

*Humanitarian Assistance from the Standpoint of
the Human Rights of the Disaster-Affected Individuals:
Present and Future Perspectives*

LL.M. Paper

Supervisor

Professor Nicolas Michel

Candidate

Maria Giovanna Pietropaolo

(Student Number: 11-342-615)

Academic Year 2012/2013

Table of Contents

Introduction.....	3
-------------------	---

Section I

The Adoption of a Human Rights-Based Approach to Humanitarian Assistance	6
1.1 Introducing the ‘Concepts’ of Humanitarian Assistance	6
1.2 The Emergence of IDRL and the Question of the Existence of a Human Right to Humanitarian Assistance	8
1.3 A Human Rights-Based Approach to Humanitarian Assistance through the Lens of the Component Rights	12
1.4 Humanitarian Assistance as a Stand-Alone Human Right	15
a) Right-holders.....	18
b) Duty bearers	19
c) Regulation	20

Section II

The Scenarios of Implementation of Humanitarian Assistance Operations	22
2.1 The Current Performance of Humanitarian Assistance Operations: Implementation of the Component Rights	22
a) The component rights of the affected individuals.....	23
b) The obligation of the affected state to grant the component rights.....	23
c) The obligation of the affected state to seek assistance	25
d) The obligation of the affected state not to arbitrarily withhold consent to the access of foreign aid	26
e) The right of the international community to offer humanitarian assistance.....	27
2.2 Strengthening the Protection of Persons Affected by Disasters: Legal Implementation of the Autonomous Right to Humanitarian Assistance	29
i. Self-Sufficient National Response Capacity of the Affected State	30
ii. Inadequate National Response Capacity of the Affected State	30
a) The affected individuals and groups’ human right to humanitarian assistance.....	31

b) The obligation of the international community to provide assistance: the positive dimension of the human right to humanitarian assistance	32
c) The obligation of the affected state not to prevent the access of international aid: the negative dimension of the human right to humanitarian assistance.....	33

Section III

The Changing Equilibrium Between Human Rights, Sovereignty and Solidarity.....	35
3.1 The Current Friction between Sovereignty and Human Rights	36
a) Security Council action under Chapter VII	37
b) The international responsibility of the affected state for its internationally wrongful acts	39
c) Human rights mechanisms	40
d) State of necessity as a ground for intervention	41
e) Individual criminal responsibility	42
3.2 The Human Right to Humanitarian Assistance: Expression of a New Equilibrium	43
Concluding Remarks.....	49
Chart A: Current Scenario of Implementation of the Component Rights in the Event of Disaster	52
Chart B: Humanitarian Assistance Operations in Case of Recognition of an Independent Human Right to Humanitarian Assistance	52
Bibliography.....	52

Introduction

The obstacles met in carrying out relief operations in post-disaster scenarios have proved that the international legal framework is ill-suited to adequately ease the plight of the disaster-affected individuals. Incoordination, improvisation and obstruction by sovereign states are among the reasons that have triggered a strong demand for the regulation of humanitarian assistance operations. As a consequence, a plethora of legal instruments have been adopted, merging into a new transversal branch of international law: International Disaster Response Law. The latter covers the codification of the commitments of states and other entities to post-disaster assistance and the adoption of efficiency-oriented measures to ease the delivery of aid. Its emergence has sanctioned the ‘adoption’ of the topic of humanitarian assistance in the international legal order.

Nevertheless, the new legal connotation of humanitarian assistance is merely expressed in the language of states’ obligations, concessions and entitlements. The affected individuals are recognized as needy but with no entitlement to assistance. This is mainly due to the current inexistence (though the issue is academically much debated) of a human right to receive humanitarian assistance.

The present work challenges this traditional approach. In dealing with humanitarian assistance the view angle is extended beyond the states, to the individuals affected by a disaster and their human rights. The shift of perspective is possible starting from the premise that disasters do not hit and destroy the existing human rights-framework but occur in it. Therefore, even in the absence of a human right to humanitarian assistance *per se*, it is possible to ‘import’ the whole existing corpus of human rights law into the framework of IDRL.

It is against this backdrop that two main questions are addressed in the present work. Whether it is possible to speak of an indirect human right to humanitarian assistance *de lege lata* and whether it is desirable, and eventually in which form, to recognize a direct human right to humanitarian assistance *de lege ferenda*.

The first part is introduced by a brief presentation of the main concepts preliminary to any reflection on humanitarian assistance. Before delving into the core of the topic, the disputed issue of the current existence of a human right to

humanitarian assistance is solved in the negative by way of a survey of the relevant sources of international law. Notwithstanding this defect, it is illustrated that the human rights-dimension of humanitarian assistance can be indirectly inferred from the so-called 'component rights' of humanitarian assistance (rights to life, food, health and medical services, water and sanitation, adequate housing and clothing). The indirect protection deriving from the component rights, it is argued, should not prevent us from reflecting on the contribution that the recognition of a direct human right to humanitarian assistance would offer. In order to demonstrate the possible advantages, a profile of a stand-alone human right to humanitarian assistance is outlined. Its structure is mainly based on suggestions that can be inferred from the extensive *corpus* of soft-law on the topic.

The analysis turns, in section II, to an illustration of the system of implementation of humanitarian assistance. Since the latter must be considered, as anticipated, a human rights-oriented operation, its performance must therefore be seen as a way to implement the human rights of the affected individuals. A comparison is presented between the juridical positions relevant in the present scenario based on the component rights and the prospective one centred on an autonomous human right to receive humanitarian assistance. The parallel between the two frameworks will highlight the innovations and practical advantages that would derive from the recognition of the new right.

In section III, the parallelism between the present and hypothetical human rights-dimension of humanitarian assistance, moves to the aspect of the theoretical placement in the international order. To this end, humanitarian assistance is approached as a combination of three fundamental principles, namely human rights protection, sovereignty and solidarity. From this perspective, it is possible to illustrate the inadequacy of the current scheme of implementation to represent the evolving equilibrium between the three components. The present system indeed, despite the envision of some balances, leaves sovereignty in the spotlight. Consequently, it overlooks the increasing importance of human rights protection and the 'constitutional' role which is being attributed to solidarity.

The recognition of an independent human right to humanitarian assistance, will be illustrated, would be an adequate expression of the new equilibrium in the regulation of humanitarian assistance.

The present work might, in conclusion, be described as an attempt to consider humanitarian assistance from the standpoint of human rights law, in the form of a dialogue between the current and future hypothetical human rights scenario of disaster-relief operations. The comparison triggers investigations on issues such as third-generation rights, sovereignty as responsibility and solidarity as a norm of the international order. As a result, these reflections inevitably offer food for thought and arguably provide elements to support the feasibility and desirability of the recognition of a stand-alone human right to humanitarian assistance.

SECTION I

The Adoption of a Human Rights-Based Approach to Humanitarian Assistance

1.1 Introducing the ‘Concepts’ of Humanitarian Assistance

The approach to humanitarian assistance adopted in the present paper paves the way to reflections on sensitive issues among which the evolving relevance of sovereignty and solidarity in the international legal order, the role of human rights obligations in times of emergency, the feasibility of the designation of new human rights, the innovative reach of the so-called third generation rights.

It is hence opportune to set the field of relevance of the herein exposed reflections by providing an accurate definition of humanitarian assistance. The latter indeed, due to its interdisciplinary and far-reaching field of application, is often too broadly understood and confused with institutes akin to it.

On a general note, the terms ‘humanitarian assistance’ refer to the:

“Opération menée par un ou plusieurs États, organisations intergouvernementales ou organisations non gouvernementales, tendant à procurer, dans le respect du principe de non-discrimination, des secours aux victimes, principalement civiles, des conflits armés internationaux ou non-internationaux, de catastrophe naturelles ou de situations d’urgence du même ordre”.¹

The wording “situations d’urgence du même ordre” lends the definition a dangerous open-ended character which must be limited by specifying what can be intended as the triggering element of the operations of humanitarian assistance, namely a disaster.

Several and heterogeneous have been the definitions suggested to this end.² In this context, it seems opportune to recall the explanation provided by the International Law Commission (hereinafter ILC) when dealing with its mandate on the

¹ J. Salmon (ed), *Dictionnaire de Droit International Public*, (Bruylant, Bruxelles 2001), p. 98.

² See for example, Institute of International Law, ‘Resolution on Humanitarian Assistance’, (Bruges, 2 September 2003), Section I, para.2. Available at http://www.idi-iiil.org/idiE/resolutionsE/2003_bru_03_en.PDF, last accessed 9 August 2013; Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (adopted 18 June 1998, entered into force 8 January 2005) UNTS No. 40906, art 1(6).

protection of persons in the event of disasters which largely corresponds to the topic under consideration.³

The ILC has defined disaster as “a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of the society”.⁴ It should be clarified that, for the purpose of this work, armed conflicts do not fit in the definition of disaster. Indeed the delivery of humanitarian assistance in wartime is regulated by International Humanitarian Law⁵ that, as *lex specialis*, removes conflict-related assistance from the present field of investigation.⁶

It is against this backdrop that the distinguishing features of humanitarian assistance must be understood. As to its object it consists, as above-indicated, in the consignment of relief. The latter can take a tripartite form, namely assistance in kind, financial assistance or the service of trained personnel.⁷ The content of the operation varies according to the needs arising in every specific situation but must necessarily concern goods and/or services which are indispensable for the survival, or to alleviate the suffering, of the disaster-affected population.⁸

The adherence to the humanitarian principles of humanity, neutrality and impartiality is a second distinguishing, mandatory feature, of humanitarian assistance. This is confirmed by the omnipresent reference which has been made

³ In 2006 the ILC was entrusted to designate a “legal framework for the conduct of international disaster relief activities”. United Nations Sixth Committee, International Law Commission (UNILC), ‘Report on the work of its fifty-eighth session’ (2006) UN Doc A/61/10, Annex C, para. 24.

⁴ UNILC ‘Report on the work of its sixty-second session’ (2010) UN Doc A/65/10, Chapter VII, p. 325.

⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949), 75 UNTS 287, arts 23, 59; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3, art 70; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 UNTS 609, art 18(2); J.M. Heanckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, (ICRC and Cambridge University Press, Cambridge 2009), Vol. I: Rules, rule 55.

⁶ For an analysis of the regulation of humanitarian assistance in international humanitarian law see M. Sassoli, A.A. Bouvier, A. Quintin, *How does law protect in war?*, (ICRC, Geneva 2011), Volume I, pp. 294-300.

⁷ P. Macalister-Smith, *International Humanitarian Assistance. Disaster Relief Actions in International Law and Organization*, (Martinus Nijhoff Publishers, Dordrecht 1985), pp. 3, 4.

⁸ J. Salmon (ed), *supra* note 1, p. 98.

by the General Assembly to them when dealing with the topic under consideration.⁹

Finally, noteworthy in order to delimit the field of investigation of the present work, is the distinction between humanitarian assistance and development aid. The two concepts differ indeed in the underlying motives and goals.¹⁰ Humanitarian assistance, which can be considered a synonymous of disaster relief,¹¹ is marked by two essential characters that it does not share with development aid and that justify its exceptional regulation, namely the short-term and urgent nature.

1.2 The Emergence of IDRL and the Question of the Existence of a Human Right to Humanitarian Assistance

The traditional understanding of humanitarian assistance as a charitable operation is being slowly undermined by a regulatory process that has led to a progressive attraction of the issue under exam in the juridical realm. This process, since the moment of its inception in 1927 with the adoption of the Convention establishing the International Relief Union,¹² has led to the adoption of more than 300 hard-law and soft-law instruments.¹³

The International Federation of the Red Cross and Red Crescent Societies (hereinafter IFRC), which has taken upon itself the task of analyzing this regulatory *corpus*, has named it ‘International Disaster Response Law’

⁹ United Nations General Assembly (UNGA) Res 43/131 (8 December 1988) UN Doc A/RES/43/131, preamble; UNGA Res 45/100 (14 December 1990) UN Doc A/RES/45/100, preamble; UNGA Res 46/182 (19 December 1991) UN Doc A/RES/46/182, principle 2; UNGA Res 59/141 (25 February 2005) UN Doc A/RES/59/141, preamble; UNGA Res 59/212 (3 March 2005) A/RES/59/212, preamble; UNGA Res 62/94 (25 January 2008) UN Doc A/RES/62/94, preamble.

For an analysis of the principles of neutrality, impartiality and humanity see UNILC, ‘Third report on the protection of persons in the event of disasters by Eduardo Valencia Ospina, Special Rapporteur’ (31 March 2010) UN Doc A/CN.4/629, paras 26-50.

¹⁰ F. Kalshoven, ‘Assistance to the victims of armed conflicts and other disasters: Introduction to the Conference Theme’ in F. Kalshoven (ed), *Assisting the victims of Armed Conflict and Other Disasters*, (Martinus Nijhoff Publishers, Dordrecht 1989), p. 21.

¹¹ P. Macalister-Smith, *supra* note 7, p. 3.

¹² Convention Establishing an International Relief Union (adopted 12 July 1927, entered into force 27 December 1932) 35 L.N.T.S 249.

¹³ For a list see UNILC, ‘Second Addendum to the Memorandum of the Secretariat on the Protection of Persons in the Event of Disasters’ (31 March 2008) UN Doc A/CN.4/590/Add.2.

(hereinafter IDRL).¹⁴ According to the IFRC, the core of IDRL covers “the laws, rules and principles applicable to the access, facilitation, coordination, quality and accountability of international disaster response in times of non-conflict related disasters which includes preparedness for imminent disaster and the conduct of rescue and humanitarian assistance activities”.¹⁵ The emergence of IDRL incontrovertibly proves the affirmed juridical character of humanitarian assistance in the current international legal order.

The question therefore arises if, as an effect of the regulation of disaster-relief operations and of the codification of the commitments of some states and other entities, it can be argued that the disaster-affected individuals have been granted a right to receive assistance.

In order to answer this question it is necessary to analyze, though briefly, whether this claim satisfies “the law-creating process of international law”;¹⁶ whether, in other words, the existence of the right under exam has been acknowledged by international treaty or custom.¹⁷

With reference to treaty-law, a form of recognition (despite being indirect because drafted in the language of states’ obligations) can be found in article 23 of the African Charter on the Rights and Welfare of the Child,¹⁸ in article 11 of the International Convention on the Rights of Persons with Disabilities¹⁹ and in article

¹⁴ In 2001 the IFRC launched the International Disaster Response Laws, Rules and Principles (IDRL) Programme with a view to improve the contribution that the existing legal framework could offer to the delivery of humanitarian aid. The Programme led to the adoption of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance at the thirteenth International Conference of the Red Cross and Red Crescent Movement. Available at <http://www.pacificdisaster.net/pdnadmin/data/documents/1878.html>, last accessed 14 August 2013.

¹⁵ IFRC, ‘International Disaster Response Laws (IDRL): Project Report 2002-2003’ (2003), p. 15. Available at http://www.icrc.org/eng/assets/files/other/idrl_report_final_ang.pdf, last accessed 3 August 2013.

¹⁶ R. J. Hardcastle, A. T. L. Chua, ‘Humanitarian assistance: towards a right of access to victims of natural disasters’ (1998) 38 *International Review of the Red Cross* 589, p. 3.

¹⁷ Treaties and custom must indeed be considered as the two “sources of law from which international human rights protection is derived”. W. Kälin, J. Künzli, *The Law of International Human Rights Protection*, (Oxford University Press, Oxford 2011), p. 37.

¹⁸ African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/24.9/49 (1990).

¹⁹ International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UN Doc A/61/49.

9(2)(b) of the Kampala Convention.²⁰ However no similar recognition of a human right to humanitarian assistance is spelled out in a universally binding and general treaty.

Conversely, a plethora of soft-law instruments expressly mention the right under exam. An illustrative, yet incomplete, list includes, in chronological order, the Resolution of the First International Conference of Humanitarian Law and Moral (1987);²¹ the Principles on Humanitarian Assistance adopted by the San Remo International Institute of Humanitarian Law (1992);²² the Code of Conduct for International Red Cross and Red Crescent Movements (1994);²³ the so-called “Monhok Criteria” (1995);²⁴ the Guiding Principles on Internal Displacement (2001);²⁵ the Institute of International Law Resolution on Humanitarian Assistance (2003).²⁶

Taken together, those instruments can become relevant for our analysis only as evidence of state practice. Indeed, due to the absence of a general recognition of the right to humanitarian assistance in treaty-law, it is to the customary source that the analysis must turn.

For a norm to be considered customary, it must be supported by extensive and virtually uniform state practice guided by the perception of its legally binding character.²⁷ The multitude of inter-state agreements adopted with a view to regulate disaster relief operations and the help provided by the international

²⁰ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 22 October 2009, entered into force 6 December 2012), (Kampala Convention), art 9(2)(b).

²¹ Première Conférence Internationale de Droit et Morale Humanitaire, sous l'égide de Médecins du Monde et de la Faculté de droit de Paris-Sud, ‘Résolution sur la reconnaissance du devoir d'assistance humanitaire et du droit à cette assistance’ (28 January 1987) in M. Bettati, B. Kouchner, *Le devoir d'ingérence*, (Éditions Denoël, Paris 1987), pp. 291, 292.

²² San Remo International Institute of Humanitarian Law, ‘Principes Directeurs Concernant le Droit à l'Assistance Humanitaire’, 804 *International Review of the Red Cross* 548 (1993).

²³ IFRC and ICRC, ‘Code of Conduct for International Red Cross and Red Crescent Movements and Non-Governmental Organizations in Disaster Relief’ (1994) principle 1. Available at <http://www.ifrc.org/Global/Publications/disasters/code-of-conduct/code-english.pdf>, last accessed 3 August 2013.

²⁴ The “Monhok Criteria” are the outcome of the meetings held in 1993 by the Task Force on Ethical Humanitarian Assistance established by the World Conference on Religion and Peace. They were published in 17 *Human Rights Quarterly* 192 (1995).

²⁵ Economic and Social Council (ECOSOC), ‘Guiding Principles on Internal Displacement’ (22 July 1998) UN Doc E/CN.4/1998/53, principle 3.2.

²⁶ Institute of International Law, *supra* note 2. .

²⁷ See *North Sea Continental Shelf Cases (Federal Republic Of Germany/Denmark; Federal Republic Of Germany/Netherlands)* ICJ, Judgement of 20 February 1969, para. 74.

community to disaster-affected populations, support the acknowledgement of the existence of the first element for custom.²⁸ It suffices to mention, as an illustrative example, the 150 million dollars in aid pledged by 52 donor states to the cyclone devastated Myanmar in 2008.²⁹ The relevant practice is even more copious if one accepts that the required material element for custom should not be identified solely in the behaviour of the states to the detriment of the practice of non-state actors. Indeed a major role in disaster relief operations is notoriously played by organizations such as the United Nations, the IFRC, Médecins sans frontières and several regional intergovernmental ones.³⁰

However, as Hardcastle and Chua have underlined, the problematic aspect concerns the fact that the “willingness of States to render assistance does not necessarily imply the existence of a right under International law for victims of natural disasters to receive humanitarian aid”.³¹

With a view to clarify the point in question, an investigation of the response of the international community to the restrictions imposed by the government of Myanmar to the access of international assistance in the wake of the cyclone Nargis in 2008, has been conducted. The analysis aimed at assessing whether the obstruction of relief operations has been considered a violation of the right under consideration. A survey of the public statements made by officials representing states, international, regional and non-governmental organizations, has showed that, besides one isolated case,³² no other voice was raised recognizing the entitlement of the individuals affected by the cyclone to receive humanitarian assistance. Instead, the refusal of foreign aid was condemned as a violation of the rights to life, food and health.³³ Moreover, the international community has not

²⁸ Hardcastle, Chua, *supra* note 16, p. 5.

²⁹ S. Mydans, ‘Donors Press Myanmar to Let Aid Workers In’ *New York Times* (26 May 2008). Available at http://www.nytimes.com/2008/05/26/world/asia/26donor.html?ref=cyclonenargis&_r=0, last accessed 17 August 2013.

³⁰ Hardcastle, Chua, *supra* note 16, pp. 3, 4.

³¹ *Idem*, p. 5.

³² Joint communiqué issued by the Ministry of Foreign and European Affairs and the (French) Ministry of Defence (Paris 15 May 2008). Available at <http://www.ambafrance-uk.org/Bernard-Kouchner-on-Burma-disaster.html>, last accessed 15 August 2013.

³³ See for example Amnesty International, ‘Myanmar Briefing. Human Rights concerns a month after Cyclone Nargis’ (5 June 2008) AI-Index: ASA 16/013/2008. Available at

considered itself bound by an obligation to provide assistance stemming from a correspondent right of the disaster-affected individuals to be aided. In this respect, reference was only made to a moral obligation.³⁴

In light of the above, it is possible to conclude the analysis on the *de lege lata* existence of a right to humanitarian assistance in the negative, due to the absence of a general treaty or customary recognition. However, one should not forget that, first, humanitarian assistance is not, because of the absence of a human right to receive it, a *legibus soluta* operation. It enjoys indeed the support of the broad regulatory *corpus* mentioned abroad. Second, as the Myanmar case has shown, the absence of an autonomous right to humanitarian assistance is not a compelling reason for the abandonment of a human-rights-language when talking about humanitarian assistance.

1.3 A Human Rights-Based Approach to Humanitarian Assistance through the Lens of the Component Rights

It might be argued that, due to the exceptionality of the constraints to which a state affected by a natural disaster is subjected and because of the absence of an autonomous right to humanitarian assistance, the protection of its population by the affected state is a ‘human-rights free’ operation. On the contrary, the occurrence of a disaster in a given country does not *ipso facto* put the individuals affected by the disaster in a human-rights vacuum.³⁵ States are indeed “under *permanent* [emphasis added] and universal obligation to provide protection to those on their territory under the various international human rights instruments

<http://www.amnesty.org/en/library/asset/ASA16/013/2008/en/8592e938-32e5-11dd-863f-e9cd398f74da/asa160132008eng.html>, last accessed 3 August 2013.

³⁴ Emblematic is the statement of Mr Menzies Campbell, Former British Liberal Democratic Leader, who stated “I don't think we have any legal right to impose it [air drops]- we might have a moral obligation”. —, ‘Forcing aid to Burma “incendiary”’, BBC News, (9 May 2008). Available at http://news.bbc.co.uk/2/hi/uk_news/7391492.stm, last accessed 15 August 2013.

³⁵ The point in question was stressed in the Brookings-Bern Project on Internal Displacement, ‘Human Rights and Natural Disasters. Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster’ (March 2008), p.2. Available at <http://www.refworld.org/docid/49a2b8f72.html>, last accessed 4 August 2013.

and customary international human rights law³⁶ and therefore even when disasters strike.

What are therefore the human rights that the affected individuals can claim *vis à vis* the affected state in these situations, keeping in mind the current impossibility to identify a right to receive humanitarian assistance? The adoption of a human rights-based approach is, in these occasions, justified on the basis of the so-called ‘component rights’ to humanitarian assistance.³⁷ In other words the rights that represent the legal entitlements to the satisfaction of those needs that are at the basis of humanitarian assistance operations.

The appellation of component rights can be attributed to two main groups of rights. The first one, concerning the civil and political dimension, encompasses the right to life which legitimizes the affected individuals to demand from the state the protection necessary for their life not to be jeopardized in case of disaster.³⁸ As to the second category, it pertains to the socio-economic aspect and refers to the subsistence rights i.e. the rights to food,³⁹ health and medical services,⁴⁰ water and sanitation,⁴¹ adequate housing and clothing.⁴²

³⁶ UNILC, ‘Preliminary report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur’ (5 May 2008) UN Doc A/CN.4/598, para. 25.

³⁷ D. Fisher, ‘The Right to Humanitarian Assistance’ in W. Kalin and others (eds), *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges*, (The American Society of International Law, Washington 2010), p. 53.

³⁸ Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948) UNGA Res 217 A (III), UN Doc. A/810 (1948), art 3; International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 6.

³⁹ UDHR, article 25(1); International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force 3 January 1976) 992 UNTS 3, art 11(1). The right to food is therein recognized as an element of the right to an adequate standard of living.

⁴⁰ UDHR, art 25(1); ICESCR, art 12. The provision expressly refers only to the right to the “highest attainable standard of health” but it implies the right to have access to the goods and services (including medicines and medical care) necessary for its realization. See Committee on Economic Social and Cultural Rights (CESCR), ‘General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)’ (11 August 2000) E/C.12/2000/4.

⁴¹ The right to water is not expressly recognized in the ICESCR but was first recognized by the CESCR in General Comment No 6 and then analysed in depth as an element of the right to an adequate standard of living in General Comment No 15. As to the right of sanitation, it was also recognized as a component of the right to an adequate standard of living and as related to the rights to health and housing. See CESCR, ‘General Comment 15: The right to water (arts. 11 and 12 of the Covenant)’ (20 January 2003) UN Doc E/C.12/2002/11; CESCR, ‘Statement on the Right to Sanitation’ (18 March 2011) UN Doc E/C.12/2010/1, para. 7.

⁴² UDHR, art 25(1); ICESCR, art 11 for the right to sufficient clothing and housing as elements of the rights to an adequate standard of living.

The presented list of component rights reproduces the one suggested by the Special Rapporteur on the protection of persons in the event of disasters. Ospina, ‘Preliminary report’, *supra* note 36, para. 26.

Disaster-affected states maintain the peremptory obligation to respect, protect and fulfill them,⁴³ abstaining from any discrimination founded on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁴⁴

The question arises, at this point, on how to justify the continuing relevance of the component rights in post-disaster scenarios. The doubt is particularly relevant considering that natural disasters might, *in abstracto* and if the other relevant conditions are met,⁴⁵ justify derogations by the affected states.⁴⁶ In order to answer this question, a distinction must be made between the two categories of component rights.

With reference to the right to life, the state’s obligation is not subjected to any exception due to its non-derogable character.⁴⁷ Moreover, the right under exam acquires particular relevance in light of the broad interpretation that the Human Rights Committee (hereinafter HRC) has provided. Accordingly, the right to life implies, in addition to the duty to respect it, the obligation to take positive action for its protection and fulfillment.⁴⁸ Similarly, the European Court of Human Rights has stressed that the right to life implies a positive obligation for the state to adopt measures aimed at saving the lives of the right-holders also in case of disaster.⁴⁹

⁴³ Ospina, ‘Preliminary report’, *supra* note 36, para. 26. On the subdivision of the human rights obligations in 3 categories (respect, protect and fulfill) and on their different positive/negative nature see Kälin, Künzli, *supra* note 16, pp. 96, 97.

⁴⁴ ICCPR, art 2(1); ICESCR, art 2(2).

⁴⁵ It should be proved, in addition to the existence of a state of emergency, that the derogation is proportional, non-discriminatory and consistent with the other international obligations of the derogating state. As to the procedure, it should be officially and validly proclaimed and notified. Kälin, Künzli, *supra* note 17, pp. 144-148.

⁴⁶ UN Human Rights Committee (HRC), ‘General Comment 29: Article 4: Derogations during a State of Emergency’ (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11, para. 5.

For an analysis of the possibility for states to derogate from human rights treaties in case of natural disaster see E. Sommaro, ‘Derogations from Human Rights Treaties in Situations of Natural or Man-Made Disasters’ in A. de Guttry, M. Gestri, G. Venturini (eds), *International Disaster Response Law*, (Springer, T.M.C. Asser Press, The Hague 2012), pp. 323-352.

⁴⁷ The right to life is expressly labelled as non-derogable in all major human rights instruments containing a derogation clause. See, for example, ICCPR, art 4(2); IACHR, art 27(2); ECHR, art 2(2).

⁴⁸ HRC, ‘General Comment 6: Article 6 (Right to Life)’ (30 April 1982), UN Doc HRI/GEN/1/Rev.1 at 6 (1994), para. 5.

⁴⁹ *Öneryildiz v. Turkey*, European Court of Human Rights (ECtHR), Judgment of 30 November 2004, para. 71; *Budayeva and Others v. Russia*, ECtHR, Judgment of 20 March 2008, paras 128-137.

For what concerns the subsistence rights, as the Committee on Economic, Social and Cultural Rights (hereinafter CESCR) has indicated in its General Comment no 12, the entitlement to their fulfillment is opposable to the state also by those persons that are victims of a disaster.⁵⁰ Unquestionably the types of catastrophes considered in the present paper, can substantially affect the capacity of the affected state to progressively implement the subsistence rights as required by the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR).⁵¹ Nevertheless, no disaster, crisis or exceptional situation of any type which affects the economic and political capacity of a state can justify the non-fulfillment of the minimum obligation of every economic, social and cultural right.⁵² From this core component no derogation is considered to be admissible.⁵³ States have indeed, with reference to the right to food seen as an illustrative example, “a core obligation to take the necessary action to mitigate and alleviate hunger [...], even in times of natural or other disasters”.⁵⁴

1.4 Humanitarian Assistance as a Stand-Alone Human Right

For as strong the protection that can currently be inferred from the component rights is, it entails some important shortcomings. First non-affected states are not seen as duty-bearers to the benefit of the victims of disasters occurring outside their own territory. Secondly, when the international community is ready to provide assistance but meets the opposition of the affected state, it is burdensome

On the customary nature of the positive obligations deriving from the right to life see K. Luopajarvi, ‘Is there an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?’ (2003) 15 *International Journal of Refugee Law* 678, pp. 693, 694. Luopajarvi argues that, at least with respect to threats deriving from the right to life by the action of private actors, the customary nature of the obligation is undeniable.

⁵⁰ CESCR, ‘General Comment 12: The Right to Adequate Food (Art. 11 of the Covenant)’ (12 May 1999), E/C.12/1999/5, para. 15.

⁵¹ ICESCR, art 2(1).

⁵² CESCR, ‘General Comment 3: The nature of States parties obligations (art. 2, par.1)’ (14 December 1990), E/1991/23, para 10.

⁵³ The ICESCR does not contain any provision concerning the possibility to derogate from the rights in it sanctioned. Nevertheless, the survey of states practice and doctrinal writings has led Muller to identify a trend showing that among the rights recognized in the ICESCR, only the labour rights (contained in article 8) are derogated from. Conversely all the others, at least in their minimum content, are not considered as derogable. A. Muller, ‘Limitations to and Derogations from Economic, Social and Cultural Rights’, (2009) 9 *Human Rights Law Review* 557, pp. 597-599.

⁵⁴ CESCR, ‘General Comment 12’, para 6.

and extremely hard to circumvent the opposition and reach the people in need. These and similar reasons, illustrate the desirability of the recognition of a direct human right to receive humanitarian assistance in order to enhance the victims' protection.

The freedom in the recognition of new human rights has been limited by the General Assembly with the adoption of resolution 41/120. Its article 4 enumerates five requirements that new international human rights instruments should comply with.⁵⁵

The latter must be first, consistent with the existing body of international human rights law and second, of fundamental character. An instrument dealing with the right to humanitarian assistance would, thanks to the interrelation existing between the new right and the component rights, clearly satisfy both requirements. The essential auxiliary role that humanitarian assistance plays with reference to already recognized human rights, illustrates indeed the aptness and essentiality of the recognition of the right under exam in the international legal order.

Article 4 additionally requires a sufficiently precise definition so to give rise to identifiable and practicable rights and obligations; where appropriate, a functioning implementation machinery and finally the capacity of the new right to attract broad international support. It could be argued that the most appropriate measure to attain the required level of precision and clarity would be the adoption of a treaty (arguably in the form of a protocol extending the range of protected human rights by existing Covenants).⁵⁶ Furthermore, the concerted efforts of the states involved in the drafting process (when broadly sponsored) could presumably prove underlying wide international support. It seems therefore appropriate to advocate for the adoption of a general binding instrument which

⁵⁵ UNGA, Res 41/120 'Setting international standards in the field of human rights' (4 December 1986) UN Doc A/RES/41/120, art 4.

⁵⁶ The practice of adopting additional protocols to widen the set of protected rights while at the same time broadening the competence of the monitoring mechanisms is common, for example, to the Council of Europe's ECHR and to the ICCPR.

On the importance of the adoption of a Convention to this end see also D.D. Tansley, *An Agenda for the Red Cross: Final Report: Reappraisal of the Role of the Red Cross*, (Henry Dunant Institute, Geneva 1975), p. 80.

accurately recognizes and strictly regulates the implementation of a human right to humanitarian assistance, so to meet the standards set by the General Assembly. Before dealing with a possible structure of the right, some issues pertaining to its substance should be addressed. The right to humanitarian assistance would not be an indirect right which finds its legal basis in the component rights (as it could be argued that it currently is),⁵⁷ but it would have its own self-standing relevance. As such, it would not be a secondary right, as affirmed by the members of the so-called ‘alternative’ trend of the academic debate on humanitarian assistance.⁵⁸ According to this school of thought, humanitarian assistance is more “a sort of substitutive procedure”⁵⁹ to the component rights than a right *per se*. On the contrary, notwithstanding the fact that it would become relevant when and if the component rights are violated, the human right to humanitarian assistance should be considered a primary right similarly to the right to an effective remedy. Once the substance of the right has been clarified, it is possible to move to its content. The remaining part of this section is indeed an attempt to infer from an analysis of the existing soft-law instruments and ongoing debates on the topic involving academics, practitioners and representatives of states, a structure (among the several constructions that could possibly be imagined) of the human right to humanitarian assistance. Far from aspiring to provide an exhaustive definition and regulation of the new right (the inter-disciplinary nature of the issue would indeed require the concerted efforts of technicians from several fields), the purpose here is to present an outline of the right touching upon three main aspects, namely the identification of the right-holders, duty-bearers and of a possible regulation of its implementation. Reference is made to the following sections of the paper for an in-depth analysis of the juridical and theoretical aspects relevant to the conceptualization of the right.

⁵⁷ See A. Creta, ‘A (Human) Right to Humanitarian assistance in Disaster Situations? Surveying Public International Law’ in *International Disaster Response Law*, *supra* note 46, p. 373.

⁵⁸ *Idem*, pp. 370-373, on the debate between “Deniers, Advocates and ‘Alternatives’”.

⁵⁹ M. Domestici-Met, Intervention in *Le Droit à l’Assistance Humanitaire. Actes du Colloque international organisé par l’UNESCO*, (UNESCO, Paris 1996), p. 88.

a) Right-holders

The identification of the addressees of protection demands an elaboration on a traditional aspect pertaining to the right under exam, namely its alleged belonging to the so-called ‘third generation of human rights’.⁶⁰ Without dealing with the appropriateness (or lack thereof) of a categorization of human rights in three generations,⁶¹ it suffices to say here that agreeing with the idea that humanitarian assistance belongs to the solidarity rights group would imply taking an unnecessary⁶² stand on the collective nature of the right.

It can indeed be observed that, to label it as a ‘people’s right’ would be hard, if not impossible because impossible is to identify *a priori* a group of people which is the addressee of protection. Indeed the people affected by a disaster do not necessarily share any national, social or other pre-existing character. What associates them is the fact of finding themselves in the area hit by a disaster at the moment of its occurrence. Moreover the adoption of a collective/individual dimension as a mutually exclusive operation is unhelpful and it was in fact compared to “tilting an imaginary windmill”.⁶³

As explained by Keba Mbaye,⁶⁴ for some human rights it is possible to foresee a dual individual/collective dimension. This seems the best approach for the right under consideration that extends beyond the unquestionable individual aspect,⁶⁵ including “the individual victim’s right to receive his or her share of

⁶⁰ Indeed, since its inception, the debate on the existence of the right under exam has been framed in the terms of a solidarity-right issue. See Gros Espiell, ‘Les Fondements Juridiques du Droit à l’assistance Humanitaire’ in UNESCO, *supra* note 59, p. 18; S. P. Marks, ‘Emerging Human Rights: A New Generation for 1980s?’ (1981) 33 Rutgers Law Review 435; P. Alston, ‘Making Space for New Human Rights: The Case of the Right to Development’ (1988) 1 Harvard Human Rights Yearbook 3; K. Vasak, ‘Les Différentes Catégories des Droits de l’Homme’ in A. Lapeyre, F. De Tinguy, K. Vasak, *Les Dimensions Universelles Des Droits de l’Homme* (Bruylant, Bruxelles 1990).

⁶¹ For a criticism of this classification see P. Alston, ‘A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?’ (1982) 29 Netherlands International Law Review 307.

⁶² G. Triggs, ‘The Rights of ‘Peoples’ and Individual Rights: Conflict or Harmony?’ in J. Crawford (ed), *The Rights of Peoples*, (Clarendon Press, Oxford 1988), p. 155.

⁶³ *Idem*, p. 156.

⁶⁴ K. Mbaye, ‘Introduction to Part Four: Human Rights and Rights of People’ in M. Bedjaoui (ed), *International Law: Achievements and Prospects*, (Martinus Nijhoff Publishers, Paris 1991), p. 1053.

⁶⁵ Creta, *supra* note 57, pp. 367, 368.

the assistance and the collective right of the group to benefit from that assistance”.⁶⁶

b) Duty bearers

The obligation to provide humanitarian assistance could bind non-affected states *in primis* but could also extend to other subjects of the international community (international organizations, non-governmental organizations etc...). The centrality of their role in the delivery of humanitarian assistance is indeed highly renowned.⁶⁷

Since it would be inconceivable to impose on each and every member of the international community the same burden of obligations, the *an* and *quantum* of the duty to provide assistance should vary according to criteria such as resources-availability and physical or social proximity.⁶⁸

Along with the positive obligation of the international community, a negative one not to impede the access of humanitarian assistance should be imposed on the affected state. The recognition of the right to humanitarian assistance implies indeed not only the commitment to assist the victims of disasters occurring outside a state’s own territory, but also consenting *una tantum* to the access of foreign aid in each state’s territory when it is affected by a disaster and unable to adequately assist its population. The consent given by every state to this end when adhering to the instrument recognizing the relevant right would not constitute an exception to its sovereignty. On the contrary it would be an exercise of it, as will be developed *infra*, in line with the modern understanding that of sovereignty as responsibility Deng has first introduced.⁶⁹

⁶⁶ Marks, *supra* note 60, p. 450; see also Gros Espiell, *supra* note 60, pp. 19, 20.

⁶⁷ Their importance is also recognized by the General Assembly that has indeed invited states to work in cooperation with, among others, the International Federation of the Red Cross. UNGA Res 63/139 (5 March 2009) UN Doc A/RES/63/139, para. 7.

⁶⁸ G. Kent, ‘The Right to International Humanitarian Assistance’, (University of Hawaii, 2005), p. 17.

⁶⁹ F. Deng and others, *Sovereignty as Responsibility: Conflict Management in Africa*, (The Brookings Institution Press, Washington D.C. 1996).

c) Regulation

A realistic implementation of the right to humanitarian assistance requires a strict regulation of its practical aspects. With due consideration of the territorial sovereignty of the affected state and in order to avoid that the delivery of humanitarian aid is perceived as an illegitimate foreign intervention, it seems wise to agree with the suggestion to entrust neutral non-governmental organizations with the task to distribute relief-aid.⁷⁰ Clearly the affected state, so long as it does not obstruct the delivery of assistance, would maintain its coordinator role.

Furthermore, as to the corrective procedures relevant in case of violation, the existing monitoring and complaint human rights mechanisms (whose field of competence should be appropriately extended) could be relied on, as will be illustrated in section III.

To conclude, a definition of the human right to humanitarian assistance which takes into consideration the observations presented above can be suggested.

The human right to humanitarian assistance could be defined as the human right of the individuals and groups affected by a natural or similar disaster and inadequately supplied by the affected state, to receive humanitarian assistance by the international community. The latter should have an obligation to provide assistance, on the basis of the consent given *una tantum* by states by adhering to the treaty recognizing and regulating the right. Humanitarian assistance should be carried out in the respect of the agreed modalities and in compliance with the fundamental humanitarian principles of humanity, neutrality and impartiality.

In order for the above-mentioned definition, or any other plausible one, of a human right to humanitarian assistance to be adopted, the conceptual framework for its recognition should be first set. According to Marks the process of recognition of a new right normally starts by the formulation of a “law of ...”.⁷¹ This leads to the identification of “first the legal implications of the problem, then

⁷⁰ See, for example, Vasak, *supra* note 60, p. 316, art 22 and Hardcastle and Chua, *supra* note 16, pp. 7-8.

⁷¹ Marks, *supra* note 60, p. 442.

the human rights⁷² ones. Only at this point, it is possible to focus on the “reformulation of the whole problem in terms of a new human right”.⁷³

Transposing this method to the right under exam we can observe how the emergence of IDRL has contributed to the analysis of the legal implications pertaining to humanitarian assistance. Before being able to recognize the new right it is therefore necessary to take a further step, namely to identify the human rights implications. This expression can be interpreted as referring to an investigation of the practical and theoretical consequences which would be triggered by the adoption of the new right. It is to an analysis of these aspects that the next sections of the present work are devoted.

⁷² *Idem.*

⁷³ *Ibid.*

SECTION II

The Scenarios of Implementation of Humanitarian Assistance Operations

A meaningful way to assess the appropriateness of the recognition of the new right to humanitarian assistance is to consider relief operations as a mechanism to implement the human rights of the affected individuals.

Looking at the scenario of implementation from this human-rights perspective, this section analyzes how the juridical positions of the actors involved (affected individuals, affected state and international community) change from the current system based on the protection of the component rights (2.1) to the hypothetical one in which a human right to humanitarian assistance is recognized (2.2). The second part of the analysis will be conducted on the basis of the structure of the human right to humanitarian assistance as prospected in the previous section.

2.1 The Current Performance of Humanitarian Assistance Operations: Implementation of the Component Rights

Humanitarian assistance operations are currently carried out on the basis of the following juridical positions: the component rights of the affected individuals; the obligation to grant those rights on the part of the affected state or the duty to seek for foreign aid or not to arbitrarily decline the offer of it; the right of the international community to offer humanitarian assistance.

The juridical positions above presented have been transposed in the ILC draft articles on the protection of persons in the event of disasters and have been illustrated by the Special Rapporteur Ospina in his fourth report.⁷⁴ It can be stated indeed that, at least in this respect, the ILC has codified the existing legal framework without aiming at the advancement of international law.⁷⁵ The affinity of the following analysis with the structure followed by the ILC explains the

⁷⁴ UNILC, 'Fourth report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur' (11 May 2011) UN Doc A/CN.4/643.

⁷⁵ The Special Rapporteur has illustrated that the draft articles can have a dual role. Indeed, on the one hand they codify the existing legal framework of humanitarian assistance; on the other, they constitute "progressive development of international law". Ospina, 'Preliminary Report', *supra* note 36, para. 59.

parallelism which is often drawn with the draft articles in the illustration of the relevant juridical positions. A graphic presentation of the current system of implementation can be found in Chart A annexed to the present paper.

a) The component rights of the affected individuals

Relief operations revolve around one main objective, namely the protection of the affected individuals.⁷⁶ Accordingly, their component rights (rights to life, food, health and medical services, water, adequate housing and clothing) constitute the keystones of our current system of implementation of humanitarian assistance. A justification of their relevance also in catastrophic scenarios and an illustration of the positive action which is required for their fulfillment in disaster situations has been presented *supra* (1.3) and it is therefore appropriate to refer thereto.

b) The obligation of the affected state to grant the component rights

In order to comply with its international obligations concerning the component rights, the state affected by a disaster is bound to their respect, protection and fulfillment.⁷⁷

Prominence was given to this duty by the ILC that has indeed codified it in draft article 9.⁷⁸ Similarly the General Assembly has highlighted, in several occasions, the primary⁷⁹ responsibility of the affected states “in the initiation,

⁷⁶ The Special Rapporteur on the protection of persons in the event of disasters has indeed qualified the protection of the individual, which finds expression in the concern for human dignity and in the protection of human rights, as the ultimate goal and inspiration of the process of humanitarian assistance and, consequently, of the ILC’s activity. See Ospina, ‘Fourth report’, *supra* note 74, para. 78.

⁷⁷ Ospina, ‘Preliminary report’, *supra* note 36, para. 26.

⁷⁸ UNILC ‘Report on the work of its sixty-third session’ (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10, Chapter IX, draft art 9.

⁷⁹ The *primary* character of the obligation of the affected state to grant the component rights might lead to confusion. It must be clarified indeed that *primary* qualifies the priority in respect to the secondary obligations of the affected state arising in case of lack of adequate resources. It does not indicate the existence of a secondary obligation on the part of the international community. This point was stressed by some members at the ILC, concerned that such wording “could lead to unwarranted intervention” by non-affected states. UNILC ‘Report on the work of its sixty-second session’, *supra* note 4, para. 318.

organization, coordination and implementation of humanitarian assistance within their respective territories”⁸⁰.

The legal sources for the obligation under consideration can be numerous and heterogeneous and include the ICCPR, ICESCR, regional human treaties,⁸¹ custom or even those pieces of national legislation enacted in order to incorporate the component rights in the national systems.

In practical terms, the state is called to face the effects produced by the disaster on its population by employing the resources at its disposal in order to provide those who are in need with food, water, medicines, clothing and housing and to ultimately preserve their lives. The state must, “to the maximum of its available resources”,⁸² adopt measures and supply goods to meet the subsistence rights. However, the minimum core content of each of those rights enabling the affected individuals to live in dignity is the compulsory minimum threshold on the basis of which the compliance of the state with its international obligations is measured.⁸³

When the disaster-response capacity of the affected state is sufficient to meet at least the core content of the component rights of the affected individuals and to preserve their lives, the ‘humanitarian assistance relationship’ might terminate here. However, very often, the affected state is unable to autonomously cope with the devastating effects of a disaster. It is in this unfortunate and frequent hypothesis that the following additional juridical positions become relevant.

⁸⁰ UNGA Res 43/131, *supra* note 9, art 2; UNGA Res 45/100 *supra* note 9, art 2; UNGA Res 46/182 *supra* note 9, art 4; UNGA Res 59/141 *supra* note 9, preamble; UNGA Res 59/212 *supra* note 9, preamble; UNGA Res 63/141 (10 March 2009) UN Doc A/RES/63/141, preamble; UNGA Res 64/251 (30 April 2010) UN Doc A/RES/62/251, preamble.

⁸¹ African Charter on Humans and Peoples’ Rights (ACHPR) (adopted 27 June 1981, entered into force 21 October 1986) 21 I.L.M. 58 (1982); Arab Charter on Human Rights (adopted 15 September 1994, entered into force 15 March 2008) 12 Int’l Hum. Rts. Rep. 893; American Convention on Human Rights (ACHR) (adopted 22 November 1969, entered into force 18 July 1978) O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, 213 UNTS 222; European Social Charter (adopted 18 October 1961, entered into force 26 February 1965) ETS 35, 529 UNTS 89.

⁸² ICESCR, art 2(1).

⁸³ CESCR, ‘General Comment 3’, *supra* note 52, para. 10.

c) The obligation of the affected state to seek assistance

When the national response capacity is insufficient to meet the affected state's obligations under human rights law, those same treaty or customary obligations give rise to a sort of secondary duty. The latter requires the affected state to address the international community with a view to seek assistance.⁸⁴ The CESCR has expressly recognized this duty when it has explained that “to the maximum of its available resources”, as the measure to consider the extent of the obligation of states parties under article 2(1) of the Covenant, must be read as including also international assistance.⁸⁵ In other words, if states parties want to demonstrate their compliance with the obligations deriving from the ICESCR, they must prove that, in addition to the resources available at the national level, they have also tried to obtain international aid.⁸⁶ The Institute of International Law in its Bruges Resolution has also recognized the obligation to seek assistance from competent international organizations and/or third states by a state which is “unable to provide humanitarian assistance to the victims placed under its jurisdiction or *de facto* control”.⁸⁷

Finally, the attention has been drawn by the Special Rapporteur Ospina on the fact that the duty of the affected state is a duty to *seek* and not to *request* assistance.⁸⁸ The distinction, far from being merely linguistic, touches upon the nature of the request. *Seeking* assistance refers indeed to a non-binding appeal; in other words the state asking for help is still entitled to refuse the aid offered in response to his demand. The term *request*, instead, binds the requesting state, depriving it of its “ability to decline offers of assistance”⁸⁹

⁸⁴ UNILC, ‘Report on the work of its sixty-third session’, *supra* note 78, commentary to draft art 10.

⁸⁵ CESCR, ‘General Comment 3’, *supra* note 52, para. 13.

⁸⁶ With reference to the right to food, the CESCR has for example stated that the state has to prove “that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food”. CESCR, ‘General Comment 12’, *supra* note 50, para. 17.

⁸⁷ Institute of International Law, ‘Resolution on Humanitarian Assistance’, *supra* note 2, section III para. 3.

⁸⁸ Ospina, ‘Fourth report’, *supra* note 74, para. 44.

⁸⁹ UNILC, ‘Protection of persons in the event of disasters. Memorandum by the Secretariat’ (11 December 2007) UN Doc A/CN.4/590, para. 65.

even when, for example, the offers do not comply with the requirements of humanity, impartiality and neutrality.

d) The obligation of the affected state not to arbitrarily withhold consent to the access of foreign aid

The necessary consent of the affected state for the access of foreign aid balances the different interests involved in the current system of implementation of humanitarian assistance. Indeed it has the function to avert the intervention of third states under pretext of delivering disaster aid and in breach of article 2(7) of the Charter of the United Nations.⁹⁰ Moreover, as a further safeguard, the state consenting to receive external aid maintains the “primary role in the direction, control, coordination and supervision of such relief and assistance”.⁹¹

A problematic aspect concerns the possibility to reconcile the centrality of the *domaine réservé* of the state with its obligation to grant the component rights of the affected persons. Can it be argued that because of the obligation deriving to it from the component rights an affected state is compelled to accept foreign aid when it is unable to autonomously meet its international obligations?

It can be said that inadequately supplied affected states are indeed obliged to give their consent in order to comply with the obligations deriving from the right to life of the affected individuals. It has in fact been argued that, among the positive measures to be taken with respect to the right to life, one could identify the obligation to accept foreign humanitarian assistance.⁹²

Similarly, with reference to the subsistence rights, the CESCR has explained that a state, in order to justify its lack of compliance with the obligations deriving from the Covenant, has to prove that “every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations”.⁹³ Undoubtedly, a refusal of foreign

⁹⁰ United Nations Charter (UN Charter) (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

⁹¹ UNILC ‘Report on the work of its sixty-third session’, *supra* note 78, draft art 9(2).

⁹² Luopajarvi, *supra* note 49, pp. 692, 693.

⁹³ CESCR, ‘General Comment 12’, *supra* note 50, para. 17.

assistance would not meet this requirement. Indeed, impeding the access to humanitarian food aid in emergency situations has been expressly qualified as a violation of the right to food.⁹⁴

This does not mean, on the other hand, that the state has an absolute duty to accept humanitarian assistance. Consent can indeed be withheld for non-arbitrary reasons like, for example, when the state possesses the resources to adequately and effectively respond to the needs of the affected individuals; when it has accepted adequate assistance from another source;⁹⁵ or when the offered humanitarian aid does not satisfy the requirements of humanity, neutrality and impartiality.⁹⁶

Finally, it could be argued that the affected state should not withhold its consent even if it is able to autonomously grant the minimum content of the subsistence rights. Indeed, the possibility to benefit from international assistance would augment the level of resources available to it. Consequently the extent of its obligations under article 2(1) ICESCR would rise. According to this view, the affected state should never decline offers of assistance on the basis of its self-sufficiency. However, the generally accepted understanding of the obligation not to arbitrarily withhold consent does not support this reading of the obligation to accept assistance. Therefore the affected state is to be considered obliged to agree to the delivery of aid in its disaster-affected territory only when it does not possess sufficient disaster-response capacity.

e) The right of the international community to offer humanitarian assistance

Just like consent represents sovereignty, the right to offer assistance embodies the principle of international cooperation.⁹⁷ The latter concerns states and non-state actors and indeed both types of entities are recognized the right to issue offers of assistance.

⁹⁴ *Idem*, para. 19.

⁹⁵ UNILC 'Report on the work of its sixty-third session', *supra* note 78, commentary to art 11.

⁹⁶ For the UN Charter, and more specifically articles 55 and 56, as a further legal basis for the obligation to accept international assistance see Luopajarvi, *supra* note 49, pp. 698-700.

⁹⁷ See UNC, arts 1(3), 55, 56.

Even when the offer of assistance is “unsolicited”,⁹⁸ it should not be considered an interference in the domestic affairs of the affected state. This conforms to what was stated by the International Court of Justice (hereinafter ICJ), according to which “the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law”.⁹⁹

Attention should be drawn to the possibility to offer assistance even when the affected state has an adequate disaster-response capacity. Indeed “cooperation and assistance by international actors will in many cases ensure a more adequate, rapid and extensive response to disasters and an enhanced protection of affected persons”.¹⁰⁰

Normally, the voluntary character of the assistance, justifies the qualification of offering governments or organizations in terms of ‘donors’.¹⁰¹ However there are some exceptional circumstances in which the right to offer assistance takes the form of an obligation. At the universal level, for example, according to the interpretation offered by the CESCR, all states parties to the ICESCR would have an obligation of cooperation.¹⁰² The Committee has indeed stated, referring to the right to food, that “states have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency [...]. Each state should contribute to this task in accordance with its ability”.¹⁰³

Furthermore states can adopt international instruments with the specific objective of creating obligations of assistance. Illustrative is the case of the

⁹⁸The wording was used by the Secretariat to refer to the offers not originating from an appeal by the affected state. UNILC, ‘Memorandum by Secretariat’, *supra* note 89, para. 64.

⁹⁹ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, ICJ, Merits, Judgement of 27 June 1986, para. 242.

¹⁰⁰ UNILC ‘Report on the work of its sixty-third session’, *supra* note 78, commentary to art 10.

¹⁰¹ The wording ‘donor governments’ is used, for example, in the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations in Disaster Relief, *supra* note 23, Annex II.

¹⁰² See CESCR, ‘General Comment 3’, *supra* note 52, para. 14. The CESCR identifies the legal grounds for this obligation in articles 55 and 56 of the UN Charter. See also ‘General Comment 14’, *supra* note 40, para. 40.

¹⁰³ CESCR, ‘General Comment 12’, *supra* note 50, para. 38.

Food Assistance Convention (at the moment only signed by 12 and ratified by 8 states),¹⁰⁴ on the basis of article 5 of which states parties agree to provide each year a certain amount of assistance in food bilaterally, through international or non-governmental organizations or through other food partners.¹⁰⁵ Agreements akin to the Food Aid Convention are frequently adopted bilaterally¹⁰⁶ or at the regional level. The so-called ‘solidarity clause’ inserted in article 222 of the Treaty on the Functioning of the European Union¹⁰⁷ is an example of the last typology.¹⁰⁸

With reference to international organizations, it can similarly be argued that the ones that have the capacity and the competence to provide assistance are obliged to do so.¹⁰⁹ According to Kolb, for example, the United Nations should, on the basis of article 55 of the Charter, be considered bound by the above-mentioned duty.¹¹⁰

2.2 Strengthening the Protection of Persons Affected by Disasters: Legal Implementation of the Autonomous Right to Humanitarian Assistance

The following presentation of the juridical positions relevant in the implementation of a human right to humanitarian assistance is an attempt to develop the content of such right as introduced in the first section of the present work.

¹⁰⁴ UN Treaty Collection, information available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XIX-48&chapter=19&lang=en, last accessed 5 August 2013.

¹⁰⁵ Food Assistance Convention (adopted 25 April 2012, entered into force 1 January 2013) UNTS I-50320, art 5 (former article 3 Food Aid Convention). Paragraph 1 reads: “To meet the objectives of this Convention, each Party agrees to make an annual commitment of food assistance, set in accordance with its laws and regulations. Each Party’s commitment is referred to as its ‘minimum annual commitment’”.

¹⁰⁶ See for example Agreement between the Swiss Federal Council and the Government of the Republic of the Philippines on Cooperation in the Event of Natural Disaster or Major Emergencies (6 December 2001). Available at <http://www.ifrc.org/docs/idrl/I494EN.pdf>, last accessed 21 August 2013.

¹⁰⁷ Consolidated version of the Treaty on the Functioning of the European Union (adopted 13 December 2007, entered into force 1 December 2009) 2008/C 115/01, art 222.

¹⁰⁸ For a list of these agreements see ‘Second Addendum to the Memorandum of the Secretariat’, *supra* note 13.

¹⁰⁹ R. Kolb, ‘De l’assistance humanitaire: la résolution sur l’assistance humanitaire adoptée par l’Institut de droit international à sa session de Bruges en 2003’ (2004) 86 *International Review of the Red Cross* 853, p. 856.

¹¹⁰ *Idem*, in note 12.

It is necessary to state beforehand that, unlike in the scenario analyzed *supra*, a clear distinction must be made between the case of ability and the one of inability on the part of the affected state to autonomously cope with the effects of the disaster. The human right to humanitarian assistance has indeed been previously defined as the “human right of the individuals and groups who are affected by a natural or similar disaster and are *inadequately supplied by the affected state*, to receive humanitarian assistance by the international community”. We can hence infer that the right to humanitarian assistance becomes relevant only when the disaster-response capacity of an affected state is inadequate. Bearing this in mind, the following analysis is divided in two parts which are respectively dedicated to the case of adequacy and inadequacy of the disaster-response capacity of the affected state. The structure of the relevant juridical positions is graphically represented in Chart B annexed to the present paper.

i. Self-Sufficient National Response Capacity of the Affected State

When a state has sufficient disaster-response capacity, relief operations are focused on the protection of the component rights. Therefore, the implementation scheme of humanitarian assistance reproduces the principal positions of the current system that was presented above (2.1). Consequently, the relevant juridical positions will be just mentioned in this place, and reference is made, for what concerns their content, to what was stated *supra*.

The ‘humanitarian assistance relationship’ involves, in this scenario, the component rights of the affected individuals, the obligation of the affected state to grant those human rights and the right of the international community to offer humanitarian assistance.

ii. Inadequate National Response Capacity of the Affected State

The implementation scheme sensibly changes when the state does not possess sufficient resources to meet the obligations deriving from its component rights. Unlike in the current system of implementation, the affected state would not have to seek assistance and/or eventually consent to the access of foreign aid. Indeed those obligations/powers would have been exercised *una tantum* with the adoption

of the instrument recognizing and regulating the human right to humanitarian assistance.

It is necessary to incidentally underline that from the notion of ‘inadequate national response capacity’ arises the need to set clear benchmarks to identify when a state meets this threshold and foreign aid must therefore be delivered. In order to assess the inadequacy, reliance should be made on so-called ‘outcome indicators’,¹¹¹ in other words on criteria that would permit an evaluation of the “status of the population’s enjoyment of a [component] right”.¹¹²

If the inadequacy threshold is met the juridical positions of all the actors involved would adjust to the different situation. Consequently those entitlements and obligations that already exist indirectly through the intermediation of the component rights would acquire autonomous relevance. Even the obligation of the international community to provide assistance, that will be soon illustrated, would not be an innovation but a generalization of the existing obligations that some states have undertaken at the bilateral, regional or universal level.¹¹³

a) The affected individuals and groups’ human right to humanitarian assistance

All the persons affected by a disaster, in addition to the component rights that can be claimed *vis à vis* the affected state, would enjoy – individually and collectively - a human right to receive humanitarian assistance.

As will be shown *infra*, this right would be characterized by a positive and a negative dimension which respectively pertain to the international community and the affected state.

¹¹¹ Outcome indicators are opposed to structural and process indicators, as was first illustrated with reference to the right to health. UNGA ‘Interim report of the Special Rapporteur of the Commission on Human Rights on the right of everyone to enjoy the highest attainable standard of physical and mental health’ (10 October 2003) UN Doc A/58/427, paras 14-29.

See also A.R. Chapman, ‘Development of Indicators for Economic, Social and Cultural Rights: the Rights to Education, Participation in Cultural life and Access to the Benefits of Science’ in Y. Donders, V. Volodin (eds), *Human Rights in education, Science and Culture*, (UNESCO Ashgate, Great Britain 2007), pp. 112-116.

¹¹² Chapam, *supra* note 111, p. 114.

¹¹³ Like, for example, the above-mentioned obligation deriving from art 222 TFUE.

b) The obligation of the international community to provide assistance:
the positive dimension of the human right to humanitarian assistance

States and other international subjects which have agreed to be bound by the instrument on the recognition and regulation of the right to humanitarian assistance would be not only entitled to offer humanitarian assistance but also obliged to do so.

As already prospected, this obligation should depend on some predetermined criteria which could include social or physical proximity.¹¹⁴ Moreover it should vary in the extent and form, taking into account the resources available to each state or other subject.¹¹⁵

The possibility and desirability (or lack thereof) of conceiving human rights obligations for international organizations in particular, and for non-state actors in general, is the object of a wide debate.¹¹⁶ Leaving aside policy-oriented considerations and focusing on the purely legal aspect of the matter, it suffices to say here that, irrespective of one's stand in the debate, it should be accepted that international organizations can acquire human rights obligations through voluntary channels.¹¹⁷ This means that they can freely decide to be bound by the obligation to respect (and eventually protect and fulfill) human rights either by acceding to a treaty on the protection of human rights or by so providing, for example, in the statute of an international organization.¹¹⁸ A similar possibility should be recognized to non-state actors with reference to the human right to humanitarian assistance. The latter should therefore be open to implementation also by non-state entities.

¹¹⁴ See note 68.

¹¹⁵ To this end, indication can be inferred from the Bruges Resolution of the Institute of International Law where it is stated that neighbouring states of the affected one should have a major responsibility in the offer of humanitarian assistance and that the quantity of the assistance should be "the maximum extent possible" for each state. See Institute of International Law, *supra* note 2, article V para. 1.

¹¹⁶ For an overview see A. Clapham, *Human Rights Obligations of Non-State Actors*, (Oxford University Press, Oxford 2006).

¹¹⁷ The major problem being how to eventually hold them accountable for human rights violations. See A. Clapham, 'The challenge of non-state actors for human rights law' in D. Moeckli and others, *International Human Rights Law*, (Oxford University Press, Oxford 2010), pp. 570, 571.

¹¹⁸ An example is article 59(2) of the ECHR as amended by protocol 14 which entered into force in 2010 and that recognizes the possibility for the EU to accede to the ECHR. See ECHR, art 59(2).

Moreover, as already anticipated, the delivery of humanitarian assistance should not be carried out through the deployment of forces of the aiding states on the disaster-affected territory. It would be desirable instead, to rely on pre-identified non-governmental or international organizations which would have agreed to carry out the task under consideration. Additionally a major role should be played by civil protection organisms.¹¹⁹ As a consequence of the possible instrumental function of the interested organizations, some non-state actors might play a dual role in respect of the delivery of humanitarian assistance. They might indeed be, due to a voluntary commitment, duty-holders and, at the same time, they might constitute the mean to carry out the obligation lying on states too.

Finally, it seems opportune to note that the international community must carry out this obligation in the respect of the regulation eventually included in the instrument recognizing the right under consideration. In addition it should abide by the humanitarian principles of neutrality, humanity and impartiality and comply with the laws of the affected state and applicable international law.¹²⁰

c) The obligation of the affected state not to prevent the access of international aid: the negative dimension of the human right to humanitarian assistance

The affected state should not obstruct by any means the free access of external aid. This includes the responsibility to waive all those requirements which would normally be demanded in order to grant the

¹¹⁹ On the notion and progressive evolution of civil protection (to be distinguished from civil defence forces which operate during armed conflicts) see E.L. Quartarelli, 'Disaster Planning, Emergency Management and Civil Protection: The Historical Development of Organized Efforts to Plan for and to Respond to Disasters', (University of Delaware Disaster Research Center, 2000) Preliminary Paper 301. Available at <http://dspace.udel.edu/bitstream/handle/19716/673/PP301.pdf?sequence=1>, last accessed 14 August 2013.

¹²⁰ 'Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance', *supra* note 13, art 4.

access to goods and personnel which could become involuntary obstacles to the implementation of humanitarian assistance operations.¹²¹

To conclude, it is appropriate to clarify that the nature of the relationship between the two scenarios of adequacy (2.2 i) and inadequacy (2.2 ii) is one of complementarity and not mutual exclusion. In other words, the emergence of the human right to humanitarian assistance does not indicate that the component rights become irrelevant and that the affected state is relieved of its obligation related to them. Indeed, in the (highly unlikely) hypothesis of supervening adequate disaster-response capacity of the affected state, the international community already acting on the territory should withdraw in favour of state action (unless invited to continue). Moreover, even when an affected state is unable to meet its people's needs, it would still maintain its obligations deriving from the component rights. The obstruction of access of the aid coming from the international community would indeed concurrently violate the right to humanitarian assistance in its negative dimension and the component rights of the affected individuals.

¹²¹ Examples of these obligations are: the grant of 'landing rights' for those planes that carry humanitarian assistance and the waiving of registrations requirements for entering goods. See IFRC and ICRC, 'Code of Conduct', *supra* note 23, Annex I.

SECTION III

The Changing Equilibrium Between Human Rights, Sovereignty and Solidarity

In an attempt to provide a complete overview of a hypothetical human right to humanitarian assistance, the analysis is moved to its theoretical placement in the international legal framework. In conformity with the approach adopted in the present work, the theoretical analysis is carried out by way of a comparison with the current scenario of implementation of humanitarian assistance informed at the protection of the component rights.

Logic would suggest treating the theoretical premises to the recognition of the right before the presentation of a possible structure of the right itself. The issue has instead been post-posed because, on the basis of the consideration of the theoretical premises, an exam of the remedies adopted to the shortcomings of implementation will be carried out.

The following analysis is based on a parallelism according to which the three actors involved in the 'humanitarian assistance relationship' each embody a fundamental principle of the international order which is relevant for the regulation of humanitarian assistance. Reference is made to the principles of human rights protection, sovereignty and solidarity. Hence, the affected individuals represent the interest of the international community in the protection of human rights; the affected state embodies the notion of sovereignty and the international community symbolizes the importance of solidarity.

The way humanitarian assistance is approached and regulated at the international level varies according to the major or minor role played by the three underlying principles in the international order. Consequently, the adoption of regulations which advance the position of one of the actors at the detriment of the others depends on the different equilibrium reached between the three principles.

This interpretation is useful to explain the centrality of the affected state in the current system of implementation of humanitarian assistance. The latter is indeed influenced by the predominance of the principle of sovereignty in the international

legal order. However a demand for new regulation is currently arising due to the growing importance of human rights protection and to a renewed attention to solidarity.

3.1 The Current Friction between Sovereignty and Human Rights

The illustration of the way the component rights are currently implemented (paragraph 2.1) shows that a predominant position, sometimes too overshadowing, is occupied by the affected state. In order to understand the reasons of this imbalanced equilibrium, an individual analysis of the roles of the three underlying principles in our current system is presented.

In the first place the centrality of sovereignty is nowadays sanctioned in articles 2(1) and 2(7) of the UN Charter. Confirm of its relevance can be inferred from the important role recognized to its corollaries, namely the principle of non-intervention¹²² and immunities of states.¹²³ Equal importance, the principle of sovereignty, has in the realm of humanitarian assistance. This is showed by the space to it deserved in the General Assembly's resolutions adopted on the topic of "Humanitarian Assistance to victims of natural disasters and similar emergency situations"¹²⁴ and by its express mention in the draft articles of the ILC on the protection of persons in the event of disasters.¹²⁵

It can be said that, in the current system of implementation, sovereignty finds expression in two different ways. First in the obligation of the international 'donors' to obtain the consent of the affected state in order to enter its territory. In this sense consent has been defined as the external aspect of the sovereignty of the

¹²² This principle was expressed in UNGA Res 25/2625 (24 October 1970) UN Doc A/RES/25/2625 and its customary character was affirmed by the ICJ in the case *Nicaragua v. United States of America*, *supra* note 99, para. 185.

¹²³ The rationale for states immunity is indeed found in the Latin maxim *par in parem non habet iudicium* which indicates that a state cannot be judged by another equal entity (another state). This would indeed infringe upon the independence and equality of states as expression of their sovereignty. Bankas E.K., *The State Immunity Controversy in International Law. Private Suits Against Sovereign States in Domestic Courts* (Springer, Berlin 2005), p. 43.

For an argument in favour of the inapplicability of the immunity in case of human rights violations see P. Gaeta, 'Immunity of States and State Officials: A Major Stumbling Block to Judicial Scrutiny?' in A. Cassese (ed.) *Realizing Utopia. The Future of International Law* (Oxford University Press, Oxford 2012), pp. 229-232.

¹²⁴ UNGA Res 43/131, *supra* note 9, preamble and art 2 and UNGA Res 45/100 *supra* note 9, preamble and art 2.

¹²⁵ UNILC 'Report on the work of its sixty-third session', *supra* note 78, draft art 9(1).

affected state.¹²⁶ Secondly, even when the affected state agrees to the delivery of humanitarian assistance by external actors on its territory, it maintains the power to coordinate the relief operations.¹²⁷

Together with the centrality of sovereignty, we are witnessing the increasing importance of the role recognized to human rights. The latter are now seen as one of the keystones of the international legal order as can be inferred from the Preamble and articles 1(3) and 55 of the UN Charter. Noteworthy are also the adoption of an always growing number of human rights treaties, the establishment of international tribunals to punish their violations and the adoption of the notion of responsibility to protect in order to enhance their respect and protection at a universal level. Due to the growing relevance of human rights, concerns have been raised for the neglected attention paid to this development in the ILC's work.¹²⁸ The Special Rapporteur's approach was indeed criticized for being expression of a too traditional understanding of sovereignty.¹²⁹

However, despite the fact that the regulation of humanitarian assistance (as also mirrored in the draft articles of the ILC) might seem very cautious in deviating from the primacy of sovereignty, the adoption of some correctives against this imbalance must be taken into consideration. Indeed nowadays, the abuse of sovereignty by the affected state empowers the affected individuals and the international community to take corrective measures to remedy or sanction it.

a) Security Council action under Chapter VII

The Security Council might, *in abstracto*, authorize the use of coercive measures to access an affected state's territory in circumvention of the state's opposition, if the situation meets the definition of a threat to peace

¹²⁶ Ospina, 'Third report', *supra* note 9, para. 34. The principle of sovereignty and the principle of non-intervention as corollary of the former, which are expressed in the institute of consent, were considered of absolute importance by the Special Rapporteur on the protection of persons in the event of disasters. He indeed rejected the proposal made by some states to delete the mention of consent from the draft articles "as it would run counter to existing regulation and practice in the field". UNILC 'Report on the work of its sixty-second session', *supra* note 4, para. 329.

¹²⁷ UNILC 'Report on the work of its sixty-third session', *supra* note 78, draft art 9(2).

¹²⁸ Zorzi Giustiniani argues that the ILC articles, notwithstanding the proclamation of their human rights-approach, do not mirror it in the substance. F. Zorzi Giustiniani, 'The Works of the International Law Commission on "Protection of Persons in the Event of Disasters". A critical Appraisal' in *International Disaster Response Law*, *supra* note 46, pp. 69-74.

¹²⁹ UNILC 'Report on the work of its sixty-second session', *supra* note 4, para. 316.

and security.¹³⁰ The question is therefore whether a disaster, understood in the ICL's sense,¹³¹ can trigger the applicability of chapter VII of the UN Charter. It can be observed that the Security Council has already relied on the powers under consideration to ease the delivery of humanitarian aid in, for example, the Great Lakes Region,¹³² Iraq,¹³³ Bosnia and Herzegovina¹³⁴ and Somalia.¹³⁵ Nevertheless the complexity of the situations that were at stake in those occasions does not provide sufficient evidence to argue that the need to ease the aid distribution *per se* justifies the use of chapter VII powers.¹³⁶

However, recently the Secretary General of the UN has stated, acting under a request by the Security Council, that natural disasters deriving from climate change can compromise peace and security because of the migration flow and the economic effects that normally originate from those types of catastrophes.¹³⁷ It might seem appropriate to infer from this statement the possibility that, in the future, the Security Council will qualify a natural or similar disaster as a threat to peace and security *per se*, paving the way for an intervention *vis à vis* a "recalcitrant state"¹³⁸ by the international community.¹³⁹

¹³⁰ Art 39 UN Charter.

¹³¹ UNILC 'Report on the work of its sixty-second session', *supra* note 4, p. 325.

¹³² United Nations Security Council (UNSC) Res 1080 (15 November 1996) UN Doc S/RES/1080, paras 3, 5.

¹³³ UNSC Res 688 (5 April 1991) UN Doc S/RES/688, para. 3.

¹³⁴ UNSC Res 770 (13 August 1992) UN Doc S/RES/770, para. 2.

¹³⁵ UNSC Res 794 (3 December 1992) UN Doc S/RES/74, preamble.

¹³⁶ Indeed the threat to peace and security was, in those occasions, constituted either by on-going armed conflicts or by the governmental repression of the civilian population in the Iraqi case. Noteworthy is the fact that, with reference to Somalia and Bosnia and Herzegovina, the SC has considered the impediment to the distribution of humanitarian aid a factor contributing to the existence of a threat or necessary for the restoration of peace and security.

¹³⁷ UNGA, 'Climate change and its possible security implications: report of the Secretary-General', (11 September 2009) UN Doc A/64/350.

¹³⁸ This expression was used in L. Condorelli, 'Intervention Humanitaire et/ou Assistance Humanitaire? Quelques certitudes et beaucoup d'interrogations' in N. Al-Nauimi, R. Meese (eds), *International Legal Issues Arising under the United Nations Decade of International Law*, (Martinus Nijhoff Publishers, The Hague 1995), p. 1010.

¹³⁹ See also M. Costas Trascasas, 'Access to the territory of a Disaster-Affected State' in *International Disaster Response Law*, *supra* note 46, pp. 240- 242.

b) The international responsibility of the affected state for its internationally wrongful acts

The human rights-centred approach suggests that a state with insufficient disaster-response capacity which arbitrarily refuses foreign aid will incur in its international responsibility for the violation of the component rights of the disaster-affected individuals.

The component rights, *qua* human rights, are *erga omnes* obligations. Human rights have indeed been so qualified by the ICJ in the Barcelona Traction case.¹⁴⁰ It follows that every state is entitled, under the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter ARSIWA), to invoke the responsibility of the affected state and to ask for the cessation of the wrong (in addition to guarantees of non-repetition and reparation) in the interest of the victims.¹⁴¹

The request of cessation would be complied with by consenting to the access of the organizations or states willing to deliver impartial, neutral and humanitarian aid to the people in need.

Moreover, under article 54 ARSIWA, the invoking states are also entitled to take lawful measures in order “to ensure cessation of the breach and reparation in the interest of the injured state or of the beneficiaries of the obligation breached”.¹⁴² It has therefore been argued that air-dropping food, medicines and similar goods in the disaster-affected territory could be considered a legitimate measure under international law.¹⁴³ Nevertheless, the compliance of this measure with the requirement of legitimacy in article 54 ARSIWA, in the absence of the consent of the receiving state, is highly problematic. Air-dropping humanitarian

¹⁴⁰ *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ, Merits, Judgement of 5 February 1970, p. 3, paras 33, 34.

¹⁴¹ UNILC ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (November 2011) Supplement No. 10 (A/56/10), Chapter IV, art 48.

¹⁴² *Idem*, art 54.

¹⁴³ Schindler, dealing with humanitarian assistance in armed conflict situations, seems indeed to have justified the possibility to act in the absence of the consent of the sovereign state, as a countermeasure to its unjust refusal and as a way to implement art 1 common to the Geneva Conventions. See D. Schindler, ‘Humanitarian Assistance, Humanitarian Interference and International Law’ in R. St-John Macdonald (ed), *Essays in Honour of Wang Tieya*, (Martinus Nijhoff Publishers, Dordrecht 1994), p. 699.

assistance constitutes indeed a manifest breach of the sovereignty of the state.¹⁴⁴ Furthermore, even from a logistic point of view, the efficacy of this solution raises serious concerns. It is indeed impossible to foresee “who is going to be at the receiving end of the air-drops”.¹⁴⁵

Though not relevant to overcome the denial of consent by the affected state, noteworthy is also the possibility to invoke the responsibility of an inactive non-affected state or international organization which had agreed to provide humanitarian aid in case of need. The entitlements to invoke the responsibility and to adopt countermeasures, find their legal sources respectively in the articles on state responsibility¹⁴⁶ and in the ones on the responsibility of international organizations.¹⁴⁷

c) Human rights mechanisms

Another great advantage deriving from the placement of the topic of humanitarian assistance in a human rights perspective is the possibility to rely on the whole regulatory and protective *corpus* thereto related.

A violation of the component rights can indeed entitle to bring a case before one of the regional human rights Courts, in compliance with their respective procedures,¹⁴⁸ or be the object of a communication before the Human Rights Committee or CESCR. The recent entry into force of the Optional Protocol to the ICESCR in particular, offers a major contribution

¹⁴⁴ Costa and Evans have indeed stated that the air dropping of aid in Sri-Lanka had to be considered a “clear violation of Sri Lankan territory”. Notwithstanding this, they argued that it could be justified on the basis of the obligations deriving from the UN Charter and from moral and political duties. See P.J. Costa, P. Evans, ‘The Indian supply Drop into Sri Lanka: Non-Military Humanitarian Aid and the Troubling Aid of Intervention’ (1988) 3 Connecticut Journal of International Law 417.

¹⁴⁵ Michael Heseltine, British Former Conservative Deputy Prime Minister, speaking about the option suggested by France to air drop humanitarian aid in Myanmar. See, BBC News, *supra* note 34.

¹⁴⁶ ARSIWA, *supra* note 141, arts 42, 49.

¹⁴⁷ UNILC, ‘Draft Articles on the Responsibility of international organizations’ (2011), Supplement No. 10 (A/66/10), Chapter V, para. 87, arts 43, 51.

¹⁴⁸ For an analysis of the powers and procedures before human rights bodies and courts see C. Krause, M. Scheinin (eds), *International Protection of Human Rights: A Textbook*, (Åbo Akademi University Institute for Human Rights, Finland 2009).

because of the central role played by the subsistence rights in the field of humanitarian assistance.¹⁴⁹

Notwithstanding the mainly *ex post* nature of the remedies offered by the above-mentioned mechanisms, one should not forget that some of them have been granted the power to adopt precautionary or interim measures.¹⁵⁰ It might be argued therefore that those individuals whose component rights are at serious risk of imminent and irreparable violation might benefit of the protection of an order to the affected state to temporarily agree to the entry of foreign relief workers and goods.

On a similar line the possibility to bring a case of violation before the national courts of those states that have incorporated the human rights constituting the component rights of humanitarian assistance in their national legislation, should be mentioned.

d) State of necessity as a ground for intervention

When a disaster creates a grave and imminent peril to an essential interest of the bordering states, it might be argued that the latter are entitled to intervene in the disaster-affected state even in the absence of its consent. The violation of its sovereign territory must be the only available measure to safeguard the above-mentioned essential interest.¹⁵¹ This might be the case, for example, in the hypothesis of the destruction of a dam which leads to flood in the territory of the neighbouring states.¹⁵² In this scenario, the intervention to halt the effects of the dam destruction would indirectly benefit the affected individuals by protecting their human rights.

¹⁴⁹ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) (adopted 10 December 2008, entered into force 5 May 2013), UN Doc. A/63/435.

¹⁵⁰ See for example the Rules of Procedure of the African Court of Human and Peoples' Rights, rule 51; Inter-American Court of Human Rights, rule 24; ECtHR, Rule 39. See also Rules of Procedure of the Human Rights Committee, Rule 86 and OP-ICESCR, art 5. The measures imposed by the HRC are generally not considered to be binding but the HRC has affirmed that the non-compliance "is incompatible with the obligation to respect in good-faith the procedure of individual communication...". HRC, 'General Comment 33' (5 November 2008) UN Doc CCPR/C/GC/33, para. 19.

¹⁵¹ And if the intervention does not seriously impair an essential interest of the disaster-affected state. ARSIWA, *supra* note 141, art 25.

¹⁵² N. Ronzitti, 'Conclusions' in *International Disaster Response Law*, *supra* note 46, p. 705.

e) Individual criminal responsibility

Those who decide on the unjustified denial of access to foreign humanitarian aid can be held individually criminally responsible for their acts. The refusal of consent to the delivery of aid might indeed amount to a crime against humanity in the form of, among others,¹⁵³ extermination which can consist in “the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population”.¹⁵⁴ It could equally amount to genocide when the other relevant elements of the crime are met.¹⁵⁵

Criminal prosecution might therefore, through deterrence, offer an important contribution in enhancing the protection of the individuals affected by a disaster.¹⁵⁶

Taken together, these measures grant a more human rights-oriented approach to humanitarian assistance to the detriment of an absolute understanding of the sovereignty of the affected state. Thanks to them, the claim voiced at the Sixth Committee of the General Assembly that humanitarian assistance concerns “the protection of persons in the event of disasters and not the protection of the rights of the states”¹⁵⁷ takes a more realistic connotation.

The overview of the present international scenario must be completed by mentioning the role that solidarity occupies in it. Solidarity, which must be

¹⁵³ Russo mentions among the crimes against humanity that might derive from a denial of consent to the access of humanitarian aid, besides extermination, murder, forcible transfer of population, persecution, other inhumane acts. F. Russo, ‘Disasters Through the Lens of International Criminal Law’ in *International Disaster Response Law*, *supra* note 46, pp. 451-455.

¹⁵⁴ Rome Statute of the International Criminal Court (ICC Statute) (adopted 17 July 1998, entered into force 1 July 2002) 2187 U.N.T.S. 90 (1998), arts 7(1)(b), 7(2)(b).

¹⁵⁵ For the crime of genocide, the commission of one or more of the five objective elements indicated in article 6 of the ICC Statute combined with the relevant subjective element must be proved. In addition evidence of the existence of the specific intent is required (intent to destroy in whole or in part a ‘national, ethnical, racial or religious group as such’). As to crimes against humanity, the act of extermination should be accompanied by the underlying *mens rea* and by the existence, with awareness on the part of the perpetrator, of the contextual element namely of a widespread and systematic practice. See A. Cassese and others, *Cassese’s International Criminal Law*, (Oxford University Press, Oxford 2013), pp. 90-100; 115-123.

On the specific issue of denial of humanitarian assistance as an act entailing individual criminal responsibility see C. Rottensteiner, ‘The denial of humanitarian assistance as a crime under international law’ (1999) 81 *International Review of the Red Cross* 555.

¹⁵⁶ Russo, *supra* note 153, p. 461.

¹⁵⁷ UNILC ‘Report on the work of its sixty-second session’, *supra* note 4, para. 316.

intended as a “feeling of responsibility towards people in distress”,¹⁵⁸ is currently merely recognized a charity-oriented role. The latter, as will be demonstrated *infra*, is inadequate for the new understanding that of this concept is being developed. For the moment being, solidarity can indeed solely be one of the reasons triggering the voluntary offer of assistance by the international community to the disaster-affected state. This is due to the fact that the principle under consideration has not been codified in terms of a general obligation to act in favour of people in distress.¹⁵⁹

In conclusion, from the presentation of the relationship between the three principles it is possible to discern a strong friction between the meticulous respect for sovereignty and the need to protect human rights. The adoption of the above-mentioned remedies, which sometimes represent “*faute de mieux*”¹⁶⁰ solutions, expresses the need to radically rethink the scenario of implementation of humanitarian assistance in order to balance the underlying interests in a way which better represents the new interdependent international order.

3.2 The Human Right to Humanitarian Assistance: Expression of a New Equilibrium

The inappropriateness of the present system of implementation of humanitarian assistance can be attributed to the overlooking of two important emerging trends in the international order. Mention is made to the reinterpretation of the notion of sovereignty and the normativization of the concept of solidarity.

The first phenomenon is the product of a process that started with Francis Deng’s reformulation of the notion of sovereignty.¹⁶¹ This new understanding was later

¹⁵⁸ UNILC, ‘Second report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur’ (7 May 2009) UN Doc A/CN.4/615, para. 51.

¹⁵⁹ The above-mentioned exceptions to this approach should not be forgotten. See *supra* paragraph 2.1, p. 21.

¹⁶⁰ This expression was used by Condorelli referring specifically to one of the remedies used to circumvent the obligation to receive the consent of the affected state for entering its territory in order to deliver humanitarian aid, namely Security Council action under chapter VII of the UN Charter. Condorelli, *supra* note 138, p. 1011.

¹⁶¹ Deng, *supra* note 69.

endorsed by the UN Secretary General.¹⁶² From an absolute principle, sovereignty has started being considered as implying also responsibilities on the state *vis à vis* its population.¹⁶³ On the basis of this reconceptualization, the doctrine of the responsibility to protect has been formulated. As a result, it is now unconceivable to argue that the treatment accorded by a state to the human rights of its population is a matter that falls in its *domaine réservé*.¹⁶⁴ On the same line, one could affirm, the assistance to disaster-affected people should no more be considered an issue at the total mercy of the sovereign state.

As to the evolution of the concept of solidarity, the mainstream has been to transform it from a purely moral concept, to a constitutional principle of the international legal order.¹⁶⁵ It has followed its codification into binding norms such as the already mentioned so-called ‘solidarity-clause’ of the TFUE¹⁶⁶ and article 37 of the Arab Charter on Human Rights.¹⁶⁷ The interest in solidarity as a concept of relevance in the international legal order has been corroborated by the appointment of an Independent Expert on Human Rights and International Solidarity by the Human Rights Commission.¹⁶⁸ The outcome of a questionnaire sent by the Independent Expert to all states confirmed the changing attitude towards solidarity which was described “by virtually all respondents as a principle and by several as a right in international law”.¹⁶⁹

¹⁶² United Nations Secretary General (UNSG), ‘A more secure world: our shared responsibility. Report of the High-level Panel on Threats, Challenges and Change’ (2004) UN Doc A/59/565, p. 21.

¹⁶³ Deng, *supra* note 69.

¹⁶⁴ UNSG, ‘In larger freedom: towards development, security and human rights for all’ (21 March 2005) UN Doc A/59/2005, para. 129.

¹⁶⁵ See K. Wellens, ‘Solidarity as a constitutional principle: its expanding role and inherent limitations’ in R. S. Macdonald, D.M. Johnston (eds), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community*, (Martinus Nijhoff Publishers, The Netherlands 2005), pp. 775-807. In addition the General Assembly has defined it as a fundamental value necessary for the realization of a democratic and equitable order. UNGA Res 59/193 (18 March 2005) UN Doc A/RES/59/193, para. 4, letter f.

¹⁶⁶ Art 222 TFUE.

¹⁶⁷ Arab Charter on Human Rights, art 37.

¹⁶⁸ UN Human Rights Commission Res 2005/55, ‘Human Rights and International Solidarity’ (20 April 2005) UN Doc E/CN.4/RES/2005/55. The mandate of the Independent Expert was extended by the Human Rights Council. UN Human Rights Council Res 17/6 (6 July 2011) UN Doc A/HRC/RES/17/6.

¹⁶⁹ Human Rights Council, ‘Report to the Human Rights Council of the Independent Expert on Human Rights and International Solidarity, Rudi Muhamad Rizki’ (5 July 2010) UN Doc A/HRC/15/32, p.3 para.6.

The need to give expression to the new roles which have been attributed to solidarity, sovereignty and human rights finds expression in the conceptualization of the new human right to humanitarian assistance.

It can indeed be observed that, first of all, the right as presented in sections I and II, is built on the premise that “state sovereignty is not withering away”.¹⁷⁰ Hence, in the prospected system, due account is paid to it. This is demonstrated by the recognition of the primary responsibility of the affected state in satisfying the rights of the disaster-affected individuals. Indeed, when the latter is capable of meeting their needs autonomously, no interference by external actors (besides a mere offer of aid) is tolerated.

At the same time, sovereignty is not employed to obstruct the delivery of the indispensable humanitarian assistance. States should agree that the goal of humanitarian assistance is “to save lives, not to challenge sovereignty”¹⁷¹ and in light of this, they should consent *una tantum* to the delivery of aid in their territory when affected by a disaster and inadequately internally supplied. This concession, as anticipated, would not constitute an exception to their sovereignty but a form of its exercise.

Secondly, the human rights of the affected individuals would benefit of enhanced protection through the recognition of a human right to humanitarian assistance. One of the major problems faced when dealing with disaster relief, namely the big time lapse occurring between the generation of the need of the affected individuals and the moment of the delivery of the aid, would indeed be solved.¹⁷²

The regulation of the new human right would offer the possibility to skip the long and complicated phases in which assistance is sought and consent is obtained because the mere recognition of the right would entitle the international community to intervene in case of insufficient supply by the affected state.

However, the possibility that an affected state unlawfully prevents the access of humanitarian aid in breach of the agreed modalities and obligations must be taken

¹⁷⁰ J. E. Alvarez, ‘State Sovereignty is Not Withering Away: A Few Lessons for the Future’ in Cassese (ed.), *supra* note 123, p. 26.

¹⁷¹ The Monhok Criteria, *supra* note 24, principle II para. 5.

¹⁷² Ban Ki-moon, ‘Response to Cyclone in Myanmar “unacceptably slow”’ UN News Service (12 May 2008). Available at <http://www.un.org/apps/news/story.asp?NewsID=26634>, last accessed 21 August 2013.

into account. This act would entail the violation of the component rights and of the human right to humanitarian assistance. It would consequently entitle the victims to rely on the human rights mechanisms of protection mentioned in the previous paragraph claiming the illegitimacy of the obstruction of access. The recognition of a human right to humanitarian assistance would render superfluous proving that one of the component rights has been violated with respect to a precise individual. It would suffice indeed to demonstrate that, despite having met the threshold of inadequate assistance, the affected state has prevented the delivery of humanitarian aid by external actors. Furthermore this behavior, as internationally wrongful act of the affected state, would also legitimize states' action under the ARSIWA, according to the above-described modalities.

Finally solidarity would be subjected to that process of coupling the moral with a legal obligations presented by Boisson de Chazournes¹⁷³ making honour to the new juridically relevant role that solidarity occupies at the international level.

It can be observed that the new equilibrium just presented is equally embodied in the doctrine of the responsibility to protect. With it humanitarian assistance shares a special “*intimité intellectuelle*,”¹⁷⁴ and structural affinity.¹⁷⁵ This can be demonstrated referring to the notion of responsibility to protect as formulated by the General Assembly.¹⁷⁶ It indeed rests on three pillars which are replicated in the structure of the right to humanitarian assistance. The first pillar concerns the primary duty of the state to protect its population and is mirrored by the primary responsibility of the affected state to grant the component rights of the affected

¹⁷³ L. Boisson de Chazournes, ‘Responsibility to Protect: Reflecting Solidarity?’ in R. Wolfrum, C. Kojima (eds), *Solidarity: A Structural Principle of International Law*, (Springer, Heidelberg 2009), p. 95.

¹⁷⁴ M. Ubéda-Saillard, ‘Les limites de la Responsabilité de Protéger: Les Désastres Naturels’ in J. Chaumette, J. Thouvenin, *La responsabilité de protéger, dix ans après. Actes du colloque du 14 novembre 2011*, (Editions Pedone, Paris 2013), p. 36.

¹⁷⁵ On the relationship between the two concepts, Muriel Ubéda-Saillard has noted an initial reciprocal exclusion in the sense that the UN GA World Summit Outcome Document has not reiterated the decision of the International Commission on Intervention and State Sovereignty (ICISS) to extend the applicability of the notion of the responsibility to protect to cases of natural disasters. Similarly, the ILC has excluded the responsibility to protect from its activities. Nevertheless, Ubéda-Saillard points to a recent rapprochement between the concepts. Ubéda-Saillard, *supra* note 175.

¹⁷⁶ More than 170 heads of government participated in the meeting that led to the adoption of the World Summit Outcome Document, then endorsed by the General Assembly. Articles 138 and 139 of the GA Resolution illustrate the structure of the doctrine of the responsibility to protect. UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1.

individuals. The second one regulates the role of the international community in assisting the state and corresponds to the right of the international community to offer assistance in case of natural disaster. Finally the third pillar which pertains to the responsibility of the international community to intervene in case of inaction by the affected state amounts to the obligation of the international community to provide assistance when the disaster-response capacity of the affected state is insufficient.

Beyond these similarities, an essential element distinguishes the conceptualization of the new right and the doctrine of the responsibility to protect. Unlike the latter that is formulated in the language of states' responsibilities, humanitarian assistance is being considered in human rights' terms.

The decision to restrict the role of sovereignty relying on a new approach is an attempt to obviate to the shortcomings faced in the implementation of the responsibility to protect. The reference is made in particular to the selectivity in the interventions due to lack of precise, binding commitments and to the neglect of sovereignty concerns in the practical implementation. The latter causes persistent detrimental suspicion on the part of sovereign states.

These problematic aspects would be taken into due consideration through the recognition of a human right to humanitarian assistance. The right would indeed give rise to a general obligation preventing *à la carte* interventions.¹⁷⁷ Moreover it would have its origin in the exercise of sovereignty of the states recognizing it and would respect, in the implementation modalities, the principle under consideration, through a pre-identification of the actors and procedures for the delivery of aid.

In conclusion, the objective of putting in practice the new equilibrium between the three components that the doctrine of responsibility to protect and the human right to humanitarian assistance share, might be labeled as utopian. However, resorting to the distinction proposed by René Jean Dupuy, this project should be addressed

¹⁷⁷ General obligation that, in practice, would be triggered according to the specific criteria some of which were mentioned above.

as an ‘open utopia’, that is, a utopia concentrated on the result, not on the means.¹⁷⁸ The latter indeed can always be subjected to scrutiny and improved.¹⁷⁹ In light of this, the advocacy for the recognition and regulation of the new right must be seen as an attempt to reflect on further means, additional to the reliance on the doctrine of the responsibility to protect, to put sovereignty at the service of human rights and not as a superficial way to play “the human rights card”.¹⁸⁰

¹⁷⁸ R.J. Dupuy, ‘L’assistance humanitaire comme droit de l’homme contre la souveraineté de l’état’ in Kalshoven, *supra* note 10, pp. 33, 34.

¹⁷⁹ *Idem.*

¹⁸⁰ A. Clapham, *Human Rights: A Very Short Introduction*, (Oxford University Press, Oxford 2007), p.1.

Concluding Remarks

Three main conclusions, each of which finds its theoretical premise in the ones preceding it, can be drawn from the above-presented reflections. The inferences to emphasize include: the imperative to move the debate on humanitarian assistance in a human rights-setting; the invocation of a new understanding of sovereignty in relation to post-disaster scenarios; the urge on the recognition of an independent human right to humanitarian assistance.

As to the first aspect, it has been highlighted how the present legal framework, already though indirectly, admits a right to be assisted through the intermediation of the component rights. In light of this, humanitarian assistance must be approached as a human rights-based and not human rights-free operation. The discretion of the affected state in deciding *an* and *quomodo* of the relief operations must therefore be weighed against the obligations stemming from the component rights of the disaster-affected individuals. The latter should no more be addressed as beneficiaries of assistance nor as victims but as right-holders.

It is against this human rights backdrop that it is possible to turn to the second conclusion which calls for a reconceptualization of the notion of sovereignty. The latter is indeed, together with human rights and solidarity, only one of the elements that influence the regulation of humanitarian assistance.

The equilibrium between the three components is gradually changing by acquiring an always more human rights-oriented and solidarity-inspired character. This evolution is currently expressed in the possibility recognized to the victims of the violation of a component right or to non-affected states to resort to some remedies when implementing humanitarian assistance. The objective of the measures under consideration is to reduce the otherwise excessive primary role played by sovereignty in this context.

The reliance on those remedies in order to adjust the system to its new demands proves to be unsatisfactory. Rather than counting on exceptional correctives to preserve the foundations of the international order, it would be of great moment to grant the protection of those foundations in the system itself. Therefore, a system which mirrors the new equilibrium should be envisioned, keeping in mind that the

acceptance of the new role which is being attributed to human rights and solidarity does not *ipso facto* correspond to the dismissal of sovereignty.

This opens the way for the last conclusion which urges for the adoption of a binding instrument recognizing and regulating a stand-alone human right to humanitarian assistance, in compliance with the new understanding of sovereignty, solidarity and human rights.

A possible structure of the right, through a consideration of the relevant juridical positions, has been presented. The suggested content and regulation are but one among the possible constructions that can be hypothesized. However the reliance for its definition on the outcomes of debates among diplomats, practitioners and scholars might be indicative of its acceptability by the international community.

By way of a comparison between the current system informed at the protection of the component rights and the hypothetical one based on the implementation of an autonomous human right to humanitarian assistance, the advantages that would stem from the recognition of the latter have been highlighted. More specifically, a strong enhancement of the protection of the disaster-affected individuals would derive from four factors. First, the recognition of the new right would create direct entitlements to receive assistance favouring the affected individuals and groups in terms of justiciability. Secondly, the international community would be recognized an obligation as opposed to a mere right to help the right-holders. Thirdly, sovereignty would be exercised *una tantum* by states, preventing affected states from abusing of this prerogative during a situation of emergency. Fourthly, the regulation of the modalities of implementation of the right would offer a great contribution in terms of expediency and efficiency of disaster-relief operations.

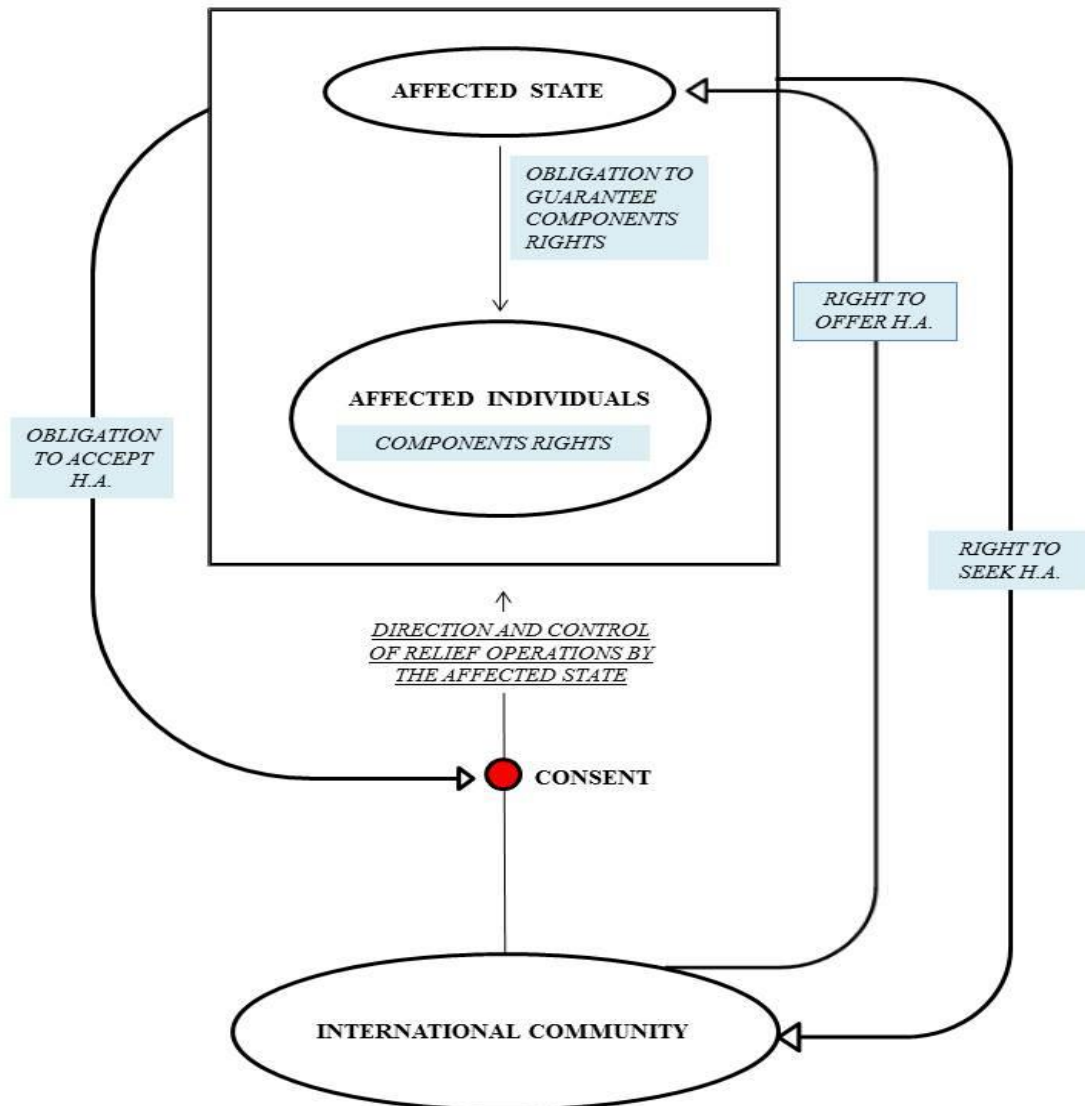
In light of these reasons and of the events following recent major natural disasters in which the benevolence of the international community was highly demonstrated, the reconceptualization of the legal framework of assistance becomes urgent. The latter must indeed avoid that the absence of adequate regulation or the abuse of sovereign power by the affected state prevent the foreign aid from reaching those who are juridically entitled to receive it.

The legal framework, be it through a more attentive application of the component rights paradigm now or through the recognition of a human right to receive assistance *per se* in the long term, must better serve and bring out the reality of post-disaster situations defined as “nature at its worst, humanity at its best”.¹⁸¹

¹⁸¹ J. Egeland, ‘Press briefing on tsunami disaster by Jan Egeland, USG for Humanitarian Affairs and Emergency Relief Coordinator’ UN News Centre (3 January 2005). Available at <http://www.un.org/apps/news/infocus/iraq/infocusnews.asp?NewsID=855&sID=9>, last accessed 21 August 2013.

Chart A

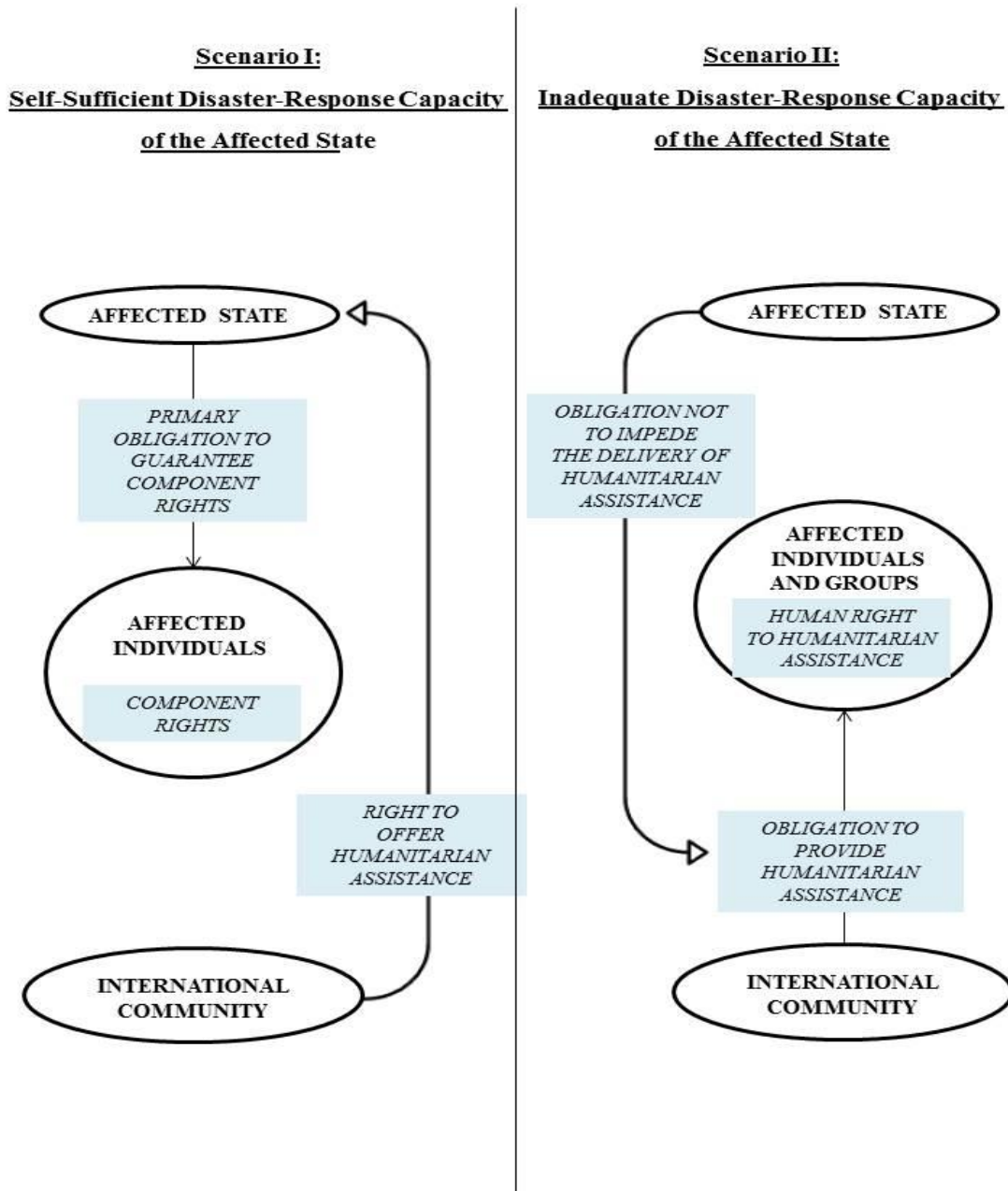
Current Scenario of Implementation of the Component Rights in the Event of Disaster



The chart represents the juridical positions (marked in blue) of the international actors (indicated in bold in the ovals) currently involved in a post-disaster scenario. The system of implementation can be limited to what is represented in the rectangle in case of sufficient disaster-response capacity by the affected state.

Chart B

Humanitarian Assistance Operations in Case of Recognition of an Independent Human Right to Humanitarian Assistance



Unlike chart A, chart B is divided in two scenarios to represent the system of implementation in case of recognition of a human right to humanitarian assistance, as illustrated in paragraph 2.2.

Bibliography

I. SOURCES

A) CASE LAW

i. International Court of Justice

North Sea Continental Shelf Cases (Federal Republic Of Germany/Denmark; Federal Republic Of Germany/Netherlands) (Judgement), (1969) I.C.J. Reports 1969 p.3.

Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Merits), (1970) I.C.J. Reports 1970 p. 3.

Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America) (Merits), (1986) I.C.J. Reports 1986 p. 14.

ii. European Court of Human Rights

Öneryildiz v. Turkey, Judgement (30 November 2004), Application no. 48939/99.

Budayeva and Others v. Russia, Judgement (20 March 2008), Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02.

B) TREATIES

i. Universal

Convention Establishing an International Relief Union (adopted 12 July 1927, entered into force 27 December 1932) 35 L.N.T.S 249.

United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287.

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 992 UNTS 3.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 UNTS 609.

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 U.N.T.S. 90 (1998).

Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (adopted 18 June 1998, entered into force 8 January 2005) UNTS No 40906.

International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UN Doc A/61/49.

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN Doc. A/63/435.

Food Assistance Convention (adopted 25 April 2012, entered into force 1 January 2013) UNTS I-50320.

ii. **Regional**

a. Africa

African Charter on Humans and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev.5,21 I.L.M. 58 (1982).

African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/24.9/49 (1990).

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (adopted 22 October 2009, entered into force 6 December 2012).

b. America

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No. 36, 1144, UNTS 123.

c. Europe

European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, 213 UNTS 222.

European Social Charter (adopted 18 October 1961, entered into force 26 February 1965) ETS 35, 529 UNTS 89.

Consolidated version of the Treaty on the Functioning of the European Union (adopted 13 December 2007, entered into force 1 December 2009) 2008/C 115/01.

d. MENA Region

Arab Charter on Human Rights (adopted 15 September 1994, entered into force 15 March 2008) 12 Int'l Hum. Rts. Rep. 893.

iii. **Bilateral**

Agreement between the Swiss Federal Council and the Government of the Republic of the Philippines on Cooperation in the Event of Natural Disaster or Major Emergencies (6 December 2001) < <http://www.ifrc.org/docs/idrl/I494EN.pdf> > accessed 21 August 2013.

C) UN DOCUMENTS

i. **Security Council**

Resolution 688 (5 April 1991) UN Doc S/RES/688.

Resolution 770 (13 August 1992) UN Doc S/RES/770.

Resolution 794 (3 December 1992) UN Doc S/RES/74.

Resolution 1080 (15 November 1996) UN Doc S/RES/1080.

ii. **General Assembly**

Resolution 217 A (III) 'Universal Declaration on Human Rights' (10 December 1948) U.N. Doc. A/810 (1948).

Resolution 25/2625 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' (24 October 1970) UN Doc A/RES/25/2625.

Resolution 41/120 ‘Setting international standards in the field of human rights’ (4 December 1986) UN Doc A/RES/41/120.

Resolution 43/131 ‘Humanitarian assistance to victims of natural disasters and similar emergency situations’ (8 December 1988) UN Doc A/RES/43/131.

Resolution 45/100 ‘Humanitarian assistance to victims of natural disasters and similar emergency situations’ (14 December 1990) UN Doc A/RES/45/100.

Resolution 46/182 ‘Strengthening of the coordination of humanitarian emergency assistance of the United Nations’ (19 December 1991) UN Doc A/RES/46/182.

Resolution ‘Interim report of the Special Rapporteur of the Commission on Human Rights on the right of everyone to enjoy the highest attainable standard of physical and mental health’ (10 October 2003) UN Doc A/58/427.

Resolution 59/141 ‘Strengthening of the coordination of humanitarian emergency assistance of the United Nations’ (25 February 2005) UN Doc A/RES/59/141.

Resolution 59/212 ‘International cooperation on humanitarian assistance in the field of natural disasters, from relief to development’ (3 March 2005) UN Doc A/RES/59/212.

Resolution 59/193 ‘Promotion of a democratic and equitable international order’ (18 March 2005) UN Doc A/RES/59/193.

Resolution 60/1 ‘2005 World Summit Outcome’ (24 October 2005) UN Doc A/RES/60/1.

Resolution 62/94 ‘Strengthening of the coordination of humanitarian emergency assistance of the United Nations’ (25 January 2008) UN Doc A/RES/62/94.

Resolution 63/139 ‘Strengthening of the coordination of emergency humanitarian assistance of the United Nations’ (5 March 2009) UN Doc A/RES/63/13.

Resolution 63/141 ‘International cooperation on humanitarian assistance in the field of natural disasters, from relief to development’ (10 March 2009) UN Doc A/RES/63/141.

Resolution 64/251 ‘International cooperation on humanitarian assistance in the field of natural disasters, from relief to development’ (30 April 2010) UN Doc A/RES/64/251.

iii. General Assembly Sixth Committee (International Law Commission)

‘Articles on Responsibility of States for Internationally Wrongful Acts (2001) Supplement No. 10 (A/56/10), Chapter IV.

‘Report on the work of its fifty-eighth session’ (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10, Annex C.

‘Protection of persons in the event of disasters. Memorandum by the Secretariat’ (11 December 2007) UN Doc A/CN.4/590.

‘Second Addendum to the Memorandum of the Secretariat on the Protection of Persons in the Event of Disasters’ (31 March 2008) UN Doc A/CN.4/590/Add.2.

‘Preliminary report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur’ (5 May 2008) UN Doc A/CN.4/598.

‘Second report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur’ (7 May 2009) UN Doc A/CN.4/615.

‘Third report on the protection of persons in the event of disasters by Eduardo Valencia Ospina, Special Rapporteur’ (31 March 2010) UN Doc A/CN.4/629.

‘Report on the work of its sixty-second session’ (3 May- 4 June and 5 July- 6 August 2010) UN Doc A/65/10, Chapter VII.

‘Articles on the Responsibility of international organizations’ (2011) Supplement No.10 (A/66/10), Chapter V.

‘Fourth report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur’ (11 May 2011) UN Doc A/CN.4/643.

‘Report on the work of its sixty-third session’ (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10, Chapter IX.

iv. Secretary General

‘A more secure world: our shared responsibility. Report of the High-level Panel on Threats, Challenges and Change’ (2004) UN Doc A/59/565.

‘In larger freedom: towards development, security and human rights for all’ (21 March 2005) UN Doc A/59/2005.

‘Climate change and its possible security implications: Report of the Secretary-General’ (11 September 2009) UN Doc A/64/350.

v. Human Rights Council (Former Human Rights Commission)

UN Human Rights Commission Res 2005/55, 'Human Rights and International Solidarity' (20 April 2005) UN Doc E/CN.4/RES/2005/55.

UN Human Rights Council, 'Report to the human Rights Council of the Independent Expert on Human Rights and International Solidarity, Rudi Muhamad Rizki' (5 July 2010) UN Doc A/HRC/15/32.

UN Human Rights Council Res 17/6, 'Mandate of the Independent Expert on human Rights and International Solidarity' (6 July 2011) UN Doc A/HRC/RES/17/6.

vi. Human Rights Committee

'General Comment 6: Article 6 (Right to Life)' (30 April 1982) UN Doc HRI/GEN/1/Rev.1 at 6 (1994).

'General Comment 29: Article 4: Derogations during a State of Emergency' (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11.

'General Comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' (5 November 2008) UN Doc CCPR/C/GC/33.

vii. Committee On Economic Social And Cultural Rights

'General Comment 3: The nature of States parties obligations (art. 2, par.1)' (14 December 1990) UN Doc E/1991/23.

'General Comment 12: The Right to Adequate Food (Art. 11 of the Covenant)' (12 May 1999) UN Doc E/C.12/1999/5.

'General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' (11 August 2000) UN Doc E/C.12/2000/4.

'General Comment 15: The right to water (arts. 11 and 12 of the Covenant)' (20 January 2003) UN Doc E/C.12/2002/11.

'Statement on the Right to Sanitation' (18 March 2011) UN Doc E/C.12/2010/1

viii. Economic and Social Council

'Guiding Principles on Internal Displacement' (22 July 1998) UN Doc E/CN.4/1998/53.

D) OTHER INTERNATIONAL SOURCES

i. **IFRC**

International Federation of Red Cross and Red Crescent Societies and ICRC, 'Code of Conduct for International Red Cross and Red Crescent Movements and Non-Governmental Organizations in Disaster Relief' (1994) <<http://www.ifrc.org/Global/Publications/disasters/code-of-conduct/code-english.pdf>>, accessed 3 August 2013.

International Federation of Red Cross and Red Crescent Societies, 'International Disaster Response Laws (IDRL): Project Report 2002-2003', (2003) <http://www.icrc.org/eng/assets/files/other/idrl_report_final_ang.pdf > accessed 3 August 2013.

ii. **NGOs**

Amnesty International, 'Myanmar Briefing. Human Rights concerns a month after Cyclone Nargis' (5 June 2008) AI-Index: ASA 16/013/2008 <<http://www.amnesty.org/en/library/asset/ASA16/013/2008/en/8592e938-32e5-11dd-863f-e9cd398f74da/asa160132008eng.html>> accessed 3 August 2013.

iii. **Others**

Première Conférence Internationale de Droit et Morale Humanitaire, sous l'égide de Médecins du Monde et de la Faculté de droit de Paris-Sud, 'Résolution sur la reconnaissance du devoir d'assistance humanitaire et du droit à cette assistance' (28 January 1987) in M. Bettati, B. Kouchner, *Le devoir d'ingérence*, (Éditions Denoël, Paris 1987).

San Remo International Institute of Humanitarian Law, 'Principes Directeurs Concernant le Droit à l'Assistance Humanitaire', 804 *International Review of the Red Cross* 48 (1993).

Task Force on Ethical Humanitarian Assistance, 'Monhok Criteria', 17 *Human Rights Quarterly* 192 (1995).

Institute of International Law 'Resolution on Humanitarian Assistance' (Bruges, 2 September 2003) <http://www.idi-ii.org/idiE/resolutionsE/2003_bru_03_en.PDF> accessed 9 August 2013.

Brookings-Bern Project on Internal Displacement, 'Human Rights and Natural Disasters. Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster' (March 2008) <<http://www.refworld.org/docid/49a2b8f72.html>> accessed 4 August 2013.

II. DOCTRINE

A) BOOKS

Bankas, E.K., *The State Immunity Controversy in International Law. Private Suits Against Sovereign States in Domestic Courts*, (Springer, Berlin 2005).

Cassese, A. and others, *Cassese's International Criminal Law*, (Oxford University Press, Oxford 2013).

Clapham, A., *Human Rights Obligations of Non-State Actors*, (Oxford University Press, Oxford 2006).

Clapham, A., *Human Rights: A Very Short Introduction*, (Oxford University Press, Oxford 2007).

Deng, F. and others, *Sovereignty as Responsibility: Conflict Management in Africa*, (The Brookings Institution Press, Washington D.C. 1996).

Heanckaerts J.M., Doswald-Beck L., *Customary International Humanitarian Law*, (ICRC and Cambridge University Press, Cambridge 2009).

Kälén, W., Künzli, J., *The Law of International Human Rights Protection*, (Oxford University Press, Oxford 2011).

Krause, C., Scheinin, M. (eds), *International Protection of Human Rights: A Textbook*, (Åbo Akademi University Institute for Human Rights, Finland 2009).

Macalister-Smith, P., *International Humanitarian Assistance. Disaster Relief Actions in International Law and Organization*, (Martinus Nijhoff Publishers, Dordrecht 1985).

Salmon, J. (ed), *Dictionnaire de Droit International Public*, (Bruylant, Bruxelles 2001).

Sassoli, M., Bouvier, A.A., Quintin, A., *How does law protect in war?*, (International Committee of the Red Cross, Geneva 2011).

Tansley, D.D., *An Agenda for the Red Cross: Final Report: Reappraisal of the Role of the Red Cross*, (Henry Dunant Institute, Geneva 1975).

B) ARTICLES AND CONTRIBUTIONS TO BOOKS

- Alston, P., 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' (1982) 29 *Netherlands International Law Review* 307.
- Alston, P., 'Making Space for New Human Rights: The Case of the Right to Development' (1988) 1 *Harvard Human Rights Yearbook* 3.
- Alvarez, J. E., 'State Sovereignty is Not Withering Away: A Few Lessons for the Future' in A. Cassese (ed), *Realizing Utopia. The Future of International Law*, (Oxford University Press, Oxford 2012).
- Boisson de Chazournes, L., 'Responsibility to Protect: Reflecting Solidarity?' in R. Wolfrum, C. Kojima (eds), *Solidarity: A Structural Principle of International Law*, (Springer, Heidelberg 2009).
- Chapman A.R., 'Development of Indicators for Economic, Social and Cultural Rights: the Rights to Education, Participation in Cultural life and Access to the Benefits of Science' in Y. Donders, V. Volodin (eds), *Human Rights in education, Science and Culture. Legal development and Challenges* (UNESCO Ashgate, Great Britain 2007).
- Clapham, A., 'The challenge of non-state actors for human rights law' in D. Moeckli and others, *International Human Rights Law*, (Oxford University Press, Oxford 2010).
- Condorelli, L., 'Intervention Humanitaire et/ou Assistance Humanitaire? Quelques certitude et beaucoup d'interrogations' in N. Al-Nauimi, R. Meese (eds), *International Legal Issues Arising under the United Nations Decade of International Law*, (Martinus Nijhoff Publishers, The Hague 1995).
- Costa, P.J., Evans, P., 'The Indian supply Drop into Sri Lanka: Non-Military Humanitarian Aid and the Troubling Aid of Intervention' (1988) 3 *Connecticut Journal of International Law* 417.
- Costas Trascasas, M., 'Access to the territory of a Disaster-Affected State' in A. de Guttry, M. Gestri, G. Venturini (eds), *International Disaster Response Law*, (Springer, T.M.C. Asser Press, The Hague 2012).
- Creta, A., 'A (Human) Right to Humanitarian assistance in Disaster Situations? Surveying Public International Law' in in A. de Guttry, M. Gestri, G. Venturini (eds) *International Disaster Response Law*, (Springer, T.M.C. Asser Press, The Hague 2012).

- Domestici-Met, M., Intervention in *Le Droit à l'Assistance Humanitaire. Actes du Colloque international organisé par l'UNESCO*, (UNESCO, Paris 1996).
- Dupuy, R.J., 'L'assistance humanitaire comme droit de l'homme contre la souveraineté de l'état' in F. Kalshoven (ed), *Assisting the victims of Armed Conflict and Other Disasters*, (Martinus Nijhoff Publishers, Dordrecht 1989).
- Fisher, D., 'The Right to Humanitarian Assistance' in W. Kalin and others (eds), *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges*, (The American Society of International Law, Washington 2010).
- Gaeta, P., 'Immunity of States and State Officials: A Major Stumbling Block to Judicial Scrutiny?' in A. Cassese (ed) *Realizing Utopia. The Future of International Law*, (Oxford University Press, Oxford 2012).
- Gros Espiell, H., 'Les Fondements Juridiques du Droit à l'assistance Humanitaire' in *Le Droit à l'Assistance Humanitaire. Actes du Colloque international organisé par l'UNESCO*, (UNESCO, Paris 1996).
- Hardcastle, R.J., Chua, A.T.L., 'Humanitarian assistance: towards a right of access to victims of natural disasters' (1998) 38 *International Review of the Red Cross* 589.
- Kalshoven, F., 'Assistance to the victims of armed conflicts and other disasters: Introduction to the Conference Theme' in F. Kalshoven (ed), *Assisting the victims of Armed Conflict and Other Disasters*, (Martinus Nijhoff Publishers, Dordrecht 1989).
- Kent, G., 'The Right to International Humanitarian Assistance', (University of Hawaii, 2005).
- Kolb, R., 'De l'assistance humanitaire: la résolution sur l'assistance humanitaire adoptée par l'Institut de droit international à sa session de Bruges en 2003' (2004) 86 *International Review of the Red Cross* 853.
- Luopajarvi, K., 'Is there an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?' (2003) 15 *International Journal of Refugee Law* 678.
- Marks, S.P., 'Emerging Human Rights: A New Generation for 1980s?' (1981) 33 *Rutgers Law Review* 435.

- Mbaye, K., 'Introduction to Part Four: Human Rights and Rights of People' in M. Bedjaoui (ed), *International Law: Achievements and Prospects*, (Martinus Nijhoff Publishers, Paris 1991).
- Muller, A., 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 Human Rights Law Review 557.
- Quartarelli, E.L., 'Disaster Planning, Emergency Management and Civil Protection: The Historical Development of Organized Efforts to Plan for and to Respond to Disasters', (University of Delaware Disaster Research Center, 2000) Preliminary Paper 301
<http://dspace.udel.edu/bitstream/handle/19716/673/PP301.pdf?sequence=1>
 accessed 14 August 2013.
- Ronzitti, N., 'Conclusions' in A. de Guttry, M. Gestri, G. Venturini (eds), *International Disaster Response Law*, (Springer, T.M.C. Asser Press, The Hague 2012).
- Rottensteiner, C., 'The denial of humanitarian assistance as a crime under international law' (1999) 81 International Review of the Red Cross 555.
- Russo, F., 'Disasters through the Lens of International Criminal Law' in A. de Guttry, M. Gestri, G. Venturini (eds), *International Disaster Response Law*, (Springer, T.M.C. Asser Press, The Hague 2012).
- Schindler, D., 'Humanitarian Assistance, Humanitarian Interference and International Law' in R. St-John Macdonald (ed), *Essays in Honour of Wang Tieya*, (Martinus Nijhoff Publishers, Dordrecht 1994).
- Sommario, E., 'Derogations from Human Rights Treaties in Situations of Natural or Man-Made Disasters' in A. de Guttry, M. Gestri, G. Venturini (eds), *International Disaster Response Law*, (Springer, T.M.C. Asser Press, The Hague 2012).
- Triggs, G., 'The Rights of 'Peoples' and Individual Rights: Conflict or Harmony?' in J. Crawford (ed), *The Rights of Peoples*, (Clarendon Press, Oxford 1988).
- Ubéda-Saillard, M., 'Les limites de la Responsabilité de Protéger: Les Désastres Naturels' in A.L. Chaumette, J. Thouvenin (eds), *La responsabilité de protéger, dix ans après. Actes du colloque du 14 novembre 2011*, (Editions Pedone, Paris 2013).

Vasak, K., 'Les Différentes Catégories des Droit de l'Homme' in A. Lapeyre and others, *Les Dimensiones Universelles Des Droits de l'Homme*, (Bruylant, Bruxelles 1990).

Wellens, K., 'Solidarity as a constitutional principle: its expanding role and inherent limitations' in R. S. Macdonald, D.M. Johnston (eds), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community*, (Martinus Nijhoff Publishers, The Netherlands 2005).

Zorzi Giustiniani, F., 'The Works of the International Law Commission on "Protection of Persons in the Event of Disasters". A critical Appraisal' in A. de Guttry, M. Gestri, G. Venturini (eds), *International Disaster Response Law*, (Springer, T.M.C. Asser Press, The Hague 2012).

III. NEWS

Egeland, J., 'Press briefing on tsunami disaster by Jan Egeland, USG for Humanitarian Affairs and Emergency Relief Coordinator' UN News Centre (3 January 2005) <<http://www.un.org/apps/news/infocus/iraq/infocusnews.asp?NewsID=855&slID=9>> accessed 21 August 2013.

—, 'Forcing aid to Burma "incendiary"' BBC News (9 May 2008) <http://news.bbc.co.uk/2/hi/uk_news/7391492.stm> accessed 15 August 2013.

Ban Ki-moon, 'Response to Cyclone in Myanmar "unacceptably slow"' UN News Service (12 May 2008) < <http://www.un.org/apps/news/story.asp?NewsID=26634>> accessed 21 August 2013.

Joint communiqué issued by the Ministry of Foreign and European Affairs and the (French) Ministry of Defence (Paris 15 May 2008) <<http://www.ambafrance-uk.org/Bernard-Kouchner-on-Burma-disaster.html>> accessed 15 August 2013.

Mydans, S., 'Donors Press Myanmar to Let Aid Workers In' New York Times (26 May 2008) <http://www.nytimes.com/2008/05/26/world/asia/26donor.html?ref=cyclonenargis&_r=0> accessed 17 August 2013.