Introduction

Equality is a common cornerstone of many contemporary democracies. In this respect, it acts as a structural principle guiding decision-makers in adopting decisions that are likely to influence the enjoyment of human rights. On the other hand, however, the equality principle is fully incorporated into human rights law, acting as a source of procedural and substantive obligations. Viewed from this angle, it not only means the principle implies a formal equality of individuals before the law, requiring a uniform implementation of the law by public authorities, but it also means it imposes a substantive equality, thus serving as a tool to fight discrimination, that is, unlawful differentiation among individuals, and particularly among the most disadvantaged in society.

In this latter dimension lies the indivisibility of the principle of equality and non-discrimination, thus becoming the inescapable core of all human rights law, and particularly in disaster scenarios. This is because it implies that any differentiation among people must be based on objective criteria of importance, and not simply on the group's membership. In the context of the above, we can appreciate the necessity of ensuring equality during disaster scenarios.

Not only is it apparent that when a disaster strikes it becomes imperative to ensure equal treatment and full relief for everyone, taking into account the particular challenges faced in protecting the human rights of vulnerable groups, but it is also increasingly evident that this imperative must inform all stages in the disaster management lifecycle.

In light of the foregoing, this chapter intends to reflect broadly on the role that equality and non-discrimination play in disaster settings in both international and European law. Due to space constraints, the discussion cannot consider in any depth the different forms of discrimination based on prohibited grounds that may be encountered in disaster scenarios. Rather, it will highlight the most significant general approaches to non-discrimination set forth in International Disaster Law (IDL), as well as in the legal implications stemming from this set of rules. To this end, the chapter proceeds in three consecutive steps. The first section describes the general approaches taken in international practice to ensure that disaster victims (potential or actual) are not discriminated against. In this connection particular emphasis will be placed on the solutions enshrined in the Draft Articles on the Protection of Persons in the Event of Disasters (hereinafter 'Draft Articles'), adopted in 2016 by the International Law Commission and to date representing the most authoritative effort to codify IDL into a set of universal rules. The second section will then highlight the way that IDL stands to benefit from an emphasis on non-discrimination (third stage).
section), while also offering a general reflection on the legal status and scope of the equality and non-discrimination principles in IDL. The main outcomes of this legal analysis carried out are summarised in the fourth section.

Setting the scene: the main approaches to non-discrimination in disaster scenarios and their rationale

Due in particular to the paramount importance the protection of vulnerable groups has in disaster scenarios, it does not come as a surprise that IDL instruments make recurrent reference to the need not to discriminate among victims of disasters. In this respect, three general approaches may be distinguished: (1) non-discrimination is written into IDL instruments as an implicit attribute of classic principles governing humanitarian assistance (the ‘humanitarian approach’); (2) non-discrimination is explicitly recognised among the constitutive elements of the human rights-based approach to disaster management (the ‘human rights-based approach’); and (3) the two previous trends are merged, with the same instrument making reference to both the humanitarian and human rights-based approach to non-discrimination (constituting a ‘mixed approach’). Let us consider the main features of these three trends in the following subsections.

The humanitarian approach to non-discrimination: incorporating humanitarian principles into international disaster law

A first clear trend in IDL consists in straightforwardly incorporating the basic principles of humanitarian assistance into the relevant instruments. These are the principles of humanity, impartiality, and neutrality. In fact the latter two principles (impartiality and neutrality) are commonly considered inherent in non-discrimination discourse. More to the point, impartiality is considered a source-level principle requiring that humanitarian assistance be provided without taking sides in any controversy of a political, social, religious, or ideological nature. Impartiality is considered a source-level principle requiring that assistance be provided non-discriminatorily solely on the basis of the victim’s needs and in proportion to such needs. Drawing on Jean Pictet’s well-known systematisation of humanitarian principles, impartiality can then be conceived as a principle containing three intertwined but separate subprinciples: the principle of non-discrimination, that of proportionality, and that of impartiality. So, even though the principle of non-discrimination is not expressly mentioned, it figures as an implied element of humanitarian assistance, as it is rooted in International Humanitarian Law (IHL). The implied relevance of the principle of non-discrimination has also been confirmed by the International Court of Justice in the Nicaragua case, where at issue were the conditions that had to be met in order for humanitarian assistance to be deemed to persons in need in Nicaragua in conformity with international law. In light of the fundamental principles declared at the Twentieth International Conference of the Red Cross, the Court found that

if the provision of 'humanitarian assistance' is to escape condemnation as an interference in the internal affairs of Nicaragua, not only must it be limited to the purposes stated in the practice of the Red Cross, namely 'to prevent and alleviate human suffering', and 'to protect life and health and to ensure respect for the human being', it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the contra’s and their dependents. 12

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198
Turning to the instruments and provisions that may be included in the IDL category, traces of this trend can be found in the first place in the resolutions adopted by the United Nations General Assembly (UNGA) in various sessions, starting from the UNGA Resolution 46/182 – a notable intervention in the establishment of the foundational principles of humanitarian assistance. Indeed, according to this resolution, ‘humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality’. More recently, the UNGA has reaffirmed the paramount role of these principles in its Resolution 71/128 on International Cooperation on Humanitarian Assistance in the Field of Natural Disasters. Inclusive reference to the humanitarian principles has also been made in some international treaties. Not surprisingly, due to the commitment the International Red Cross and Red Crescent Movement has made to the improvement of the humanitarian agenda, the same approach is incorporated into the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, adopted in 2017 by the International Federation of Red Cross and Red Crescent Societies (IFRC). In particular, Guideline No. 4 (Responsibilities of Assisting Actors) states that ‘assisting actors should ensure that their disaster relief and initial recovery assistance is provided in accordance with the principles of humanity, neutrality and impartiality’. Similar solutions are present in other soft-law instruments, such as the Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies of 2003, as well as the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief of 2006, (the so-called Oslo Guidelines). The human rights-based approach to non-discrimination: international disaster law making direct recourse to non-discrimination clauses elaborated under International Human Rights Law Next to the humanitarian approach, clearly providing for paramount principles, it is also possible to discern another approach, which as mentioned consists in relevant international-law instruments and provisions making direct reference to the principle of non-discrimination. This means that, on this approach, non-discrimination is not conceived as a derived principle contained in that of impartiality but enjoys a freestanding status. Unlike the humanitarian approach, this one is firmly rooted in International Human Rights Law (IHRL) – hence the idea of a human rights-based approach to disaster management. As will be seen, different techniques have been developed under IHRL to promote equality and non-discrimination among individuals. The great majority of IHRL instruments starting from that milestone instrument which is the Universal Declaration of Human Rights (UDHR), contain an accessory non-discrimination clause mentioning an open list of prohibited grounds on which there can be no discrimination in respect of the human rights protected by the instrument at stake. Sometimes the IHRL instruments explicitly enshrine the principle of non-discrimination and equality in relation to specific individual rights. In other cases, the non-discrimination clauses have also been formulated as the diplomatic practice” others through the practice of relevant monitoring bodies. Lastly, several issue-specific conventions have been developed for the purpose of eliminating discrimination on one particular ground – evidence that discrimination on that ground is especially reprehensible or that those who are discriminated against on that ground are particularly vulnerable. These treaties generally do not make explicit reference to disaster scenarios. The most significant exception is the Convention on the Rights of Persons with Disabilities, under which...
States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters. 28

However, as is clearly demonstrated in different contributions to this volume, 29 just because an instrument makes no explicit reference to any disaster scenario does not mean that such scenarios fall outside the scope of the instrument in question. On the contrary, it is very much the practice of human rights monitoring bodies to take a human rights-based approach to disaster management, and most importantly for our purposes here, to clearly invoke the non-discrimination clauses contained in relevant treaties, stressing the need to protect the vulnerable members of society as well as their full enjoyment or exercise of rights and freedoms, in either pre- or post-disaster settings.

Quite instructive, in this respect, is the practice of the Committee on Economic, Social and Cultural Rights (CESCR) established under the corresponding Covenant. In its General Comment on the right to the highest attainable standard of health, for instance, the CESCR has stated that States parties have a joint and individual responsibility . . . to cooperate in providing disaster relief . . . Priority in the provision of international medical aid, distribution and management of resources . . . should be given to the most vulnerable or marginalized groups of the population. 30

This obligation is clearly derived from the equity, non-discrimination clause (Article 2, para 2) of the Covenant’s right to health clause (Article 12) – a combination in virtue of which there can be no discrimination on any grounds in providing access to healthcare and hence no intent to nullify the equal enjoyment of the right to healthcare. Similarly, in its General Comment on the right to adequate food, the CESCR has highlighted the need to ensure the most vulnerable populations are given priority in food aid, or a need that follows from the prohibition on any discrimination in access to food (under Article 2, para 2 of the Covenant), to be read in conjunction with Article 11. The same attitude, which the CESCR has also taken to the right to adequate housing, as well as the right to adequate living standards, is also present in the activity of other monitoring bodies, such as the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW). 31

Turning to IDL, it is interesting to note that the need for non-discriminatory treatment for people as soon as had already been recognized in the instrument that to some extent stands as the progenitor of this branch of international law, that is, the International Convention and Statute Establishing an International Relief Union. 36 Indeed, Article 3 of this Convention expressly provides that “[t]he International Relief Union shall operate for the benefit of all stricken peoples, whatever their nationality or their race, and irrespective of any social, political or religious distinctions.” Although the Convention prohibited only a select number of discriminatory grounds in line with the understanding of the limited discrimination practices of the time, it clearly reflects the necessity of prompt assistance for all persons in need anticipating – albeit in a cursory and rather primitive fashion – some of the constitutive elements of the current human rights-based approach to non-discrimination.

More robust (and recent) elements of a human rights-based approach to non-discrimination in disaster settings can be found in the framework established under the 2003 Bruges Resolution.
Addressing discrimination in disasters

of the International Law Institute on Humanitarian Assistance. In particular, the Brussels Resolu-
tion contains a provision on the right to humanitarian assistance stating that such assistance shall be offered and, if accepted, distributed without any discrimination on prohibited grounds, while taking into account the needs of the most vulnerable groups. In the same vein, under the Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-Made Disasters, the goods of assistance shall be distributed without any discrimination based on race, religion, language, political or other factors.

Needless to say, this kind of approach does not apply only to disaster response. This is especially apparent in the range of instruments adopted internationally to develop a climate change adaptation and mitigation system. In a resolution adopted in 2009 on human rights and climate change, the Human Rights Council (HRC) stresses that ‘the effects of climate change will be felt most acutely by those segments of the population who are already in vulnerable situations owing to factors such as geographic poverty, gender, age, indigenous or minority status and disability’.

The emphasis on the need to protect vulnerable groups is also present in the Sendai Fram-
work for Disaster Risk Reduction, where this protection is listed among the guiding principles

Disaster risk reduction requires an all-of-society engagement and partnership. It also requires empowerment and inclusion, accessible and non-discriminatory participation, paying special attention to people disproportionately affected by disasters, especially the poor. A gender, age, disability, and cultural perspective should be integrated in all policies and practices, and women and youth leadership should be promoted.

Quite significantly, a human rights-based approach to non-discrimination is also enshrined in the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, even if in the preambular section – and for the first time ever in a binding multilateral treaty – the Paris Agreement recognises the need to protect human rights in managing climate change internationally stating that such protection must in particular take the position of vulnerable individuals and groups into account.

Mixing the humanitarian and human rights-based approaches in managing discrimination in disaster settings

Far from representing two alternative approaches, the incorporation of humanitarian principles and that of non-discrimination clauses are two complementary ways to go about ensuring the pro-
tection of vulnerable groups in disaster scenarios. This explains why these two approaches have

A first example of the mixed approach can be found in the 2000 Framework Convention on Civil Defence Assistance: having established that the contracting parties may not discriminate in providing the assistance needed to prevent disasters or mitigate their consequences, Article 3 of the Convention clarifies that the same assistance must also be governed by the principles of humanity and impartiality.

The same attitude can also be found in EU law. ‘Whatsoever is mention in primary law is the legal basis of EU humanitarian aid, namely, Article 214 of the Treaty on the Functioning of the European Union (TFEU).’ The previous, intertwined with the Lisbon Treaty, is meant

197
to establish the legal framework for ad hoc financial assistance and relief protection for people in third countries who fall victim to natural and man-made disasters, and it enumerates three principles of EU humanitarian assistance: impartiality, neutrality, and non-discrimination. As is apparent, this list does not perfectly correspond to that of the above-mentioned humanitarian principles: on the one hand, the principle of humanity is not expressly mentioned; on the other, the principle of non-discrimination— which, as we have seen, works as a sub-principle of that of impartiality—is listed next to the other guiding principles, suggesting that the drafters of the EU Treaties understood it as having primary legal standing. The fact that humanity is not present in the Treaty provision does not in itself seem particularly relevant. As I have discussed elsewhere, the very same provision also states that EU humanitarian aid operations ‘shall be conducted in compliance with the principles of international law’. It is thus possible to conclude that the principle of humanity is not one which works as a guiding principle of EU action in the domain in question unless as it constitutes a well-established core principle of humanitarian assistance, whose continuous nature under international law cannot easily be questioned. By contrast, the inclusion of non-discrimination among the guiding principles of the EU humanitarian aid does not seem irrelevant. For it suggests that reference is made here to the EU general principle of non-discrimination this is a valuable contribution of the EU integration process, and more importantly where we are concerned it stands at an essential piece of the standard for protecting fundamental rights – a standard we can refer to in the EU Charter of Fundamental Rights. In other words, the reference made in Article 214 TFEU seems to express the Union’s adherence to a human rights-based understanding of non-discrimination. This conclusion is supported by the European Consensus on Humanitarian Aid, an important document outlining the policy framework for EU action in response to humanitarian crises. Indeed, the list of classic ‘fundamental humanitarian principles’ contained in this document only includes humanity, impartiality, neutrality, and confidentiality. It is thus evident that the non-discrimination principle is not deemed by the drafters of the European Consensus a constitutive element of what in this chapter is being called the ‘humanitarian approach’.

Moreover, and quite significantly, the same dual attitude expressed in the legal basis of EU humanitarian aid can also be found in the EU’s international agreements, as well as in EU secondary law dealing with disaster management.

At the regional level, traces of this mixed approach can also be found in the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), which not only mentions the non-discrimination principle together with equality and equal protection before the law, but also stresses the need to ensure respect for the humanitarian principles of humanity, impartiality, and neutrality and the independence of humanitarian actors.

More importantly for our purposes, however, a similar attitude seems to also emerge from the work the International Law Commission (ILC) has devoted to the topic of the protection of persons in the event of disasters. Worthy of mention in this respect is Draft Article 6, which the ILC adopted in 2016 on second reading. The Draft Article – titled ‘Humanitarian Principles’ – merges the two trends analysed in previous subsections, echoing in particular the solutions adopted in both UNGA Resolution 46/182 and the Bruges Resolution of the Institute of International Law. It reads as follows:

Response to disasters shall take place in accordance with the principles of humanity, impartiality, and neutrality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.
Importantly, the final version of this provision differs from the one originally proposed by the Special Rapporteur, whose only classic humanitarian principles were listed. The rationale behind the ILC’s amendment is explained in the Commentary to the Draft Articles, where it is stated that the principle of non-discrimination, applicable also in the context of disaster risk reduction, reflects the inherent equality of all persons and the determination that no adverse distinction may be drawn between them. Prohibited grounds for discrimination are non-exhaustive and include ethnic origin, sex, nationality, political opinions, race, religion, and disability. The Commission determined that non-discrimination should be referred to as an autonomous principle in light of its importance to the topic at hand.

As is apparent from the ILC’s arguments, the importance of the non-discrimination principle resides in its indissoluble link to the principle of equality and its achievement from a human rights-based approach to disaster management. Moreover, the fact that the Commentary makes express reference to the concept of disaster risk reduction suggests that the human rights element in non-discrimination comes into play at all stages of disaster management, including the pre-disaster stage.

Quite significantly, the ILC’s choice to expressly mention both the principle of impartiality and that of non-discrimination has been warmly received by States. This can be appreciated, for example, in the positions expressed by Austria, Greece, Indonesia, and Ireland in the Sixth Committee of the UNGA, as well as in the United States’ comments on the ILC’s Draft Articles. On the contrary, when it came to the concept of neutrality, several States questioned the wisdom of mentioning it, arguing that the concept is closely bound up with situations of armed conflict, which are supposed to fall outside the scope of the topic.

What can be concluded, also in light of the previously mentioned element of practice, is that there seems to be a significant and broad consensus on the idea that non-discrimination in disaster management can be more effectively ensured when the relevant instruments expressly make reference not only to humanitarian principles but also to the non-discrimination principle per se.

The potential added value of the ‘mixed approach’ to non-discrimination in disaster scenarios

For fear of burdening a more linguistic issue, the additional recourse to non-discrimination clauses in IDL instruments may significantly add to the protection of persons who are (or may be) affected by disasters. Generally speaking, it must first be noted that such recourse strengthens the need to avoid discrimination against vulnerable groups in disaster scenarios as well as the consequences that such a central purpose is to help those who are most disadvantaged. Moreover, as the protection of persons who are vulnerable in this respect can be achieved by means of such clauses, it is clear that the additional recourse to non-discrimination clauses in IDL instruments may significantly add to the protection of persons who are (or may be) affected by disasters.

First, as can be appreciated by a closer inspection of the elements of practice mentioned in the previous sections, the incorporation of non-discrimination clauses into the relevant instruments makes it possible to extend to IDL the working definitions and tools elaborated in IHRL to implement equality and non-discrimination among the beneficiaries of human rights. As for the working notions, reference can be made not only to the classic distinction between direct and indirect discrimination, but also to concepts such as ‘multiple or intersectional discrimination’ and ‘discrimination by association’, which significantly extend the scope of application of anti-discrimination law. On the other hand, recourse to non-discrimination clauses...
Federico Casolari

gives the actors concerned a chance to have access to the 'toolkit' so far developed to implement anti-discrimination law. In this respect, an essential role is played by so-called 'positive actions' (or 'affirmative actions') aimed at alleviating historical and/or structural disadvantages in order to further the goal of substantive and genuine equality.84 The role of positive action in this context is even stronger once we consider that according to the practice of human rights monitoring bodies, failure to take such measures to ensure substantive equality can amount to discrimination under IHRL.85

Quite significantly, this understanding has been codified in the most recent universal convention for fighting discrimination, that is, the UN Convention on the Rights of Persons with Disabilities, where Article 2 in fact makes it clear that '[d]iscrimination on the basis of disability' . . . includes all forms of discrimination, including denial of reasonable accommodation'.86

Second, as can be appreciated from the comments made to the ILC's Draft Articles,87 non-discrimination clauses, and thus the human rights-based approach they express, seem to be better suited to ensuring an adequate protection of vulnerable groups after disaster occurs. This is probably because humanitarian principles are traditionally linked to the assistance provided in response to man-made crises and natural disasters. Like a through-line connecting all stages of disaster management, the inclusion of non-discrimination clauses into the IDL instruments could thus facilitate a more coherent and comprehensive approach to human rights protection in disaster scenarios. Third, the inclusion of a human rights-based approach in shaping non-discrimination in IDL should logically lead to the redefinition of a treatable right not to be discriminated against in disaster settings. In other words, similarly to what may be observed in the implementation of human rights instruments containing non-discrimination clauses, the human rights-based approach can be expected to prompt a shift toward substantive equality in disaster settings that in turn should prompt us to refine our understanding of the corresponding duty not to discriminate. From this perspective, this duty should be understood not only as an auxiliary obligation needed to ensure a full respect for other human rights (such as the right to humanitarian assistance),88 but also as a self-standing duty, thus entailing a corresponding autonomous right.

If similar rights can already be considered in existing human rights treaty-based systems containing a general non-discrimination clause,89 a question arises about the possible identification of a corresponding international customary rule.

In this connection, it is important to first point out the clear statement the Inter-American Court of Human Rights has made in its advisory opinion on the juridical condition and rights of undocumented migrants,90 holding that

the principle of equality before the law and of equal protection belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, we have an obligation to ensure that this fundamental principle is respected, and that discrimination on the basis of any personal characteristic is regarded as a threat to the democratic order, as a breach of the rights of all citizens, and as a violation of the principles of equality and non-discrimination contained in the treaties of the American continent.91

As correctly highlighted in the literature,92 although the acknowledgment of the peremptory status of the principle of equality and non-discrimination is indeed significant (and desirable), this view does not mean that the principle is supreme over all other human rights. More precisely, it means that only the prohibitions against social discrimination, and against practices that are directly associated with it, must be observed, while the other human rights-based obligations, such as the right to humanitarian assistance, must also be respected.
Addressing discrimination in disasters

In all other cases, whenever human rights monitoring bodies have acknowledged the essential role that non-discrimination and equality play in the protection of human rights, this acknowledgment—coupled with these bodies’ consistent practice of seeking to enlarge the scope of the protection afforded by the principles at issue—has paved the way for the formation of corresponding (ordinary) international customary rules. It is interesting to note in this regard that the different texts in which States undertook the relevant grounds of discrimination scholarship is usually reluctant to view the process of looking back on the whole—complicated—then arguing that the principle of non-discrimination has yet to achieve the status of international customary law while, on the other hand, the practice in disaster settings suggests that the States and the actors concerned have shown a desire to insert an express reference to non-discrimination in the ILC’s Draft Articles that looks at the practice of States and express acts could be regarded as already established as far as non-discriminatory conduct in disaster scenarios is concerned. In other words, the process used to give assistance to potential disaster victims might have speeded up the formation of an international customary rule prohibiting discriminatory treatment in disaster settings.

Be that as it may, considering that some human rights treaty-based regimes already recognize a self-standing right to non-discrimination, the further question is raised of whether limits to, and derogations from, this right are to be considered admissible in the event of disasters. As is well-known, human rights treaties do recognize the possibility of limiting, and derogating from, the vast majority of protected rights. This possibility was also to be involved in a disaster scenario. Having said that, however, it is obvious that the practice of invoking limits to, and derogations from, non-discrimination clauses in disaster settings may risk undermining (or even nullifying) the very rationale behind those clauses in disaster events, that is, the welfare recognition of the special challenges faced in the protection of the human rights of vulnerable groups affected by humanitarian emergencies. In other terms, the possibility of significantly limiting (or derogating from) non-discrimination clauses in disaster events—except for the case of racial discrimination, which is prohibited under peremptory international norms—could lead to the striking conclusion that similarly situated vulnerable groups or persons in deep need of assistance enjoy only a limited protection, if any.

Such a conclusion, however, would require that the States’ treaty provisions allowing limitations and derogations—and the relative practice of monitoring bodies—impose specific requirements that must be met in order to lawfully trigger the corresponding mechanisms. These requirements generally provide that limitations must be compatible with the nature of the right in question, and derogations cannot involve unjustifiable discriminations. The cases where they involve the protection of human rights of vulnerable groups affected by humanitarian emergencies.

In light of the foregoing, it may be argued that (1) the essence of the right not to be discriminated against cannot be undermined by any of the limitations introduced by States in dealing with disaster scenarios and (2) any related derogations introduced for the same purpose cannot in any way give rise to unjustifiable discriminations. In light of the principle of proportionality, however, this does not exclude that a ‘reasonable balance between States’ and individuals’ interests’ must be reached, taking also into account the capacity of affected States before and after a disaster strikes.

Concluding remarks

A number of conclusions can be drawn from the foregoing analysis. A first element that deserves to be mentioned is that different approaches inform the way relevant IDL instruments frame the imperative not to discriminate among (actual or potential) disaster victims. Increasingly strong in this regard is the approach that combines the classic humanitarian principles with explicit references made to the non-discrimination principle as understood in IHRL. As far as
chapter has highlighted, this approach seems to be the one best suited to disaster settings, for on the one hand it makes it possible to better cover all the stages in a disaster’s lifecycle, while at the same time it provides a clear conceptual and legal basis for human rights monitoring both in the advances made to date and in the future development of better abstract substantive equality among individuals.

From this perspective, although the solution the ILC adopted in the Draft Articles could be further improved, 107 this solution, and the enactment of the action concerned, importantly consolidates the trend just mentioned, thus facilitating the process toward the formation of an international customary rule prohibiting discriminatory treatment in disaster scenarios, while underscoring the point that – in spite of some caveats the Commission formulated in resolving on the topic – the rights of individual disaster victims are to be genuinely protected, a dialogue needs to be pursued among IDL, IHRL, and IHL.

Selected bibliography


Notes

1 Unless otherwise indicated, this contribution takes into account developments in practice and legislation up to 30 June 2017.


3 According to the Human Rights Committee (HRComm), the term ‘discrimination’ . . . should be understood to imply any distinction, exclusion, restriction or preference which is based on an [prohibited] ground . . . and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

Cf. HRComm, General Comment No. 18: Non-Discrimination, UN Doc. HRI/GEN/1/Rev.9 (10 November 1989).


5 Clifford (n. 1) 422. The close interaction between the two notions explains why they are usually treated as overlapping legal concepts: cf. HRC, General Comment No. 18: Non-Discrimination, para 1; Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para 1, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20 (2009) paras 2–3. According to the Court of Justice of the European Union, equality and non-discrimination ‘are simply two labels for a single general principle of . . . [EU] law, which prohibits both treating similar situations differently and treating different situations in the same way, unless there are objective reasons for such treatment’. C-422/02 P, Europe Chemi-Con (Deutschland) GmbH v. Council and Commission, Case C-422/02 P, ECLI:EU:C:2005:56, para 33.

Similarly the Inter-American Court of Human Rights has held that in the light of the Office’s definition of equality as ‘measures taken to prevent and remove discrimination’, stated within extraordinary extraordinary rights from the fact that the principle must be guaranteed without discrimination’. CE Advisory opinion of 17 September 2003, Case 466, which in the light of the Office’s definition of equality as ‘measures taken to prevent and remove discrimination’, stated within extraordinary extraordinary rights from the fact that the principle must be guaranteed without discrimination’. CE Advisory opinion of 17 September 2003, Document No. 466, p. 85. 107
Addressing discrimination in disaster


6. This point has recently been reiterated in General Assembly Resolution 71/128 on international cooperation in the field of natural disasters, from relief to development, where the General Assembly notes ‘that persons with disabilities, older persons, women and children are disproportionately affected in natural disasters’ (A/RES/71/128, UN Doc. A/RES/71/128, 25 October 2016, paras 17, 21).


10. It is in fact undisputed that humanitarian principles are grounded in International Humanitarian Law: see also the Third Report on the Protection of Persons in the Event of Disasters, presented by the Special Rapporteur to the Commission for Human Rights (2016), paragraph 13.8.3.

11. The main internationally ‘prohibited grounds’ are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. U.N. International Covenant on Civil and Political Rights (entered into force 17 December 1976), articles 2, 7, 9, 14, 15, 26(3), (4); and U.N. International Covenant on Economic, Social and Cultural Rights, article 2. The International Committee of the Red Cross, The Fundamental Principles of the Red Cross and the Red Crescent, 3rd ed. (1986), para 243.


14 UNGA, Res 49/128 (a), (b). This finding made these principles particularly valuable in the aftermath of the fall of the Berlin Wall, when they were used as a framework for understanding the rights of individuals who had been held under communism.
15 Although the protocol has not been widely ratified, its principles have been applied by the European Court of Human Rights in several cases, such as the case of Mrs. D. v. Hungary (2005) 41 EHRR 1, which concerned the detention of a citizen of Hungary in violation of the prohibition on torture.
21 Office for the Coordination of Humanitarian Affairs, Oslo Guidelines – Revision 1.1 November 2007, available at www.unocha.org/sites/dms/Documents/Oslo%20Guidelines%20EN%20(2).pdf, accessed 30 June 2017. The guideline No. 22 (‘Core principles’) provides that humanitarian principles and practices should be developed in order to be consistent with the principles of humanity, neutrality, and impartiality.
Addressing discrimination in disasters

28  Convention on the Rights of Persons with Disabilities (n. 27) art 11; emphasis added. See also UNGA, Res 63/150, UN Doc. S/RES/63/150 (11 February 2009 para 9, urging 'States to take, in accordance with their obligations under international law, . . . all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters', and UNGA, Res 71/128 (n. 1), para 49, emphasizing the importance of mainstreaming the perspective of persons with disabilities in disaster risk reduction'. On that topic, see Ito (n. 5).

29  See in particular the chapters in Parts III and IV.

30  CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc. E/C.12/1999/4 (1999), paras 18–19; see also B. Vukas, 'Humanitarian Assistance in Cases of Emergency', Yearbook of the Institute of International Law, Volume 71, Part II, 262. As is well known, the resolution aims to establish a common legal framework for humanitarian assistance to be deployed in both peacetime and wartime. Even so, the resolution may be considered an IDL instrument to the extent that the parties freely agree to respect the provisions of the resolution; for a useful survey of the resolution, see the Appendix to this volume.

31  CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11), UN Doc. E/C.12/1999/5 (1999), paras 14–15; see also Rolnik's chapter in this volume.

32  CESCR, General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant), UN Doc. E/C.12/1995/4 (1995), para 18; see also Rolnik's chapter in this volume.

33  CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), UN Doc. CEDAW/C/SLB/CO/1–3 (1995), para 19; see also Inglese's chapter in this volume.

34  See, for instance, CERD, Concluding Observations on the United States of America, UN Doc. CERD/C/USA/CO/6 (2008) para 31, where the Committee expresses its concerns about the impact that Hurricane Katrina had on low-income African American residents, recommending that state intensify its effort to help those displaced by the hurricane to return to their homes.

35  CommEDAW, Concluding observations on the Solomon Islands, UN Doc. CEDAW/C/SLB/CO/1–3 (1995), para 4; emphasis added. See also UNGA, Res 46/182, UN Doc. A/RES/46/182 (8 December 1991) para 5, urging States 'to take, in accordance with their obligations under international law, . . . all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergency and the occurrence of natural disasters', and UNGA, Res 71/128 (n. 1), para 49, emphasizing the importance of mainstreaming the perspective of persons with disabilities in disaster risk reduction'. On that topic, see Ito (n. 5).

36  Convention establishing an International Relief Union (adopted 12 July 1927, entered into force 29 September 1931) 135 LNTS 247.

37  Yearbook of the Institute of International Law, Volume 71, Part II, 262. As is well known, the resolution aims to establish a common legal framework for humanitarian assistance to be deployed in both peacetime and wartime. Even so, the resolution may be considered an IDL instrument to the extent that the parties freely agree to respect the provisions of the resolution; for a useful survey of the resolution, see the Appendix to this volume.

38  Art II, para 3; emphasis added.


40  Art 4, para 2; emphasis added.

41  See, for instance, CERD, Concluding Observations on the United States of America, UN Doc. CERD/C/USA/CO/6 (2008) para 31, where the Committee expresses its concerns about the impact that Hurricane Katrina had on low-income African American residents, recommending that state intensify its effort to help those displaced by the hurricane to return to their homes.


45  See, for instance, CERD, Concluding Observations on the United States of America, UN Doc. CERD/C/USA/CO/6 (2008) para 31, where the Committee expresses its concerns about the impact that Hurricane Katrina had on low-income African American residents, recommending that state intensify its effort to help those displaced by the hurricane to return to their homes.

42  Ibid art 19(d).
pdf, accessed on 30 June 2017.
44  It need scarcely be mentioned that, under the 1969 Vienna Convention on the Law of Treaties, the
preamble of a treaty may be relevant to its interpretation. Cf. Vienna Convention on the Law of Treaties
45  The significance of the reference made to human rights protection in the Paris Agreement is high-
lighted, inter alia, by B. Mayer, ‘Human Rights in the Paris Agreement’ 6
Climate Law (2016) 109; O. Quirico, ‘Systemic Integration between Climate Change and Human Rights in International Law’ 35
Netherlands Quarterly of Human Rights 71. See also Sossai’s chapter in this volume.
46  The Preamble expressly mentions:
‘Parties should, when taking action to address climate change, respect, promote and consider three
important obligations: freedom, the right to health, the rights of indigenous peoples, local
communities, migrants, children, persons with disabilities and people in vulnerable situations and
the right to development; as well as gender equality, empowerment of women and intergenera-
tional equity.
(italics added)
47  Framework Convention on Civil Defence Assistance (adopted 22 May 2000, entered into force
pdf, accessed on 30 June 2017.
48  Ibid art 3(c).
49  Ibid art 3(d).
51  Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European
52  Supra, first subsection.
53  Ibid.
54  F. Casolari, ‘The External Dimension of the EU’s Humanitarian Response’ in A. de Guttry, M. Gestri and G.
Venturini (n. 6) 129, 152.
55  T. Tridimas, The General Principles of EU Law (2nd edn, Oxford University Press, 2006) 60. Among the
most recent works offering an overview of the EU principles of equality and non-discrimination, see
L. S. Rossi and F. Casolari (eds), The Principle of Equality in EU Law (Springer, 2017); J. Croon-Gestefeld,
Reconceptualizing European Equality Law: A Comparative Institutional Analysis (Hart, 2017); P. Watson (ed),
56  In particular, the non-discrimination principle is codified in the Charter’s art 21, which reads as follows:
1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic
features, language, religion or belief, political or any other opinion, membership of a national
minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the
scope of application of the Treaties and without prejudice to any of their specific provisions, any
discrimination on grounds of nationality shall be prohibited.
57  But see also P. Van Elsuwege and J. Orbie, ‘The EU’s Humanitarian Aid Policy after Lisbon: Implica-
tions of a New Treaty Basis’ in I. Govaere and S. Poli (eds), EU Management of Global Emergencies – Legal
Framework for Combating Threats and Crises (Brill Nijhoff, 2014) 21, maintaining that the non-dis-
crimination principle mentioned in art 214 TFEU may be considered as a ‘derived principle’ insofar as
its substance follows from the principle of impartiality.
58  Cf. Joint Statement by the Council and the Representatives of the Governments of the Member
States meeting in the Council, the European Parliament and the European Commission, OJ C 25/1
(2008).
59  Ibid para 2.1.10.
60  See, for instance, the Partnership Agreement between the Member of the African, Caribbean and Pacific
Group of States of the one part, and the European Community and its Member States of the other
Addressing discrimination in disasters


61. Decision No. 1313/2013 on a Union Civil Protection Mechanism, OJ L 347/924 (2013). The decision, providing for civil protection assistance in the event of disaster inside and outside the European Union, makes it clear that, in all cases where assistance under the Union Mechanism contributes to a Union humanitarian response, it needs to be consistent with humanitarian principles (art 26, para 3). However, as with any other piece of EU legislation, this decision has to be implemented by both EU institutions and Member States on the basis of the Charter of Fundamental Rights (thereby including the non-discrimination clause of art 21).


63. Ibid art 3, para 1(d). The non-discrimination principle is also mentioned in arts 5, para 1, and 9, para 2(c), of the Kampala Convention.

64. Ibid arts 5, para 8, and 6, para 3.


68. This is the reason why the Nordic countries have proposed to amend the Draft Article 5, devoted to the respect of human rights in the event of disaster, according to the following formula: 'States must ensure that the rights of affected persons under international human rights law are respected, protected and fulfilled without discrimination.' Cf. Joint comments by the Nordic countries on the Report of the International Law Commission on the work of its sixty-sixth session (Chapter V: Protection of persons in the event of disasters) 3, available at http://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/english/pop_finland_nordic.pdf&lang=E, accessed on 30 June 2017.

69. See also, in the same vein, the International Organization for Migration (IOM) Comments and observations on the International Law Commission Draft articles on the protection of persons in the event of disasters with commentaries, 11 (text available at http://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/english/pop_iom.pdf&lang=E, accessed on 30 June 2017), highlighting the fact that the non-discrimination principle also plays a pivotal role in the context of disaster prevention. Indeed, according to the IOM, this warm reception cannot be taken for granted, considering the strong reactions that emerged in the debate on other solutions written into the Draft Articles.

70. This is another example of a norm that is particularly relevant in the context of the prevention of disasters. Instead of, or in addition to, this issue, the prevention of discrimination is a concern of the Commission’s Special Rapporteur and the Commission’s Special Rapporteur on the prevention of racism and racial discrimination in the context of the prevention of disasters.


74. Ibid 10.
76. They include Greece (UNGA, UN Doc. A/C.6/65/SR.22 (n. 72) 8), Ireland (UNGA, UN Doc. A/C.6/65/SR.24 (n. 73) 10), the United Kingdom (ibid 11), Portugal (UNGA, UN Doc. A/C.6/65/ SR.23 (n. 71) 3), Austria (ibid 6–7), and Estonia (ibid 11).
77. But see the position expressed by the European Nordic countries, among others, that respect for neutrality should never be renounced in the context of armed conflict, since neutrality is a right that cannot be derogated. Joint comments by the Nordic countries on the Report of the International Law Commission (n. 68) 2. In fact, as the ILC itself has rightly stressed in its Commentaries on the Draft Articles, the principle of neutrality is not applicable in the context of natural disasters, particularly in situations in which persons are not surrounded by armed forces and cannot be considered combatants, even if they are suspected of having links with armed groups. Cf. Commentary to Draft Article 6, in Report of the International Law Commission, Sixty-Eighth Session (n. 67) 33–34. See also, in this vein, Bartolini, Natoli, and Riccardi (n. 10) 35.
79. The latter is enshrined in the principle of non-discrimination, which is not to be understood as excluding the possibility of “positive discrimination” as appropriate. The phrase “while taking into account the needs of the particularly vulnerable” is to be understood in this sense. Cf. Commentary to Draft Article 6 (n. 67) para 7.
81. Emphasis added. A further example of a measure involving a legitimate differential treatment can be found in art 2, para 3, of the International Covenant on Economic, Social and Cultural Rights (n. 23), providing that ‘developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals’. Cf. B. Saul, D. Kinley and J. Mowbray, The International Covenant on Economic, Social and Cultural Rights—Commentary, Cases and Materials (Oxford University Press, 2014) 214.
Addressing discrimination in disasters

98. This to the extent that such a right is recognised internationally. On this question see Hesselman’s chapter in this volume.

99. See, for instance, Human Right Committee, General Comment No. 18 (n. 2), para 1: ‘Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.’


101. International Covenant on Economic, Social and Cultural Rights (n. 23) art 4. The practice of the CESCR stresses that it is a ‘minimum essential level’ which must be achieved. See, for example, CESCR, General Comment No. 9 (The Nature of the Obligations Implied in the Covenant) para 21 (2000) and CESCR, General Comment No. 14 (The Right to Health) para 7 (2005).

102. A. and Others v. The United Kingdom, App No. 3455/05 (ECtHR, Judgment of 19 February 2009) paras 182–190. The European Court has elaborated that condition in light of the principle of proportionality. See Schabas (n. 26) 600.

103. International Covenant on Civil and Political Rights (n. 5), art 4, para 1; American Convention on Human Rights (n. 23) art 27, para 1.

104. For the reasons outlined above, I do not entirely share the opinion of some scholars who have underscored a twofold structure of Draft Article 6, arguing that, while its first part, devoted to humanitarian principles, should enjoy an absolute standing, the second part, devoted to non-discrimination, may be limited or derogated in view of its link to the human rights dimension. Cf. Bartolini, Natoli and Riccardi (n. 10) 37.


107 As currently worded, the Draft Article is subject to two lines of criticism. The first one is that the principles governing assistance to persons in need are explicitly restricted to disaster response; although the Commentary makes it clear that other stages of the disaster cycle may also be considered, it would have been better to more clearly frame the scope of the provision’s timeframe. The second line of criticism is that Draft Article 6, as currently worded, does not clarify its subjective scope. On this question, see Natoli’s chapter in this volume.