

**Something old, something new:  
Disaster risk reduction in international law**

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1. *Introduction*

*Praestat cautela quam medela.* Prevention is better than cure. This also holds true in the field of disasters, where for a long time a reactive policy has prevailed, notwithstanding the enormous human and financial costs that it implies. The present contribution intends to provide a general overview of the development, and the actual content, of disaster risk reduction (DRR) norms in international law.<sup>1</sup> This will be done first of all by going through the main stages of the evolution of DRR as part of international disaster response law at the global (section 2) and regional level (section 3). Separate attention will then be given to two major international law instruments, the Sendai Framework for Disaster Risk Reduction (section 4) and the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters (section 5), whose recent adoption has proved crucial for DRR. Finally, an assessment will be made of the various ways in which DRR features different fields of international law and ultimately of the role of international law in the domain (section 6).

2. *The evolution of DRR norms in international disaster response law*

The first truly international effort to set up an institutional regime dedicated to disaster relief – the International Relief Union (IRU) – already encompassed the crucial aspect of prevention. IRU's farsighted promoter, the Italian Red Cross Society's president Ciruolo, had indeed

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<sup>1</sup> The term DRR is here used as a catch-all phrase for all pre-disaster activities.

cautioned against an approach to natural disasters which was merely responsive and shown that prevention and preparedness measures were feasible already at that time:

‘In living memory, every region continues to be flagellated along its geological, meteorological and health life by the same phenomena which contribute to giving it its history and certain characters. One can, by recalling the type of earthquake, meteorological, epidemic, and even economic calamities that affect each continental region over the millennia, preordain a permanent organization to study all sorts of calamities, to search for their rhythms, to prepare for instruments and relief efforts, for the carrying out of possible preventive repairs. In this business, piety must have science as a collaborator [...] It is possible to plan the necessary studies in time to prepare for a return of scourge’.<sup>2</sup>

Ciraolo’s proposal for an international disaster relief agency was taken up by the League of Nations in 1922 and formed the basis for the adoption of the Convention and Statute Establishing an International Relief Union in July 1927.

IRU was mainly charged ‘in the event of any disaster due to force majeure, the exceptional gravity of which exceeds the limits of the powers and resources of the stricken people, to furnish to the suffering population first aid and to assemble for this purpose, funds, resources and assistance of all kinds’.<sup>3</sup> Nevertheless, Ciraolo’s suggestions were reflected in one of the secondary objectives of the organization, that of ‘[encouraging] the study of preventive measures against disasters’. A total of 30 States adhered to IRU, which unfortunately however proved to be a fiasco, *inter alia* due to the lack of the necessary financial support to undertake its mandates. As was remarked upon by Fisher, ‘an enduring lesson that can be drawn from the IRU experience is the supreme difficulty – even in the waning days of Wilsonian idealism – of persuading the international community to funnel all financial support and coordinating authority for disaster relief into a single agency’.<sup>4</sup>

<sup>2</sup> The quotation is from MG De Rossi, *L’Unione internazionale di soccorso nella Convenzione di Ginevra del 1927 e nella nuova organizzazione internazionale* (Edizioni di ‘Politica estera’ 1945) 11 (my translation).

<sup>3</sup> Cf art 2 of the Convention.

<sup>4</sup> D Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies 2007) 27.



IRU's failure resulted in the abandonment of the idea of regulating international disaster assistance through a single global treaty, and in the parallel recourse to two distinct strategies: the adoption, on one hand, of regional and bilateral specialized treaties on disaster law, and, on the other hand, of global treaties on a wide variety of issues containing *ad hoc* rules applicable to disaster situations.<sup>5</sup> The first trend, which has had an increasing and continuing success ever since, has led to the creation of a brand-new field of international law: International Disaster Response Law (IDRL). *Nomen est omen*: the great majority of instruments that can be said to belong to such a regime, for a long time dealt almost exclusively with the second phase of the disaster cycle (response).

An insufficient focus on prevention also characterised the mandate of the UN Disaster Relief Office (UNDRO), which was established at the beginning of the '70s with the primary objective 'to mobilize, direct and coordinate the relief activities of the various organizations of the UN system'. UNDRO's actions in relation to the pre-disaster phase was indeed seriously hampered by the vagueness of tasks ('[t]o promote the study, prevention, control and prediction of natural disasters, including the collection and dissemination of information concerning technological development'<sup>6</sup>) and the limited funding and staff devoted to it. Some forty years after IRU's establishment, real advances in DRR still had yet to be made.

A global awareness of the increasing incidents and impacts of natural disasters and of the consequent need to reduce disasters' risks and their impact on local populations only came at the end of the '80s with the UN's proclamation of 1990-1999 as the International Decade for Natural Disaster Reduction (IDNDR).<sup>7</sup> It was indeed at that point in time that an increase in both the frequency and destructiveness of natural and technological disasters had reached an unprecedented level. The IDNDR was followed by a number of important initiatives at UN level, starting with the Yokohama Strategy for a Safer World and its Plan of Action, which

<sup>5</sup> Cf A De Guttry, 'Surveying the Law', in A De Guttry, M Gestri, G Venturini (eds), *International Disaster Response Law* (Springer 2012) 34-35.

<sup>6</sup> See UNGA Resolution A/RES/2816(XXVI) of 6 December 6 1971, lett f.

<sup>7</sup> IDNDR's objective was 'to reduce through concerted international actions, especially in developing countries, loss of life, property damage and social and economic disruption caused by natural disasters' (UNGA Resolution A/RES/42/169 of 11 December 1987).



were adopted in 1994 at the World Conference on Natural Disaster Risk Reduction and then endorsed by the General Assembly (GA).<sup>8</sup> These documents provided the first international guidelines on natural disaster prevention, preparedness and mitigation. They affirmed, *inter alia*, that prevention, preparedness and planning at the community and national levels, at the regional and subregional levels and at the international level should be made integral to development policies with the ultimate goal of building resilient communities and reducing vulnerability to hazards. It was thus recognized that each country bears the primary responsibility for protecting its people and infrastructure while the international community should prove strong political will and leadership to achieve the objectives identified. It can be said that Yokohama unquestionably sanctioned a paradigmatic shift in focus from disaster management to disaster *risk* management (better known as DRR).

Another important step was taken in December 1999, when the IDNDR was replaced by the International Strategy for Disaster Reduction (ISDR) and a permanent secretariat (UNISDR) was established to ensure ISDR's implementation and to involve all stakeholders of the ISDR system<sup>9</sup> in the promotion and operationalisation of DRR practices.<sup>10</sup> Of particular significance was the Second World Conference on Disaster Reduction held in Kobe (Hyogo), Japan, on January 2005, less than a month after the Indian Ocean tsunami, one of the deadliest natural disasters in recorded history. The major outcome of the conference was the Hyogo Framework for Action 2005-2015 Building the Resilience of Nations and Communities to Disasters (HFA).<sup>11</sup> The HFA was the first plan to explain, describe and detail the work that is required from all different sectors and actors to substantially reduce disaster losses 'in lives and the social, economic and environmental assets of communities and

<sup>8</sup> UNGA Resolution A/RES/49/22 A of 2 December 1994.

<sup>9</sup> '[W]hat is traditionally known as the ISDR system denotes in reality a loose "alliance" of states, international organisations, non-governmental organisations, civil society groups, financial institutions, and technical bodies working together and sharing information in the attempt to reduce disaster vulnerabilities of both communities and nations' (L Corredig, 'Effectiveness and Accountability of Disaster Risk Reduction Practices: An Analysis Through the Lens of Informal International Lawmaking' February 2012 Paper no 2 Disaster Law Working Papers Series 4).

<sup>10</sup> See UNGA Resolution A/RES/54/219 of 3 February 2000.

<sup>11</sup> The HFA was subsequently endorsed by the GA (cf UNGA Resolution A/RES/60/195 of 22 December 2005).



countries'. To that end it set five priorities for action, to be implemented by States and other stakeholders 'as appropriate, to their own circumstances and capacities'.<sup>12</sup>

The HFA brought important progress in the way DRR was approached at national and international level, and prompted *inter alia* the creation of specialised bodies such as the HFA National Focal Points. Its adoption also triggered legislative changes in a wide number of countries. Nonetheless, achievements were 'patchy across regions and unevenly distributed among the five priorities for action'.<sup>13</sup> Above all, the HFA failed to bring about a substantial reduction of disaster losses and to invert the trend which sees disaster financing mostly focused on the response and reconstruction phases.<sup>14</sup>

### 3. *The growing role of regional cooperation in DRR*

From the 1990s onwards DRR has been regulated by a growing number of global, regional and bilateral instruments. As to global instruments, it bears recalling, in particular, the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations and the 2000 Framework Convention on Civil Defence Assistance. The most relevant developments, however, have come at the regional level, and serve to prove the crucial bridging role that regionalism can play between the international and national systems even in this domain.<sup>15</sup> Not coincidentally, the HFA called upon regional organizations to establish or strengthen their own frameworks for disaster management (DM) cooperation.<sup>16</sup>

The majority of regional DM instruments are non-binding in nature. Among the few binding frameworks, the most relevant ones are those

<sup>12</sup> Cf HFA (n 11) 6 para 15.

<sup>13</sup> E Calliari, J Mysiak, 'Renewed international commitment for Disaster Risk Reduction' in M Hare, C van Bers, J Mysiak (eds), *A Best Practices Notebook for Disaster Risk Reduction and Climate Change Adaptation: Guidance and Insights for Policy and Practice from the CATALYST Project* (TWAS 2013) 23.

<sup>14</sup> J Kellett, A Caravani, 'Financing disaster risk reduction: A 20-year story of international aid' (ODI, 18 September 2013).

<sup>15</sup> On the issue see E Ferris, D Petz, 'In the Neighborhood: The Growing Role of Regional Organizations in Disaster Risk Management' (The Brookings Institution 2013).

<sup>16</sup> HFA (n 11) para 31.

developed by the Association of Southeast Asian Nations (ASEAN) and the European Union (EU), to which separate attention will now be given.<sup>17</sup>

### 3.1. *The ASEAN Agreement on Disaster Management and Emergency Response*

The ASEAN Agreement on Disaster Management and Emergency Response (AADMER) has the distinction of being the first legally binding agreement on DM to also cover DRR. It is not surprising that this is the case, considering that Southeast Asia is the most disaster-prone region in the world.<sup>18</sup> And indeed, regional cooperation on DM has existed there since the 1970s. In 1971 the ASEAN Experts Group on Disaster Management was established, with the aim of enhancing cooperation among the Member Countries so as to minimize the adverse consequences of disasters on the latter's economic and social development.<sup>19</sup> A few years later, in 1976, ASEAN Member States (MS) signed the Declaration on Mutual Assistance on Natural Disasters, through which they committed to assist, within their capabilities, any MS affected by a natural disaster of major magnitude<sup>20</sup> and to 'designate a national government agency to be [their] internal coordinating body' in DM.<sup>21</sup> However, it was not until the 2000s that ASEAN actually proved both its skills – through its action in the 2004 Indian Ocean tsunami and the 2008 Cyclone Nargis in Myanmar – and potential in DM – with the signing of the AADMER.

The drafting of AADMER was completed just six months after the

<sup>17</sup> The other regional binding instruments are the Caribbean Disaster Emergency Response Agency Agreement (1991, amended in 2013) and the South Asian Association for Regional Cooperation (SAARC)'s Agreement on Rapid Response to Regional Disasters (2011).

<sup>18</sup> ASEAN Member States 'account for more than 30 percent of all global disaster fatalities and nearly nine percent of those populations affected by disasters. From 2000-2010, annual financial losses from natural disasters have averaged USD \$4.4 billion' (ASEAN, 'Disaster Management Reference Handbook' (2015) 14).

<sup>19</sup> In 2003, the expert working group was transformed into the ASEAN Committee on Disaster Management (ACDM).

<sup>20</sup> Art III a).

<sup>21</sup> Art II.



HFA and entered into force, for all ASEAN MS,<sup>22</sup> in December 2009. It is a comprehensive DM agreement but, in the spirit of the HFA, it gives special consideration to DRR.<sup>23</sup> Three of the six principles which should guide States Parties in the implementation phase concern DRR: to give priority to prevention and mitigation; to mainstream DRR efforts into sustainable development policies, planning and programming at all levels; and to involve all stakeholders [...], utilising, among others, community-based disaster preparedness and early response approaches.<sup>24</sup> A general obligation is then placed on parties 'to co-operate in developing and implementing measures to reduce disaster losses including [...] identification of disaster risk, development of monitoring, assessment and early warning systems, [and] exchange of information and technology'.<sup>25</sup> More specific obligations are detailed in Parts III (Disaster Prevention and Mitigation) and IV (Disaster Preparedness) of the Agreement.<sup>26</sup>

Among ASEAN institutions, a key role in implementing the AADMER is entrusted to the ASEAN Committee on Disaster Management (ACDM), which is made of MS' respective national agencies and acts as the executive body of the Agreement, as well as to the ASEAN Coordinating Centre for Humanitarian Assistance on disaster management (AHA Centre). The latter was established in 2011 and is aimed at facilitating 'co-operation and coordination among the Parties, and with relevant United Nations and international organisations, in promoting regional collaboration'.<sup>27</sup> Its functions include the management of standby arrangements, risk assessments, information and knowledge management, and the facilitation of joint emergency responses. In this latter respect, the Centre channels the assistance made available, on a voluntary basis, by States parties<sup>28</sup> following an explicit request by a disaster-

<sup>22</sup> ASEAN membership consists of all Southeast Asian countries except for Timor Leste.

<sup>23</sup> The agreement also specifically mentions the HFA (n 11) 10th preambular para.

<sup>24</sup> Art 3, paras 4-6.

<sup>25</sup> Art 4 a).

<sup>26</sup> Cf arts 4-7.

<sup>27</sup> Agreement on the Establishment of the ASEAN Coordinating Centre for Humanitarian Assistance on disaster management, 17 November 2011, art 3.1.

<sup>28</sup> Each MS makes available, on a voluntary basis, assets and capacities for the 'regional standby arrangements for disaster relief and emergency response' (art 8).

stricken MS.<sup>29</sup> Additionally, it is expected to facilitate activities for technical cooperation and scientific research.

Apart from the activities which are specifically assigned to the AHA Centre, collaboration in DRR is generally facilitated by the ASEAN Secretariat, as is the case for the recent Declaration on Institutionalizing the Resilience of ASEAN and its Communities and Peoples to Disasters and Climate Change.<sup>30</sup>

As a whole, AADMER is certainly the most timely, comprehensive and ambitious regional DM framework. This is all the more remarkable considering that the so-called 'ASEAN way', on which ASEAN was founded, is based on a strict adherence to national sovereignty and non-intervention. On the negative side, the Agreement does not set exact targets to be fulfilled nor is it equipped with an enforcement mechanism to be activated in the case of non-compliance. However, 'this weakness is partly mitigated by the AADMER work program's relatively clear formulation of activities for member states in the different areas of the program, which can be monitored by the secretariat'.<sup>31</sup>

### 3.2. *The EU's Civil Protection Mechanism*

The EU does not have, for its part, a specific treaty dealing with DM. Nonetheless, EU MS have coordinated their national civil protection capacities in the case of major natural disasters since the mid-1980's and with the Lisbon treaty cooperation in the pre-disaster phase has significantly advanced.

The so-called Civil Protection Mechanism (CPM) was launched in 2001 by Council Decision 2001/792/EC with the objective of fostering the mobilisation of assistance in event of disasters and improving preparedness at national level in collaboration with Community institutions. The Decision provided, *inter alia*, for the establishment of a Monitoring and Information Centre (MIC) and a Common Emergency Communication and Information System to liaise between the MIC and MS's contact

<sup>29</sup> Art 11.

<sup>30</sup> The Declaration was adopted in Kuala Lumpur on 27 April 2015.

<sup>31</sup> D Petz, 'Strengthening Regional and National Capacity for Disaster Risk Management: The Case of ASEAN' (The Brookings Institution 2014) 22.



points, and for assistance in the development of detection and early warning systems.

The CPM was amended for the first time in 2007 with the adoption of an amending decision (2007/779/CE) and a Civil Protection Financial Instrument (Decision 2007/162/EC). It was not, however, until the Lisbon Treaty that civil protection has become a self-standing policy with a specific legal basis in the Treaties.<sup>32</sup> By enumerating civil protection among the fields in which the EU has a supporting competence, Art. 6 f) TFUE stipulates, in conformity with previous practice, that the role of European institutions is complementary and cannot go beyond coordination of MS action.<sup>33</sup> In other words, it recognizes the sovereign prerogatives of the States in that domain. Art. 196 TFUE then regulates in detail the new competence area, by referring to a broad range of actions which also concerns the risk prevention phase.

More specific advances in DRR have been achieved with the establishment of the new Union Civil Protection Mechanism (UCPM) by Decision 1313/2013.<sup>34</sup> One of the main innovations of the UCPM in fact concerns disaster preparedness and arises from the creation of a European Emergency Response Capacity in the form of a ‘voluntary pool of pre-committed response capacities of the Member States’.<sup>35</sup> The Emergency Response Coordination Centre, based at the Commission’s headquarters, then ensures permanent monitoring and immediate reaction, and through the MIC collects, analyses and disseminates real-time information on disasters.

The brand-new instrument also has a strengthened focus on disaster prevention activities.<sup>36</sup> This is clearly evident in the preamble, where it is affirmed that the EU should ‘aim at achieving a higher level of protection

<sup>32</sup> Earlier, EU civil protection actions and legislation were based on the catch-all provision of art 308 TEC.

<sup>33</sup> EU action is aimed to ‘support and complement MS’ action at national, regional and local level’ (art 196.1 a) TFEU). Art 196.2 also emphasises that, accordingly, ‘any harmonisation of the laws and regulations of the Member States’ is excluded.

<sup>34</sup> Cf Decision 1313/2013/UE of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism. On 16 October 2014, this decision was complemented by the implementing Decision 2014/762/EU on the functioning of the UCPM.

<sup>35</sup> Decision 1313/2013, art 11.1.

<sup>36</sup> ‘This was the first time that disaster risk reduction measures were included as legally binding elements of regional legislation’ (UNISDR, *Annual Report 2013*, 2013 17).

and resilience against disasters [...] by fostering a culture of prevention'. The prevention phase is then the object of Chapter II, which puts a particular emphasis on national provisions relating to risk assessment and risk management planning. Participating States, whose primary responsibility in the civil protection domain is explicitly acknowledged,<sup>37</sup> are required to share their national risk assessments, develop disaster risk management planning and share assessments of their national risk management capability.<sup>38</sup> Additionally, on a voluntary basis, they shall 'participate [...] in peer reviews on the assessment of risk management capability'.<sup>39</sup> The Commission, for its part, has been assigned a supporting role with the overall objective of guaranteeing an effective and coherent approach to DRR.<sup>40</sup>

The UCPM is a manifestation of solidarity both inside and outside the EU.<sup>41</sup> First of all, it also involves some non-EU MS. Secondly, assistance through the Mechanism can be requested by *any* affected country, as well as by international organisations.<sup>42</sup> With respect to interventions outside the Union, the Decision highlights the need for the Mechanism 'to promote consistency in international civil protection work' of all actions undertaken by the EU and its MS. Nonetheless, the limits of the EU competence *in subjecta materia* are expressly recalled by the Decision.<sup>43</sup>

By and large the Mechanism has proved effective. However, in an effort to develop a more integrated DM approach, on November 2017 the Commission proposed some targeted changes.<sup>44</sup> Regarding DRR, the changes seek to ensure stronger national prevention strategies by engaging MS, with the Commission's assistance, in reviewing and making them

<sup>37</sup> Art 1.3.

<sup>38</sup> On the basis of art 5 f), specific Risk Management Capability Assessment Guidelines were made available on 8 August 2015 ((2015/C 261/03)).

<sup>39</sup> Art 7 d).

<sup>40</sup> Cf art 5.1.

<sup>41</sup> Another important innovation of the Lisbon treaty concerning disasters is the solidarity clause (art 222 TFEU), which poses a clear-cut obligation on MS and the EU to 'act jointly in a spirit of solidarity if a member State is [...] the victim of a natural or manmade disaster'. A reference to such clause is made by the same Decision 1313/2013, which affirms that the UCPM 'should also contribute to the implementation of Article 222 [TFEU], by making available its resources and capabilities as necessary' (preamble, para 4).

<sup>42</sup> Cf arts 15.1, 16.1 of Decision 1313/2013.

<sup>43</sup> Cf art 16.9.

<sup>44</sup> COM(2017)772.



available, and to provide closer cooperation and synergies with other EU disaster prevention policies. More importantly the proposal, while reiterating MS's primary responsibility in DM, identifies in the promotion of inter-MS solidarity ex Art. 3.3 TEU the ultimate objective of the UCPM and to that end accords an increased coordinating role to the Commission.

#### 4. *The Sendai Framework for Disaster Risk Reduction*

Building on the Yokohama Strategy and the HFA, the Sendai Framework for Disaster Risk Reduction 2015-2030 (SFDRR) was adopted at the Third UN World Conference on Disaster Risk Reduction held in Sendai, Japan, in March 2015, and subsequently endorsed by the GA.<sup>45</sup>

The SFDRR extensively broadens the scope of DRR by covering any 'risk of small-scale and large-scale, frequent and infrequent, sudden and slow-onset disasters caused by natural or man-made hazards, as well as related environmental, technological and biological hazards and risks'.<sup>46</sup> Moreover, its adoption consecrates the definitive passage from disaster management to risk management, enhanced resilience and, most importantly, the prevention of *new* risks.<sup>47</sup> The overarching objective is to achieve '[t]he substantial reduction of disaster risk and losses in lives, livelihoods and health and in the economic, physical, social, cultural and environmental assets of persons, businesses, communities and countries'.<sup>48</sup> Disaster risk is herein understood 'in all its dimensions of exposure, vulnerability and hazard characteristics',<sup>49</sup> and it is established that the reduction of risks can be achieved through one or more of these three variables. Accordingly, the document highlights the need to reduce major global disasters' 'risk drivers', such as climate change, development, poverty and inequality, and to opt for cross-sectoral approaches in order to address disaster risks.

<sup>45</sup> Cf UN GA A/RES/69/283 of 23 June 2015.

<sup>46</sup> SFDRR, para 15. In contrast, the scope of the HFA merely encompassed 'disasters caused by hazards of natural origin and *related* environmental and technological hazards and risks' (HFA, 1 fn 3, emphasis added).

<sup>47</sup> Its main goal is indeed to '[p]revent new and reduce existing disaster risk' (SFDRR, para 17).

<sup>48</sup> SFDRR, para 16.

<sup>49</sup> M Wahlström, 'Foreword' in SFDRR.

In stark contrast to the HFA, which contained no reference to human rights, the SFDRR recognizes explicitly the existence of a link between DRR and human rights in its Guiding Principles,<sup>50</sup> where it ‘requires that in taking all the necessary measures to prevent and reduce disaster risk, states and all other stakeholders promote and protect all human rights’.<sup>51</sup> Of relevance is also the fact that one of the seven global targets set by the document, by requiring the substantial increase ‘of the availability of and access to multi-hazard early warning systems and disaster risk information and assessments to people by 2030’,<sup>52</sup> indirectly evokes the importance of the rights to information and participation as the basis for the needed ‘multi-hazard approach and inclusive risk-informed decision-making’<sup>53</sup> which should inform DRR. Accessibility and inclusivity are moreover distinctive features of the SFDRR, which also emphasises the importance of women’s participation for effective disaster risk policies and programmes.<sup>54</sup>

Another difference between the two frameworks concerns implementation and accountability. At the time of its adoption, the HFA was greeted as a success since it provided a universally agreed plan of principles for international cooperation on DRR. However, it was a very loose framework which accorded a great deal of flexibility in the implementation stage, as shown by the caveat ‘as appropriate, to their own circumstances and capacities’.<sup>55</sup> Such a limitation could only partially be explained by the need to recognize the big differences among countries in hazards and vulnerabilities, as well in the funds available to implement DRR measures.<sup>56</sup> More fundamentally, it denoted States’ resistance to commit in an area traditionally regulated by domestic legislation, and the limited, albeit growing willingness of affluent States to provide technical and financial assistance for DRR activities. In response to the mentioned

<sup>50</sup> SFDRR, para 19 c).

<sup>51</sup> UNISDR, *Reading the Sendai Framework for Disaster Risk Reduction 2015–2030* (2015) 13 <[www.unisdr.org/we/inform/publications/46694](http://www.unisdr.org/we/inform/publications/46694)>.

<sup>52</sup> SFDRR, para 18 g).

<sup>53</sup> SFDRR, para 19 g).

<sup>54</sup> SFDRR, para 36 a)(I).

<sup>55</sup> HFA, para 15.

<sup>56</sup> As instead suggested by L Corredig, ‘Effectiveness and Accountability of Disaster Risk Reduction Practices: An Analysis through the Lens of IN-LAW’ in A Berman, S Duquet, J Pauwelyn, RA Wessel, and J Wouters (eds), *Informal International Lawmaking: Case Studies* (Torkel Opsahl Academic EPublisher, 2012) 474.



gaps, the SFDRR contains several references to strengthening mechanisms, setting of standards, defining laws, legislation and plans, reporting duties etc.<sup>57</sup> More fundamentally, it lays down a set of seven global targets against which progress should be measured. As a matter of fact, these targets are quite vague: they indeed refer only to ‘substantial’ qualifiers of advancement and do not specify the quantitative degrees of progress to be made. Nonetheless, the SFDRR acknowledges this lacuna and anticipates that the targets ‘will be complemented by work to develop appropriate indicators’.<sup>58</sup> A series of 38 global indicators was then developed by an Open-ended Intergovernmental Expert Working Group (OIEWG) and endorsed by the GA in February 2017.<sup>59</sup> As was explained by the OIEWG’s Rapporteur, these indicators ‘are very important in that they provide, for the first time, a basic structure for an international system to record disaster losses and set minimum standards that can be implemented by any country’.<sup>60</sup> The establishment of globally comparable and objective indicators certainly constitutes undeniable progress with respect to the HFA, whose monitoring tool – the HFA Monitor – was based on self-assessment and did not allow for international benchmarking.

Having briefly analyzed the content of the SFDRR and its main innovations compared to the HFA, it is necessary to evaluate its formal relevance from the viewpoint of international law. As is known, there is a generalised tendency to qualify any sort of international non-binding instrument as pertaining to soft law. In international disaster law a variety of diverse acts and instruments such as multiple GA resolutions, the Sphere Project, the IFRC’s IDRL Guidelines and the three DRR frameworks for action have been considered as pertaining to soft law. Such a generalisation, however, can be highly misleading. In fact, apart from the

<sup>57</sup> Cf G Bartolini, T Natoli, A Riccardi, *Report of the Expert Meeting on the ILC’s Draft Articles on the Protection of Persons in the Event of Disasters 3* (2015) International Law and Disasters Working Papers Series 42, in which the various provisions on accountability are depicted as ‘extraordinarily strong’.

<sup>58</sup> SFDRR, para 18.

<sup>59</sup> OIEWG’s recommendations are contained in Report A/71/644ii (Dec 2016), which was endorsed by UN GA Resolution A/RES/71/276 of 2 February 2017.

<sup>60</sup> Cf ‘IN-DEPTH: Monitoring progress of the Sendai Framework for Disaster Risk Reduction’ 2 May 2017 <<http://climateobserver.org/depth-monitoring-progress-sendai-framework-disaster-risk-reduction/>>.

absence of binding character, soft law is still devoid of a generally accepted definition, thus remaining an elusive concept.

Alternatively, with respect to the HFA, the recourse to other categorisations have been proposed. According to the first proposal, the concept of ‘non-conventional concerted acts’ could be applied.<sup>61</sup> Elaborated by Schachter back in 1991, this category would cover diverse forms of concerted acts, different from treaties and customs, which share two basic elements: they are devoid of legal commitment and they are authored by States.<sup>62</sup> A second and more recent category, ‘informal international lawmaking’, is defined as ‘[c]ross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (process informality), and/or as between actors other than traditional diplomatic actors [...] (actor informality) and/or which does not result in a formal treaty or other traditional source of international law (output informality)’.<sup>63</sup> The HFA is considered a product of such informal lawmaking because its adoption was supported by the ISDR system ‘through activities that occurred outside of well-established channels involving, last but not least, uncommon entities not traditionally associated with lawmaking formalities’.<sup>64</sup>

The second proposal better captures the reality, since it takes account of the social changes that in the last two decades have also invested the international community, and the new forms of cooperation gaining ground in the same period. Moreover, both the HFA and the SFDRR undoubtedly have a certain normative value, as also attested to by the fact of being referred *inter alia* by regional binding DM instruments<sup>65</sup> and UN human rights treaty bodies.<sup>66</sup>

<sup>61</sup> As was proposed by A La Vaccara, ‘An Enabling Environment for Disaster Risk Reduction’, in De Guttry et al (n 5) 217.

<sup>62</sup> O Schachter, ‘Non-conventional concerted acts’, in M Bedjaoui (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff 1991) 266–269.

<sup>63</sup> J Pauwelyn, ‘Informal International Lawmaking: Framing the Concept and Research Questions’ in J Pauwelyn, RA Wessel, and J Wouters (eds), *Informal International Lawmaking* (OUP 2012), 22.

<sup>64</sup> Corredig (n 56) 502.

<sup>65</sup> The HFA and the SFDRR are referred, respectively, in the preamble of the AADMER (10th preambular para) and of the 2017 EU Commission Proposal amending the UCPM (13th preambular para).

<sup>66</sup> See in this respect Sommaro, Venier in this Zoom-in, at para 3.1.



A closer analysis and comparison of the negotiation processes of the HFA and the SFDRR, however, shows that States are – still – the main protagonists and the only veritable lawmakers of DRR. Contrary to other areas of international cooperation, such as public health protection, growing internationalisation was accompanied, if not even conditioned, by a renewed willingness of States to firmly control the lawmaking process. Both frameworks were adopted after a lengthy and multiform negotiating process which was characterised by the parallel undertaking of traditional, behind closed doors intergovernmental negotiations on one hand, and inclusive consultations involving various stakeholders and civil society actors on the other hand. In either case the decision-making power rested essentially on the governmental component. Moreover, the said component has gained in relevance over time. SFDRR's negotiations were indeed marked by a heightened politicization,<sup>67</sup> which is also evident in the notable increase of participating States (from 168 in Hyogo to 187) and in the number of heads of State or government who personally attended the final stage of the process in Sendai (over 25). Such politicization, and the consequent formality and top-down nature of the negotiation process, diminished the influence that DRR experts and practitioners were able to exert on the agenda compared to the HFA.<sup>68</sup>

5. *DRR in the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters*

DRR was also embraced by the International Law Commission (ILC) within the Draft Articles on the Protection of Persons in the Event of Disasters (DAs), which were adopted on their second reading in May 2016.<sup>69</sup> The works on the project began in 2008 but it was not until 2013 that the Special Rapporteur Valencia-Ospina focused on the pre-disaster phase, putting into practice his original intention to cover all the phases

<sup>67</sup> In this sense cf L Pearson, M Pelling, 'The UN Sendai Framework for Disaster Risk Reduction 2015–2030: Negotiation Process and Prospects for Science and Practice' (2015) 1 *Journal of Extreme Events*, 1571001-2.

<sup>68</sup> *ibid.* See also A T de la Poterie, M-A Baudoin, 'From Yokohama to Sendai: Approaches to Participation in International Disaster Risk Reduction Frameworks' (June 2015) *International Journal of Disaster Risk Science* 135.

<sup>69</sup> UN Doc A/71/10 (2016) chap IV.

of the disaster cycle. On the basis of a detailed review of the prevention principle in international law, Valencia-Ospina proposed two draft articles, related respectively to ‘Cooperation for disaster risk reduction’ and the ‘Duty to reduce disaster risk’.<sup>70</sup> In the final text only the second one has survived,<sup>71</sup> while a reference to cooperation in DRR can now be found in the commentary to Draft Art. (DA) 7 (Duty to cooperate). Such suppression inevitably diminishes the overall role of prevention in the context of the DAs. The latter, indeed, while also applying in the pre-disaster phase, are focused primarily on disaster response and – to a more minor extent – recovery.<sup>72</sup>

The remaining provision dedicated to DRR – DA 9 – is crucial however. It establishes unambiguously an obligation, posed on each State individually, to reduce the risk of disasters ‘by taking appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters’. Such a duty, expressed in broad terms, is based mainly on three kinds of sources: principles emanating from International Human Rights Law (IHRL), various instruments on DRR and climate change expressing States’ commitment to reduce disaster risks, as well as national policies and legal frameworks that incorporate DRR measures. Despite its broad scope, it has a flexible character and indeed its content is shaped by the *due diligence* standard typical of International Environmental Law (IEL) norms. Accordingly, it just requires the adoption of a certain conduct from States, leaving to them a margin of discretion as to the concrete measures to take, mainly at domestic level, for this purpose. The provision then lists three examples of DRR measures, namely: the conduct of risk assessments; the collection and dissemination of risk and past loss information; and the installation and operation of early warning systems. The said measures, essentially drawn from international human rights principles, are singled out because they reflect ‘the most prominent types of contemporary disaster risk reduction efforts’ whose relevance is ‘further confirmed by their inclusion in the Sendai Framework’.<sup>73</sup>

<sup>70</sup> Both articles were adopted on first reading without any change (cf DAs 10-11, A/CN.4/L.831).

<sup>71</sup> Even though its title was changed to ‘Reduction of the risk of disasters’.

<sup>72</sup> As highlighted by the ILC Commentary to DA 1, para 4.

<sup>73</sup> ILC Commentary, para 17.



As shown by the length of its commentary, DA 9 is based on an impressive amount of practice in different, but related areas of international law. Notably, it has the great value of condensing such practice in a basic, cross-cutting principle whose respect would allow in and of itself the achievement of one of the purposes of the whole project. Its late insertion in the DAs, though, is responsible for some inconsistencies or at best ambiguities, which may limit its function. For instance, the disaster notion perfectly epitomizes the reactive approach pervading the ILC project. Contrary to the SFDRR,<sup>74</sup> the DAs are applicable only to events reaching a rather high threshold of gravity.<sup>75</sup> Small-scale events, despite their frequency and destructiveness, thus risk being excluded from the draft's scope.<sup>76</sup>

To sum up, notwithstanding its structural limits, DA 9.1 can be considered to be among the most progressive and forward-looking provisions of the project. It is no coincidence that several States voiced their doubts regarding the customary character of the obligation to reduce disaster risks.<sup>77</sup> Even assuming that these doubts are (partly) founded, it cannot be denied that DA 9.1 has a strong basis in various norms and principles of IEL, IHRL and International Disaster Law (IDL).<sup>78</sup> Additionally, its flexible formulation does not make its application too burdensome for States.

It remains now to be seen what final form the project will take. In any case, the DAs have already proven to be an important contribution to the consolidation and development of IDL, first of all concerning DRR.<sup>79</sup>

<sup>74</sup> Cf SFDRR, para 15.

<sup>75</sup> Cf DA 3 a). On the issue cf G Bartolini, 'A Taxonomy of Disasters in International Law', in F Zorzi Giustiniani, E Sommario, F Casolari, G Bartolini (eds), *Routledge Handbook of Human Rights and Disasters* (Routledge 2018).

<sup>76</sup> Cf the concerns expressed by ISDR's Secretariat and IOM (A/CN.4/696). However, the ILC affirms in the commentary to DA 3 a) that 'the draft articles apply equally to [...] frequent small-scale events (floods or landslides)'.

<sup>77</sup> Cf ILC, Eighth Report on the Protection of Persons in the Event of Disasters, A/CN.4/697 (17 March 2016) para 193.

<sup>78</sup> On States' obligations to reduce disaster risks in IHRL see M Sossai, 'State Failure to Take Preventive Action and to Reduce Exposure to Disasters as a Human Rights Issue', in Zorzi Giustiniani et al (n 75).

<sup>79</sup> In 2014 the European Commission remarked that 'the progressive recognition at international level that prevention is a legal obligation (duty to prevent) through the development of international law by the International Law Commission concerning the "Protection of persons in the event of disasters" is [...] highly relevant and should be

This is also shown by the fact that the ILC works and the SFDRR's negotiations benefited from a mutual influence, to the point that the two final texts have been considered as complementary.<sup>80</sup>

#### 6. *Taking stock of DRR norms in international law*

As shown, DRR instruments have grown exponentially over time. In the last two decades DRR has become the most promising part of IDRL, which not coincidentally has been renamed IDL.

Apart from specific developments in IDL, though, there is a wide array of international law instruments which are relevant for DRR. This is notably the case with various IEL and IHRL treaties. The linkages among IDL, IEL and IHRL are indeed crucial for DRR, though not to the point of rendering them overlapping regimes.

IEL, which can be considered to be the forefather of DRR, since its birth was focused on technological disasters. IDL was born instead to counter the effects of natural disasters. With the increasing recognition that disasters, contrary to hazards, are always man-made, such distinction has vanished. Apart from that, IEL typically concerns disasters 'which involve major environmental harm and which also have some international dimension, either because they have transboundary impacts or because they affect a domain of shared international concern'.<sup>81</sup> In IDL, instead, disasters' distinguishing feature is the social disruption that a hazard may cause.<sup>82</sup> Despite the differences, following the expansion of DRR norms and the consequent growing preventative focus that now features IDL, the two branches have come closer, thus increasing the op-

used as a vehicle to improve the implementation of the post-2015 HFA' (COM(2014) 216 final, 8 April 2014 12).

<sup>80</sup> ISDR's Secretariat stated: 'there is a strong alignment and complementarity as well as a functional relation between the draft articles and the Sendai Framework, in that the former articulates the duty to reduce the risk of disasters and to cooperate, and the latter articulates modalities and measures that States need to adopt to discharge such duty' (A/CN.4/696).

<sup>81</sup> T Stephens, 'Disasters, International Environmental Law and the Anthropocene', Sidney Law School, Legal Studies Research Paper No 15/93 1.

<sup>82</sup> The social disruption element is present both in the disaster notion ex DA 3 a) and the one elaborated by the OIEWG in its Report on DRR terminology and indicators.



portunity to take full advantage of their complementary role. Accordingly, it has been suggested that ‘tying the fulfillment of IEL obligations directly into evolving disaster law practices including [DRR] efforts may offer useful approaches for managing hazards so that chronic environmental conditions do not create unnecessary risk’.<sup>83</sup> Moreover, IEL continues to be an important source of inspiration for IDL, which has borrowed extensively from it in laying down substantive as well as procedural obligations and standards.

As to IHRL, the existence of extensive human rights obligations in the field of DRR is nowadays widely recognized and the content of such obligations is in constant evolution and refinement. DRR could not be wholly encapsulated by IHRL but the latter ‘can and should strengthen disaster norms and institutions in two principal ways. First, [IHRL] sets out the minimum standards that the disaster risk reduction norms and institutions must meet. And, second, human rights institutions include mechanisms to promote compliance with those procedures and standards and to provide remedies when they are not met’.<sup>84</sup>

The exponential growth of DRR as part of IDL has contributed to the latter’s consolidation as a distinct field. At the same time, DRR concerns have increasingly been taken into account in other related fields. An active role in this respect was pursued by UNISDR, which has worked to ensure the mainstreaming of DRR into development goals and to advance the DRR agenda in the activities of the UN monitoring bodies and in the ILC works.<sup>85</sup> This process has culminated in 2015, with DRR taking centre stage, being the object of the first out of three major global development frameworks to be renewed that same year.<sup>86</sup> Such coinciding timetables were indeed doubly significant. First, they marked the official inclusion of DRR among the ‘common concerns’ of the international community. Secondly, they fuelled discussions about the need to

<sup>83</sup> Cf A Telesetsky, ‘Overlapping International Disaster Law Approaches with International Environmental Law Regimes to Address Latent Ecological Disaster’ in J Peel and D Fisher (eds) *The Role of International Environmental Law in Disaster Risk Reduction* (Brill 2016) 424.

<sup>84</sup> JH Knox, ‘Afterword: Environmental Disasters and Human Rights’ in Peel, Fisher (n 83) 466-7.

<sup>85</sup> UNISDR, *Annual report 2016* 13.

<sup>86</sup> The result of these negotiation processes were the SFDRR (March 2015), the Sustainable Development Goals (September 2015) and the Paris Agreement (December 2015).

create linkages and stimulate ‘coherence’ between DRR, climate change and sustainable development.

In recent times the asserted need to limit fragmentation and ensure coherence has become a *leitmotiv*. Fragmentation and coherence, however, are relative concepts: they ‘are not aspects of the world but lie in the eye of the beholder. [...] Novelty presents itself as “fragmentation” of the old world’.<sup>87</sup> Furthermore, the fragmentation or ‘collision’ which is caused by the increasing density of international law is not necessarily a negative phenomenon. It can generate synergies ‘in which the interaction of different areas of law produce better outcomes than if there were no interaction’.<sup>88</sup> This is well evidenced by the development of DRR-related norms, which also proves how the existence of multiple legal regimes can facilitate advancements in international cooperation. As to the much invoked coherence, on the contrary, the UN post-2015 agenda has shown the difficulties of pursuing an integrated approach to DRR, sustainable development and climate change.<sup>89</sup> A more practicable objective, in this respect, could be that of agreeing on a single *lingua franca* at the level of basic notions like adaptation, mitigation and vulnerability. This would facilitate a better understanding and convergence at both the negotiation process and the implementation and monitoring stages.

In conclusion, DRR by now permeates various areas of international law. In some fields, like IEL and IHRL, its presence was always latent but it has taken a concrete form only recently, in parallel with the development of proper DRR norms. With respect to the latter, the role of international law has grown within certain boundaries. Instruments like the SFDRR and the DAs, despite their non-binding character, reflect the importance that the international community assigns to DRR and the essential function that international cooperation is called to play in such a domain. Accordingly, international law now provides an overall framework

<sup>87</sup> ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi’ UN Doc A/CN.4/L.682 (13 April 2006) para 20.

<sup>88</sup> JP Trachtman, *The Future of International Law: Global Government* (CUP 2013) 217.

<sup>89</sup> In the final text of the SFDRR the call for coherence was reduced to a petition of principle following the removal of references to the Sustainable Development Goals and the Paris Agreement from all sections on implementation.



of principles and standards that can be said to be universally accepted by a whole range of State and non-State actors. At the same time, international lawmaking is firmly in the hands of States, whom have proved to be more and more cautious in relinquishing their powers in what they consider as largely in their domestic jurisdiction. And indeed, for the most part DRR is still governed by national legal orders.<sup>90</sup>

<sup>90</sup> Beyond a certain point cooperation can probably advance only at the regional level, as shown by the recent and relevant progresses achieved by ASEAN and the EU.

