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NATURAL DISASTERS AND INTERNATIONAL LAW - A PRELIMINARY NOTE

Kenneth Keith

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 Societies[1] 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"?

[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.

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.

(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
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> 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 if 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.
II International Law Commission – draft articles on the protection of persons in the event of disasters provisionally adopted to date.

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