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Sources of IDL: Focus on Customary International Law (2023)

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1 Introduction**

It can be argued that modern international disaster law owes its genesis to the call by the International Federation of Red Cross and Red Crescent Societies (IFRC) in 2000 to ‘design practical legal tools to strengthen disaster response around the world’.¹ In proposing the creation of an ‘international disaster response law’, the IFRC suggested that the operational application of the non-binding Sphere Standards² could be an example of the development of customary international law relating to humanitarian assistance and response.³ The IFRC noted that the Sphere Handbook provides ‘explicit standards’ for humanitarian professionals, which in turn raised a series of interesting legal questions. For example, how much field use or State acceptance would be needed to support a claim that the Sphere Standards were part of customary international law? Perhaps more fundamentally, how would such a claim of rights be enforced?⁴ There is clearly extensive international practice in the provision of humanitarian assistance following disasters, and increasing practice in promoting disaster risk reduction, prevention and

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1 International Federation of Red Cross and Red Crescent Societies (IFRC), *World Disasters Report 2000* (Geneva, 2000), Chapter 8: ‘Towards an International Disaster Response Law’, 156.

2 Sphere Association, *The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response* (4th ed, Geneva, 2018). The original edition of the Sphere Handbook was published in 2000, following a pilot version in 1998.

3 IFRC (n 1) 153.

4 *Ibid.*

preparation (as evidenced by the non-binding Hyogo⁵ and Sendai⁶ Frameworks), as well as in the fields of disaster recovery and rehabilitation. However, is there any corresponding legal basis (i.e. *opinio juris*) behind the actions of States and other humanitarian actors in the field of disaster prevention, response and recovery? Alternatively, do States act simply on the basis of diplomatic and friendly relations, or even self-interest?

As part of our continuing series of short articles on the sources of international disaster law,⁷ this contribution will examine the current work of the International Law Commission (ILC) on the identification of customary international law, and consider how this might be applied to the field of international disaster law. Analogies will be made to the extensive work undertaken on customary international humanitarian law by the International Committee of the Red Cross (ICRC), as well as related branches of law such as international refugee and forced displacement law. The contribution will conclude with some reflections on the potential crystallisation of customary international law in the context of disasters.

2 The ILC's Work on Customary International Law (2011–18)

2.1 Overview

Although the ILC completed their examination of customary international law several years ago, it is pertinent to examine it in this volume of the Yearbook since the topic is a component part of their interlinked programme of work on the sources of international law. Over the past decade or so, the ILC has spent considerable time re-examining Article 38(1) of the Statute of the International Court of Justice (ICJ). The ILC finalised their Draft

5 UNISDR, Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters, as adopted at the World Conference on Disaster Reduction, 18–22 January 2005, Kobe, Hyogo, Japan, UN Doc. A/CONF.206/6.

6 UN, Sendai Framework for Disaster Risk Reduction 2015–2030 (18 March 2015), UN Doc. A/CONF.224/CRP.1

7 See: Dug Cubie, 'Sources of IDL: The New IFRC Disaster Law Database' (2022) 3 Yearbook of International Disaster Law, 637–641; Dug Cubie, 'Sources of IDL: Focus on Case Law' (2023) 4 Yearbook of International Disaster Law, 640–647; Dug Cubie, 'Sources of IDL: Focus on General Principles of Law' (2024) 5 Yearbook of International Disaster Law, 493–501.

Conclusions on the identification of customary international law in 2018,⁸ and then their Draft Conclusions on peremptory norms of international law (*jus cogens*) in 2022.⁹ Running concurrently with this, the ILC commenced its study of general principles of law in 2017 (scheduled for completion in 2025), as well as subsidiary means for the determination of rules of international law (commenced 2021) and non-legally binding international agreements (scheduled to commence in 2024).¹⁰

Between 2013 and 2018, the ILC Special Rapporteur tasked with examining customary international law, Sir Michael Woods, produced five reports on different aspects of the topic, culminating in a finalised set of 16 Draft Conclusions.¹¹ The topic was originally entitled ‘Formation and Evidence of Customary International Law’.¹² Following debate within the ILC and in the UN General Assembly’s Sixth (Legal) Committee, this was changed to “Identification of Customary International Law” – partly to avoid translation issues between different languages, but also to highlight that the focus of the analysis was on processes rather than the substantive content of customary international law (CIL).¹³ Indeed, the finalised Commentaries note: ‘the draft conclusions concern the way in which rules of customary international law are to be determined, that is, the legal methodology for undertaking that exercise’.¹⁴ This legal methodology is elaborated via the “two-element” approach

8 UN, Report of the International Law Commission Seventieth session (30 April–1 June and 2 July–10 August 2018), UN Doc. A/73/10, Chapter V: Identification of customary international law, 117–156.

9 UN, Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022), UN Doc. A/77/10, Chapter IV: Peremptory norms of general international law (*jus cogens*), 10–89.

10 Full details of each component of the ILC’s work on sources of international law can be found in the Analytical Guide for each topic, available at <<https://legal.un.org/ilc/guide/gfra.shtml>>, last accessed (as any subsequent URL) on 28 July 2024.

11 This IDL in Practice note will not reiterate all the issues considered by the Special Rapporteur or by States in the UNGA Sixth Committee.

12 UN General Assembly, International Law Commission, Sixty-fourth session (7 May–1 June and 2 July–3 August 2012), Formation and Evidence of Customary International Law, Note by Michael Wood, Special Rapporteur, UN Doc. A/CN.4/653 (12 May 2012).

13 UN General Assembly, Second report on identification of customary international law, by Michael Wood, Special Rapporteur (22 May 2014) UN Doc: A/CN.4/672, para. 2.

14 UN (n 8) 123.

comprised of a general practice accepted as law, which in turn is evidenced via specific actions and/or inactions of States and certain international organisations.

Despite the interconnected nature of the sources of international law (and the work of the ILC), it is notable that the Commentaries to the Draft Conclusions on CIL expressly state that: ‘no attempt is made to explain the relationship between customary international law and other sources of international law listed in Article 38 ...; the draft conclusions touch on the matter only in so far as is necessary to explain how rules of customary international law are to be identified’.¹⁵ However, the Commentaries do discuss the close connection, and potential overlap, between CIL and general principles of law set out in Article 38(1)(c).¹⁶ In particular, the Commentaries explain that “‘rules” of customary international law (...) includes rules of customary international law that may be referred to as “principles” because of their more general and more fundamental character’.¹⁷ The Commentaries also give a pertinent example of the relationship between customary rules and general principles from the ICJ’s Jurisdictional Immunities of the State case,¹⁸ in particular the Court’s argument that the customary rule of state immunity is derived from the principle of sovereignty equality of states; consequently the rule and principle must be viewed together.¹⁹ So to understand the full scope of international disaster law, there is a need to consider concurrently any general

15 *Ibid*, 124.

16 *Ibid*. A similar point was raised during the ILC’s consideration of the topic of general principles of law. As noted in the Commentaries to those Draft Conclusions: ‘The view was also expressed that confusion with other sources of international law should be avoided’. UN, Report of the International Law Commission Seventy-fourth session (24 April–2 June and 3 July–4 August 2023), UN Doc. A/78/10, Chapter IV: General principles of law, 10–35, at 25.

17 *Ibid*, 124.

18 International Court of Justice, Jurisdictional Immunities of the State (*Germany v. Italy; Greece intervening*), Judgment, I.C.J. Reports 2012, 99.

19 UN (n 8) 127, fn 682. The relationship between customary international law and general principles of law has also been examined by the ILC in the context of their work on general principles of law. See: UN General Assembly, Second report on general principles of law, by Marcelo Vázquez-Bermúdez, Special Rapporteur (9 April 2020) UN Doc: A/CN.4/741, 34–35.

principles of law and rules of customary international law which might be applicable in a disaster context.²⁰

2.2 The “Two-Element” Approach

As may be expected, the Draft Conclusions set out the well-established “two-element” approach to the identification of CIL – namely to ascertain whether or not there is a general practice that is accepted as law (*opinio juris*).²¹ As the Commentaries explain, this entails ‘a search for a practice that has gained such acceptance among States that it may be considered to be the expression of a legal right or obligation (namely, that it is required, permitted or prohibited as a matter of law)’.²² The Commentaries note that both elements are equally needed, and succinctly set out the underlying rationale for the two-element approach:

Practice without acceptance as law (*opinio juris*), even if widespread and consistent, can be no more than a non-binding usage, while a belief that something is (or ought to be) the law unsupported by practice is mere aspiration: it is the two together that establish the existence of a rule of customary international law.²³

In his second report, the Special Rapporteur highlighted the specific language of ‘a general practice’ in Article 38(1) which indicates that while States remain the primary subjects of international law, relevant practice for the identification of CIL can also include the practice of international organisations.²⁴ This concept was incorporated into Draft Conclusion 4(2), which sets

20 For discussion of general principles of law in the context of disasters, see: Dug Cubie, ‘Sources of IDL: Focus on General Principles of Law’ (n 7); and Dug Cubie, ‘Identifying Principles of International Disaster Law’ In: Marie Aronsson-Storrier and Susan C. Breau (eds), *Research Handbook on Disasters and International Law* (2nd ed, Edward Elgar, 2024), pp.11-29.

21 The Commentaries, at 125, fn 671, cite the classic *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, at 3, which held that ‘(...) in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (...)’ at 44, para.77.

22 UN (n 8) 125.

23 *Ibid*, 126.

24 UNGA, Second report (n 13) 15–18.

out that ‘in certain cases’ the practice of international organisations can contribute to the formation of CIL.²⁵ Examples of such organisations include UN agencies and inter-governmental organisations such as the European Union. Draft Conclusion 4(3) explicitly excludes the practice of other actors as a means of forming CIL; although, it does recognise that their practice may be of relevance in assessing the practice of States and international organisations. The Commentaries supplement this by explaining that the practice of an international organisation can lead to the rise of customary international law rules, if: a) the subject of the practice falls under the mandate of the organisation; and/or b) they have speciality, or have the subject matters specifically addressed to them, such as those practices relating to treaties they are party to.²⁶ The Commentaries explicitly reference the role of official statements of the International Committee of the Red Cross (ICRC) in the context of international humanitarian law (IHL) in influencing State practice – but the Commentaries also clearly state that ‘such [ICRC statements and publications] (...) are not practice as such’.²⁷ In the context of international disaster law, this raises important questions regarding the practice of which international organisations (if any) may be of relevance for the formation of CIL rules in disasters.

The Draft Conclusions also provide guidance as to the types of actions (or inactions) which can be used as evidence of the creation or crystallisation of a rule of CIL. In particular, Draft Conclusion 5 sets out that State practice encompasses the conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.²⁸ This is followed by examples of the types of conduct which would be classified as State practice. The non-exhaustive and non-hierarchical list contained in Draft Conclusion 6(2) includes: ‘diplomatic acts and

25 UN, Report of the ILC (n 8) 130–132. Although the Commentaries stress that: ‘(...) in many cases, it will only be State practice that is relevant (...)’, 130. The Commentaries further clarify that: ‘The term ‘international organisations’ refers (...) to organizations that are established by instruments governed by international law (usually treaties), and possess their own legal personality. The term does not include non-governmental organizations’.

26 *Ibid*, 131.

27 *Ibid*, 132. However, the Commentaries do acknowledge the ICRC’s specific legal functions under the 1949 Geneva Conventions, at fn 698.

28 *Ibid*, 132.

correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct ‘on the ground’; legislative and administrative acts; and decisions of national courts’.²⁹

Any such State actions (or inactions) must also have been undertaken on the basis of a belief that such conduct was permitted, required or prohibited by law. As reiterated in the Commentaries to Draft Conclusion 9 on the requirement of acceptance as law (*opinio juris*): ‘It is thus crucial to establish, in each case, that States have acted in a certain way because they felt or believed themselves legally compelled or entitled to do so by reason of a rule of customary international law: they must have pursued the practice as a matter of right, or submitted to it as a matter of obligation’.³⁰

Mirroring Draft Conclusion 6, Draft Conclusion 10 sets out the forms of evidence which can be used to show that a particular action was undertaken on the basis of *opinio juris*. The Conclusion recognises that such evidence can take many forms, although specific forms of evidence are highlighted, such as: ‘public statements made on behalf of States; official publications; government legal opinions, diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference’.³¹ The Draft Conclusions continue by elaborating the range of other materials which can be used to collect, synthesise or interpret relevant State and international organisation practice, namely: treaties; resolutions of international organisations and international conferences; decisions of courts and tribunals; and, as a subsidiary means of determination, teachings of the most highly qualified publicists of the various nations.³²

29 *Ibid*, 133.

30 *Ibid*, 138.

31 *Ibid*, 140.

32 See Draft Conclusions 11–14 and related Commentaries, *ibid*, 143–151.

3 Customary International Law in Disasters

As recognised during the ILC deliberations, identifying binding rules of customary international law can be challenging. In the context of the ICRC's Customary IHL study on the laws of war, Daniel Bethlehem noted that it is important to focus on actual State practice and *opinio juris*, to avoid legal uncertainty and questions of normative integrity.³³ Bethlehem also argued that 'there is reason to be cautious about encyclical or black-box approaches to the crystallisation of custom'.³⁴ This view is reflected in the Commentaries to the Draft Conclusions on CIL: 'In each case, a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination'.³⁵ The Commentaries continue by clearly stating: 'In other words, one must look at what States actually do and seek to determine whether they recognize an obligation or a right to act in that way'.³⁶

This is relevant when considering the potential existence of customary international law rules in the context of international disaster law. While it is not difficult to identify widespread State and international organisation practice in the provision of support and assistance for disaster risk reduction, preparedness and response, it is harder to determine the motivations of assisting States and humanitarian actors. If one were to ask a donor State why they were providing financial and other assistance in response to a particular disaster in another country, it is unlikely that they would say they were acting due to a sense of legal obligation or compulsion (as opposed to moral, ethical, diplomatic or other reasons). Indeed, many States questioned the existence of a legal obligation to provide or request assistance during the debates on the ILC Draft Articles on the protection of persons in

33 Daniel Bethlehem, 'The Methodological Foundations of the Study' In: Elizabeth Wilmschurst & Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2009) 3–14, at 13.

34 *Ibid*, 14. A notable difference between international humanitarian law (IHL) and international disaster law is the long history of treaty-based rules in IHL, which Bethlehem argues increases the challenges of identifying customary IHL, as opposed to engaging in a re-interpretation of the underlying treaties.

35 UN, Report of the ILC (n 8) 122.

36 *Ibid*, 125.

the event of disasters.³⁷ This argument becomes even more challenging if one looks to the practice of non-State humanitarian organisations – while there is equally extensive practice from inter-governmental and non-governmental organisations in the field of disaster preparation and response, it may be hard to determine when (if ever) such practice was based on a *legal* obligation.

However, the ILC Special Rapporteur on the protection of persons in the event of disasters, Eduardo Valencia-Ospina, did reference several examples of crossover between disasters and customary international law during his analysis of the topic. In particular, this was discussed in his seventh report (2014), where he highlighted potential customary rules related to the right of the affected State to oversee disaster response, its duty to seek assistance, and the duty to prevent disasters.³⁸ Moreover, the Special Rapporteur noted that other rules of CIL might interact with the ILC's work on disasters, albeit without specifying which rules these might be.³⁹ The Commentaries to the Draft Articles provide some guidance by referencing the applicability of human rights obligations under customary international law,⁴⁰ including in the context of the duty to seek assistance.⁴¹ Some States also acknowledged that existing rules of customary international law may be of relevance in disasters. For example, many States supported the applicability of CIL rules derived from human rights law in regard to the duty of an affected State to seek assistance.⁴² Meanwhile, Ireland noted that the duty to cooperate as set out in

37 See, for example: UN General Assembly, Fifth report on the protection of persons in the event of disasters, by Eduardo Valencia-Ospina, Special Rapporteur (9 April 2012) UN Doc: A/CN.4/652, 8–11, 15; and UN General Assembly, Eighth report on the protection of persons in the event of disasters, by Eduardo Valencia-Ospina, Special Rapporteur (17 March 2016) UN Doc: A/CN.4/697, 51, 64–66.

38 UN General Assembly, Seventh report on the protection of persons in the event of disasters, by Eduardo Valencia-Ospina, Special Rapporteur (27 February 2014) UN Doc: A/CN.4/668, 26.

39 *Ibid.*

40 UN, Report of the International Law Commission Sixty-eighth session (2 May–10 June and 4 July–12 August 2016) UN Doc. A/71/10, Chapter IV: Protection of Persons in the Event of Disasters, 31.

41 *Ibid.*, 53.

42 UNGA Fifth report (n 37) 8–9. Support for this position was expressed by: Slovenia, Finland (on behalf of the Nordic States), El Salvador, Colombia, Czech Republic, Chile, India, Romania, Ireland, Egypt and the European Union.

the Draft Articles should not go beyond the existing understanding of the concept in CIL, thereby acknowledging that such a rule already exists in CIL.⁴³

To date, there has only been limited academic examination of the issue of customary international law rules in disasters;⁴⁴ although analogies can be made from the broader field of humanitarian action. For example, in 2000 Boško Jakovljević argued that the provision of humanitarian assistance was ‘so intense, dense, widespread, and extensive, that it represents a solid body of State practice, required for the formation of a customary law rule’.⁴⁵ Likewise, some of the specific CIL rules identified by the ICRC in the context of armed conflicts may be of equal relevance in disasters, such as Rule 31: Humanitarian relief personnel must be respected and protected; and Rule 32: Objects used for humanitarian relief operations must be respected and protected.⁴⁶ Writing after the conclusion of the Draft Articles, the Special Rapporteur noted that: ‘the ILC provisions are drafted in compulsory terms as rights and duties, so that they may become binding rules of international law, either as conventional or customary law’.⁴⁷ This implies that more comprehensive customary international law rules relating to disasters may well be elaborated in the future.

43 UNGA, Eighth report (n 7) 41.

44 See for example: Natalino Ronzitti, ‘Conclusions’, in Andrea de Guttry, Marco Gestri and Gabriella Venturini (eds), *International Disaster Response Law* (T.M.C. Asser Press, 2012) 703–706.

45 Boško Jakovljević, ‘Right to Humanitarian Action and State Sovereignty’, Report of the IIHL Roundtable: Humanitarian Action and State Sovereignty (2000) 95–101, at 96. Based on this analysis, Jakovljević argued that a general right to humanitarian assistance existed. See also: Dug Cubie, *The International Legal Protection of Persons in Humanitarian Crises: Exploring the Acquis Humanitaire* (Hart, 2017), pp.183-187.

46 The ICRC Customary IHL Rule can be accessed at <<https://ihl-databases.icrc.org/en/customary-ihl/v1>>. For analysis of the ICRC CIHL Study, see: Jean-Marie Henckaerts, ‘Customary International Humanitarian Law: Taking Stock of the ICRC Study’ (2010) 78 *Nordic Journal of International Law*, 435–468; and Wilmshurst & Breau, *Perspectives on the ICRC Study* (n 33).

47 Eduardo Valencia-Ospina, (2020) ‘The Work of the International Law Commission on the “Protection of Persons in the Event of Disasters”’ (2020) 1 *Yearbook of International Disaster Law*, 5–27, at 6.

4 Future Development of CIL in Disasters

Despite the IFRC's suggestion over 20 years ago that the Sphere Standards might be an example of customary international law in development, it may be difficult to identify specific rules of disaster prevention, response or recovery which have crystallised into customary international law at this present time.⁴⁸ This is not to say that such rules do not currently exist, or might not exist in the future. Moreover, the ILC's work on the identification of CIL provides a coherent methodology for academics and practitioners to examine the question of customary international law in disasters. A pertinent research question is whether there is an emerging and/or existing coherent body of customary law rules applicable in disasters, as found in IHL,⁴⁹ or whether there is one central customary rule for disasters from which other obligations flow, such as the customary rule of *non-refoulement* in refugee law (i.e. a State's obligation not to return someone to a place where they would face persecution).⁵⁰ It is also possible that, at this moment in time, there are no rules of customary international law specifically relating to disasters (as opposed to general customary rules, e.g. in human rights law, which are applicable in a disaster setting).

In the interim, it is helpful to reflect on a key recommendation from the ILC at the conclusion of its work on customary international law. The Commission requested the ILC Secretariat to prepare a memorandum and survey on the means by which to

48 Andenas and Chiussi have argued that: 'Customary law often struggles to provide rules based on actual practice, since in many fast-evolving branches of international law practice is lagging behind. This is particularly true in relatively young areas of international law and in those areas in which the role of non-State actors has not yet been fully clarified', Mads Andenas and Ludovica Chiussi, 'Cohesion, Convergence and Coherence of International Law' In: Mads Andenas et al (eds), *General Principles and the Coherence of International Law* (Brill Nijhoff, 2019) 9–34, at 32.

49 Over 20 years ago, Michael Hoffman argued that: 'Research completed to date does not suggest the existence of a system of customary IDRL'. See: Michael Hoffman, 'What is the Scope of International Disaster Response Law?', in IFRC, *International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges* (2003) 16.

50 Sir Elihu Lauterpacht & Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion,' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 87–177.

gather and collate evidence of customary international law rules. Indeed, a proposal for the ILC Secretariat to act as a central repository of documents and texts as a means of identifying CIL had originally been made in 1949, but was not adopted due to resource and practical reasons. In 2018, the ILC acknowledged that advances in technology create the potential for it now to provide a centralised systematic and comprehensive dissemination of information concerning how to find documents constituting evidence of customary international law.⁵¹ Of note, one of the four key suggestions from the Secretariat was for the establishment of a periodically updated online database for the systemic and comprehensive dissemination of bibliographic information on the evidence of CIL.⁵² From the perspective of international disaster law, the IFRC Disaster Law Database provides a wealth of evidence for researchers and practitioners to help identify existing or emerging rules of customary international law in disasters, and so to feed into the broader work of the ILC on the identification of customary international law.⁵³

51 UN General Assembly, International Law Commission, Identification of customary international law: Ways and means for making the evidence of customary international law more readily available, Memorandum by the Secretariat (14 February 2019) UN Doc A/CN.4/710/Rev.1, 34.

52 *Ibid*, 38.

53 IFRC, Disaster Law Database, available at <https://disasterlaw.ifrc.org/disaster-law-database>.