

## **A RECIPE FOR (COUNTERING) DISASTERS? ILC DRAFT ARTICLES AND OTHER LEGAL AVENUES**

This panel was convened at 12:00 p.m. on Thursday, April 4, 2024 by its moderator, Eileen Crowley, who introduced the speakers: Eran Sthoeger, Azela Arumpac-Marte, and Giulio Bartolini.

### **AN ACADEMIC PERSPECTIVE ON THE INTERNATIONAL LAW COMMISSION DRAFT ARTICLES ON THE PROTECTION OF PERSONS IN THE EVENT OF DISASTERS**

*By Giulio Bartolini\**

The discussion on the International Law Commission Draft Articles on the Protection of Persons in the Event of Disasters (ILC DASPPED)<sup>1</sup> is at a critical stage. Based on UN General Assembly Resolution 76/119, the Sixth Committee set up a working group to “consider further the recommendation of the Commission for the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles or any other potential course of action with respect to the draft articles.”<sup>2</sup> This working group is expected to make “a recommendation to the Assembly as to any further action to take in respect of the draft articles” in the fall of 2024. Therefore, it is an opportune time to assess the DASPPED from an academic perspective.<sup>3</sup>

Academics have typically described the international legal architecture addressing the prevention and response to disasters as characterized by an “ad hoc incoherence of legal and institutional response,”<sup>4</sup> resulting in “a rather scattered and heterogeneous collection of instruments.”<sup>5</sup> The absence of an overarching and universal flagship treaty on disasters is an anomaly compared to other areas of international law. Given this legal shortcoming, the dramatic impact of disasters on affected states and communities, and the recurring legal problems for assisting actors and affected states, it seems evident that this topic deserves further lawmaking efforts. However, the main element of discussion is whether the current text of the ILC DASPPED is fit to be the basis of

\* Full Professor of International Law, University of Roma Tre.

<sup>1</sup> Report of the International Law Commission: Sixty-Eighth Session (2 May–10 June and 4 July–12 August 2016), 13–73, UN Doc. A/71/10 (2016).

<sup>2</sup> GA Res. 76/119, Protection of Persons in the Event of Disasters (2021).

<sup>3</sup> For an early comment, please refer to: Giulio Bartolini, *A Universal Treaty for Disasters? Remarks on the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters*, 99 INT'L. REV. RED CROSS 1103 (2017). Analysis on the current text are also present in the thematic issue of 1 Y.B. INT'L DISASTER L. (2018).

<sup>4</sup> David Caron, *Preface*, in THE INTERNATIONAL LAW OF DISASTER RELIEF, i, xx (David Caron, Michael Kelly & Anastasia Telesetsky eds., 2014).

<sup>5</sup> David Fisher, *Domestic Regulation of International Humanitarian Relief in Disasters and Armed Conflict: A Comparative Analysis*, 89 INT'L REV. RED CROSS 345, 353 (2007).

negotiation processes, possibly with some refinements, or is unable to be a solid foundation for future initiatives in this area. Five positive elements of the ILC DAsPPED can be identified, along with a similar number of aspects that might need further refinements.

First, the most positive aspect of the ILC DAsPPED is their capacity to balance the different and potentially diverging perspectives of involved actors: (1) the affected state, whose sovereignty represents one of the pillars of the text; (2) external assisting actors (such as states, international organizations, NGOs, and other entities, like companies) aimed at providing assistance in light of solidarity values in the international community; and (3) the victims of disasters. The ILC avoided an approach predominantly focused on addressing victims, based both on the same title of the project and on individuals-based perspectives in this area, as the so-called rights-based approach, which could have led to a shift in the overall balance of the project that would be unacceptable to states as a basis for any negotiation in this area. Instead, the ILC placed states, particularly the affected state, at the center of the system, balanced by the need to incorporate the perspectives of other stakeholders. This balance was achieved through a complex mechanism of checks and balances among the potentially diverging perspectives. Drafting techniques allowed for prioritizing the prerogatives of the sovereign state, accompanied by counterbalance clauses reinforcing the role of assisting actors or victims of disasters. For example, Article 13 recognizes the need to obtain the affected state's consent to carry out relief operations, while paragraph 2 maintains that this consent cannot be withheld arbitrarily. Similarly, parallel provisions like Articles 11 on the duty to seek assistance and 12.2 on the need for potential assisting actors to expeditiously consider requests for assistance counterbalance the measures required of different actors.

Second, the scope of the DAsPPED could be welcomed. While the primary focus is on the immediate post-disaster response and early recovery phase, the ILC DAsPPED also address disaster prevention and mitigation activities in line with contemporary perspectives on disaster management. Article 9, in particular, is key as it recognizes the relevance of disaster risk reduction, identified as a priority by states and international organizations through activities like the Sendai Framework for Disaster Risk Reduction.<sup>6</sup> Despite fierce debate at the time of its adoption, disaster risk reduction is a crucial component of any discussion in this area, as exemplified by the UN Office for Disaster Risk Reduction's Sendai Framework midterm review, which noted that as of March 2022, 125 states reported having a National Disaster Risk Reduction strategy, up from only fifty-five states in 2015.

Third, the ILC's approach to the "vertical axis"—i.e., provisions focused on the protection of disaster victims—is fair. Article 5, dealing with human rights, acts as a reminder of the relevant obligations provided by human rights sources without laying down any substantive content. Compared to other ILC projects, as was the case for expulsion of aliens, drawing up a comprehensive list of relevant rights was deemed infeasible, as it risked potential gaps in identifying relevant rights and a shift toward a rights-based approach. Article 5 leaves it open to human rights bodies to clarify the obligations pertaining to states in this area.<sup>7</sup> Furthermore human rights law acts as a solid basis for solutions provided in other provisions, as for the duty to seek assistance. Additionally, spelling out humanitarian principles in Article 6 is significant, particularly in case the working group would recommend the adoption of a treaty, as it clarifies their content and represents a novelty, given their rare inclusion in binding texts.

<sup>6</sup> GA Res. 69/283, Sendai Framework for Disaster Risk Reduction (2015).

<sup>7</sup> Walter Kälin, *Protection of Victims of Disasters: The "Vertical" Dimension of the Draft Articles on the Protection of Persons in the Event of Disasters*, 1 Y.B. INT'L DISASTER L. 28 (2018); ROUTLEDGE HANDBOOK OF HUMAN RIGHTS AND DISASTERS (Flavia Zorzi Giustiniani, Emanuele Sommario, Federico Casolari & Giulio Bartolini eds., 2018).

Fourth, regarding the “horizontal axis”—i.e., the relationship between the affected state and assisting actors—the comprehensive approach of the DAsPPED is a positive aspect. This set of provisions highlight the main aspects of this relationship by adopting a holistic approach to legal issues potentially relevant in such scenarios. This is achieved through creative attempts to pursue systemic solutions, including issues not clearly addressed in disaster law instruments, as seen with Article 17 on the termination of assistance or Article 11 on the duty to seek assistance.

Fifth, the ILC DAsPPED could provide a universal general framework in this area, representing a baseline for legal issues pertaining to disasters while deferring to more tailored instruments for specific aspects. The no-prejudice clause in Article 18.1, addressing “other applicable rules of international law,” ensures this, giving predominant application to more detailed rules included in treaties with the same *ratione materiae* as the DAsPPED, such as regional or bilateral treaties on mutual assistance or those addressing specific hazards—i.e., technological hazard. The same could be for the relationship of the DAsPPED and the potential pandemic treaty currently in negotiation under the World Health Organization aegis. In this case, the latter instrument does not include operational provisions present in the ILC DAsPPED, thus able to play a complementary role in comparison with more specific provisions detailed in the draft pandemic treaty, as for some forms of cooperation in this specific area.

Despite these positive aspects, some elements of the ILC DAsPPED could need further refinements. Here are five contentious points.

First, if a decision is made to support the drafting of a treaty, it will be necessary to move some solutions currently in the Commentary to the plain text of treaty provisions. The Commentary is rich in content, and some relevant aspects were accommodated there for drafting purposes, due to the preference for short provisions, and to avoid lengthy debates on some contentious issues. For instance, humanitarian principles in Article 6 are currently limited to the response phase, while their relevance in disaster risk reduction is only mentioned in the Commentary.

Second, fine-tuning some provisions could refine their content. For example, the term “society” in the definition of disaster in Article 3 should be clarified, and aligning the wording of Article 9 with the mainstream language of the Sendai Framework could be helpful.

Third, refinement is specifically needed for Article 18.2, which deals with the relationship of the DAsPPED with international humanitarian law (IHL). Despite the ILC’s efforts to prioritize IHL and adapt solutions inferred from IHL to disaster scenarios, the convoluted drafting process has not favored its clarity. Taking advantage of the Commentary could help better recognize IHL’s predominance when it already regulates aspects addressed by the ILC DAsPPED.

Fourth, substantial changes could make the text more operational. This is particularly relevant for Article 15 on facilitations. Early proposals made in the 2007 ILC Secretariat Memorandum included the suggestion to address this topic through a more substantial set of provisions, but this approach was not endorsed by the ILC in order to avoid a time-consuming process. In a review process of the text, more specific provisions could be elaborated, as exemplified by the 1986 International Atomic Energy Agency convention on assistance in case of nuclear accidents or by the Tampere Convention on the provision of telecommunication resources for disaster mitigation and relief operations. Similar results could be achieved through technical protocols that fix detailed provisions, allowing states to extend these to international organizations and NGOs whose assistance is accepted by the affected state, based on the acceptance by assisting actors (unable to become parties to the treaty) of some core requirements, as through an endorsement of humanitarian principles provided by Article 6.

Fifth, reforming the text could include new provisions to increase its holistic character. This could involve a provision on the obligation to notify cross-boundary disasters or provisions that could make the treaty a living instrument. This might include provisions on dispute settlement

mechanisms, an assembly of state parties to share good practices and manage some reporting mechanisms, or charged to draft complementary instruments like technical annexes to enhance the quality of international assistance.

In conclusion, even if some refinements are needed, the structure and content of the ILC DAsPPED are already quite strong. Ultimately, it is up to the states to decide whether the legal and political conditions are ripe for moving towards a universal treaty, endorsing the ILC's recommendation, or preferring a soft-law instrument, such as a UN General Assembly resolution. In the latter case, it would be helpful to avoid reopening the text as to avoid processes aimed at watering down its content. While further postponement of the decision is an option in case of a stalemate, the title of Primo Levi's novel *If Not Now, When?*<sup>8</sup> aptly captures the current momentum. Given the increased frequency and impact of disasters, it is hard to justify that cooperation in relation to disasters, a crucial area of international law, remains largely neglected in the legal and institutional agendas of states.

<sup>8</sup> PRIMO LEVI, *IF NOT NOW, WHEN?* (1982).