference.no/. Accessed 18 October 2011.

[65] Bodanski 2010, 9–15.

[66] Kamminga 1995, 111–131; Lang 1999, 157–172; Sands 2003, 231–290.

[67] 1979 Convention on Long-range Transboundary Air Pollution; 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; 1992 United Nations Framework Convention on Climate Change; 1994 United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa; 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change; 2001 Stockholm Convention on persistent organic pollutants.

[68] See Chap. 8 by Nicoletti in this volume.

[69] 1998 Convention on the protection of the environment through criminal law, Council of Europe Treaty Series no. 172, http://conventions.coe.int/. Accessed 16 February 2012.

enhance IDRL to the extent that compensation to victims of man-made disasters is involved.[70]

While sustainable development and common, but differentiated responsibilities are important elements of the concept of natural hazard mitigation, as well as disaster resilience, the precautionary principle remains more controversial. The EU strongly advocates that where scientific data do not permit complete evaluation of the risk, recourse to this principle allows policy makers to take action to protect the public from exposure to harm.[71] The same principle is included in the UN Global Compact principles.[72] Although this view is not universally shared, the adoption of the precautionary principle may certainly enhance strategies to reduce the damages caused by natural as well as by man-made hazards.

2.10 Strategies for Disaster Risk Reduction Within the Millennium Development Goals

Disasters adversely affect development, especially when they hit countries with extreme poverty and weak institutions. At the onset of the twenty-first century, the international community has undertaken unprecedented commitments in order to enhance development. On 8 September 2000, the UN General Assembly adopted the Millennium Declaration by consensus, setting out an international agenda for human development.[73] Eight Millennium Development Goals (MDGs) were agreed upon: eradicating extreme poverty and hunger, achieving universal primary education, promoting gender equality and empowering women, reducing child mortality, improving maternal health, combating HIV/AIDS, malaria, and other diseases, ensuring environmental sustainability, and developing a global partnership for development. Each MDG includes specific targets supported by quantitative indicators for measuring progress.[74]

Reducing disaster risk may greatly contribute to the achievement of MDGs. Indeed, disasters deplete assets needed to combat hunger; they destroy schools, and drain domestic resources to be devoted to education; women, and children are

[70] See Chap. 17 by Nifosi-Sutton in this volume.

[71] Commission of the European Communities, Communication from the Commission on the precautionary principle, Brussels, 2 February 2000, COM(2000) 1 final.

[72] Principle 7 of the United Nations Global Compact's Ten principles (http://www.unglobalcompact.org/AboutTheGC/, accessed 16 February 2012). The Global Compact is a UN initiative directed to businesses to align their operations and practices with ten universally recognized principles in the fields of human rights, labor, environment and combating corruption. See Sahlin-Andersson 2004.

[73] A/Res/55/2 (http://www.un.org/millennium/declaration/ares552e.pdf, accessed 16 February 2012). Section IV of the Millennium Declaration, entitled "Protecting Our Common Future", explicitly recommends collective efforts to reduce the effects of natural and man-made disasters.

[74] http://www.un.org/millenniumgoals/. Accessed 16 February 2012.

particularly vulnerable to the consequences of disasters; destruction related to environmental hazards prevents sustainable urban or rural development. International co-operation is a prerequisite for reducing risk from natural hazards.[75] The close relationship between MDGs and disaster risk reduction has been explained, *inter alia*, by the Secretary-General's Report to the General Assembly of 6 September 2001 recommending strategies that include developing early warning systems, supporting interdisciplinary and intersectoral research on the causes of natural disasters, encouraging governments to address the man-made determinants of disasters, and to incorporate disaster risk reduction into national planning processes.[76]

Although reports praise significant progress toward the MDGs, it is highly doubtful that the 2015 deadline may be met. Empowering women and girls, promoting sustainable development and protecting the most vulnerable are the most critical issues.[77] For this very reason, the relationship between MDGs and IDRL is one of mutual need. On the one hand, IDRL may benefit from the commitments that UN members have assumed to boost development. The systematic evaluation of the targets reached helps shape timely action by States on disaster-related matters. On the other hand, disaster risk policy is instrumental to the fight against poverty. As a consequence, appropriate measures of disaster risk reduction will speed up and bolster efforts to achieve the MDGs.

2.11 Conclusions

IDRL as it is taking shape in contemporary practise is not a self-contained regime, growing in isolation from general international law. On the contrary, it shares a number of fundamental tenets with the legal discipline of other areas that in various ways contribute to molding its form and content. This relationship may be aptly described in terms of mutual support and cross-fertilization. While the general principles and rules belonging to related branches of international law influence and stimulate the progress of IDRL, the latter may in turn enhance their implementation. In order to fully benefit from this productive relationship, IDRL should be construed and applied, taking into account the interpretation and implementation of HRL, IHL, refugee law, global health law, international environmental law, and the law of international development.

Customary international law plays an important, though indirect role with regard to IDRL insofar as customary HRL and IHL provisions apply to disaster response as

[75] UNDP 2004, 16.

[76] Road map towards the implementation of the United Nations Millennium Declaration, Report of the Secretary–General, 6 September 2011, A/56/326. See also Chap. 9 by La Vaccara in this volume.

[77] The Millennium Development Goals Report 2011, United Nations, New York 2011, 4–5.

appropriate. IDRL itself is essentially based on bilateral and multilateral agreements, as well as on a variety of soft law instruments aimed at translating treaty law and general principles into practice. The interplay of these sources may sometimes veil the precise content of the rules governing international disaster response. The presence of multiple actors such as States, intergovernmental, and non-governmental organizations further complicates the picture.

This situation reveals the emergence of a body of law where the traditional principles of State sovereignty and consent are confronted with the need to guarantee assistance to disaster victims, and where co-operation among States tends to be envisaged as a duty instead of a free choice. IDRL stands at the crossroads of multiple pathways. It draws from HRL, IHL, and refugee law to direct the conduct of governmental and non-State actors in disaster relief activities, as well as to establish appropriate standards of treatment for disaster victims. It relies on environmental protection, global health and development to both prevent and mitigate the consequences of disasters. It includes well-settled customary rules together with recognized principles and a variety of agreements and soft law documents. Combining those diverse sources into a coherent system is one of the challenges to which international law must rise in the twenty-first century.

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