Introduction

This chapter considers the interaction between the sub-fields of International Humanitarian Law (IHL) and International Disaster Law (IDL) in governing humanitarian assistance to disaster victims in an armed conflict. Disasters are defined as ‘a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society’.

As at March 2017, there were forty armed conflicts in or between States around the world. The majority of these armed conflicts are non-international in nature. In several of those States, the armed conflict (or a series of conflicts) has been ongoing for decades, for example the conflict between India and Pakistan regarding Kashmir. Several States affected by armed conflict are also prone to disasters. Examples in the Asia-Pacific region include China, the Philippines, Nepal, India, Pakistan, Burma/Myanmar and Indonesia. Therefore perhaps the most likely scenarios in which to consider the overlap between IDL and IHL is where a disaster occurs in a State that is already experiencing armed conflict. The Philippines is an example of a State prone to geo-physical disasters (such as volcanic eruptions and earthquakes) as well as meteorological disasters (such as storms). In 2014 the government of the Philippines concluded a peace deal with the Moro Islamic Liberation Front ending two decades of conflict, during which earthquakes and typhoons struck the island of Mindanao in addition to the cycles of drought and flood. Conflict and politicisation of aid may also lead to famine, a slow-onset disaster.

A different scenario is where a disaster or series of disasters lead to the emergence of an armed conflict. This scenario is most likely to arise from what are called ‘slow-onset disasters’, which are distinct from ‘sudden-onset disasters’ such as earthquakes or hurricanes. Examples of slow-onset disasters include sustained periods of flooding or drought that gradually reduce...
available resources and the evidence of communities to withstand further incidents. Short-term disaster relief, evacuate existing populations and aid to access timeline even to water resources, eventually triggering an armed conflict. The mismanagement of sudden-onset disaster can also lead to conflict. Cyclone Bhola hit East Pakistan in November 1970 leading to around 500,000 deaths. Existing tensions rose due to the government in West Pakistan’s inadequate response, and by March 1971, a civil war led erupted leading to the secession of East Pakistan and emergence of the independent State of Bangladesh. 

As this brief discussion demonstrates, there is certainly scope for IHL to play a role in relation to disaster-related humanitarian assistance in many countries.

There are key differences between IHL and IDL. IHL has been established for approximately 150 years and applies in situations of armed conflict and occupation. This body of law includes some of the best-known and most widely ratified treaties and well-recognized rules of customary international law, although its implementation and enforcement are far from perfect. Amongst these treaty-based and customary international law provisions are several that regulate the provision of humanitarian assistance to civilian populations affected by an armed conflict, although there is no formal definition of humanitarian assistance in the IHL instruments.

The term IDL is relatively new and encompasses disaster risk reduction as well as disaster response, increasingly replacing International Disaster Response Law (IDRL). The international legal definition of a disaster, outlined above, is more limited than the colloquial use of the term disaster, which sometimes refers to war and terrorism as well as natural industrial or technological disasters and health emergencies. There is no overarching multilateral instrument that provides a comprehensive legal framework for disasters and many IDL instruments are non-binding. Instead, IDL operates at national and bilateral levels and, increasingly, through the incorporation of soft law standards, such as the IDRL Guidelines into domestic laws and procedures. Yet, there is consensus on the existence or content of any customary international law rules within IDL. Yet, where a disaster occurs in a country where an armed conflict is ongoing or emerging, there is a possible role for both IHL and IDL.

The relationship between the two bodies of law in situations of armed conflict, and how it might apply in practice, is unclear. As States, international organizations and other actors have attempted to provide greater clarity to the content and structure of IDL over the last decade or so, the relationship between these two branches of law has proved difficult to define. The International Law Commission (ILC or the Commission) is charged with the codification and progressive development of international law. The ILC adopted its Draft Articles on the Protection of Persons in the Event of Disasters (ILC Draft Articles) at first reading in 2014. After receiving comments from States, the ILC Drafting Committee adopted revised Draft Articles after second reading in May 2016, which, along with the associated commentaries, were included in the ILC’s 2016 annual report. The ILC recommended to the General Assembly the elaboration of a convention on the basis of this draft article. The Sixth Committee considered the ILC Draft Articles from 24 to 26 October 2016. Ultimately, the General Assembly, while expressing its appreciation to the ILC for its contribution to the elaboration of a convention on this topic, decided not to submit comments concerning the Committee’s recommendation that the ILC Draft Articles should form the basis of a convention. Given the preferences of the General Assembly for ‘soft law’ outcomes from previous ILC topics, it is uncertain whether the ILC Draft Articles will form the basis for a future legally binding instrument.

However, in the process of drafting the ILC Draft Articles, the ILC has had to consider the relationship between IHL and IDL and prepared a provision to address that relationship specifically. The final version of that provision (now Draft Article 12(2), formerly Draft Article 21) provides: ‘The present draft articles do not apply to the extent that the response to a disaster is...’
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This provision offers an improved approach to the relationship than previous versions of the Draft Article. However, it still reflects the view that IDL is displaced by IHL as the lex specialis legal regime. This chapter suggests that such an interpretation is overly simplistic and gives undue weight to the lex specialis principle. The chapter first outlines the principles of IHL relevant to the provision of humanitarian assistance and their potential relationship to disaster victims. Next, it considers how the ILC has approached the role of IHL in the Draft Articles, before examining how IHL and IDL may interact in practice. Finally, the chapter argues that a more nuanced understanding of the relationship between IHL and IDL is required, which takes into account the context in which a disaster has occurred and recognises that the two may be complementary.

Relevant provisions of IHL

The relevant provisions of IHL that may be relevant in a disaster are found in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (GCIV), the Protocols Additional to the Geneva Conventions (API and APII), as well as in customary international law. For present purposes, the relevant rules of IHL include the 'applicability' provisions of IHL, that is, those provisions that specify when IHL will apply. The relevant rules also include those substantive provisions that concern when, how and by whom humanitarian assistance can be provided and the substantive content of the relevant legal obligations.

Applicability of IHL

IHL is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. Accordingly, IHL is not a regime of general application and applies only during situations of armed conflict, both international and non-international in nature, and occupation. The question of whether an armed conflict or an occupation exists is an objective one, and the relevant criterion set out varying thresholds for the application of IHL. For international armed conflicts, there must be a use of armed force between States or a declaration of war, while in non-international armed conflicts, minimum requirements of intensity of violence and organisation of armed groups must be satisfied so as to distinguish an armed conflict from internal disturbances that do not attract the application of IHL. In the context of international armed conflicts, territory is considered occupied when it is actually placed under the authority of the hostile army. Humanitarian actors must therefore make important factual determinations before being certain that IHL will apply in a given context.

Consistent with IHL's limited focus, it contains important temporal, geographic and personal limitations. First, temporally, the majority of provisions apply only for the duration of the armed conflict. For international armed conflicts, this is from the onset of hostilities until the end of hostilities. For non-international armed conflicts, IHL applies from the point at which the threshold requirements of intensity and organisation are met and then ceases to apply if a peaceful settlement or other cessation of hostilities comes into effect. For IHL provisions on occupation apply in territory in which a hostile army is situated and continue until the occupying forces withdraw or are forced from the territory, or authority is transferred to the legitimate authorities. Otherwise, IHL will cease to apply to the occupied territory 12 months from the close of military operations, although certain obligations may continue.

Second, the relevant IHL conventions are silent as to their geographical application. For international armed conflicts, this means that IHL applies at least throughout the territory of the
States party to the conflict and areas of belligerent occupation. For non-international armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there. That is, the geographic application of IHL is not restricted to the territory in which hostilities are being conducted.

Finally, IHL is limited as to the persons to whom it applies. In terms of those protected by IHL, IHL applies to specific classes of 'protected persons', in particular, civilian populations affected by armed conflict, those no longer participating in hostilities, such as the sick and wounded and prisoners of war, and those under the control of an occupying force. IHL has historically focused on the protection of those in the control of an adverse party to a conflict, and a strict interpretation of IHL would exclude a State's own nationals from its provisions. However, Article 70 of API refers to humanitarian assistance provided by impartial humanitarian organisations to the civilian population, regardless of any criterion of nationality, and independently of the Party to which they belong. In terms of who is bound, IHL creates rights and obligations for a range of actors, including States parties to the Conventions in the territory of which an armed conflict is occurring (here, States parties) who may also be parties to a conflict; third or 'neutral' States (also referred to as States parties) and international organisations and humanitarian actors.

Substantive IHL provisions on humanitarian assistance

The substantive provisions of IHL vary depending on whether a conflict is international or non-international in character and also on the nature of the parties to the conflict, which may include State and non-state actors. The distinction between international and non-international armed conflict is of decreasing relevance and many international lawyers consider that most provisions relevant to international armed conflict would now extend to non-international armed conflicts as a matter of customary international law anyway. However, given that this argument is not yet universally accepted, the discussion here will maintain this distinction.

International armed conflict

IHL contains several provisions related to the delivery of humanitarian assistance. In an international armed conflict, IHL recognises the right of humanitarian initiatives of the International Committee of the Red Cross (ICRC) and 'other impartial humanitarian organisations', which must be undertaken 'for the protection of civilian persons and for their relief' but 'subject to the consent of the Parties to the conflict concerned'. This is supplemented by Additional Protocol I (API), which requires the States party to the conflict to extend to the ICRC 'facilities within their power so as to enable it to carry out humanitarian functions assigned to it' and, as far as possible, to other humanitarian organisations authorized to perform humanitarian activities.

States parties must allow free passage 'as rapidly as possible' of all consignments of medical and hospital stores intended for the civilian population. This duty to allow the passage of relief consignments is subject to limits in particular, it only applies where the State is satisfied that there are no serious reasons for fearing that the consignments may be diverted or control over their distribution may not be effective or that some advantage may accrue to the military efforts or economy of the enemy by altering the consignment. Moreover, the State concerned may make passage conditional on the respecting prior supervising distribution of the relief consignments and may prescribe the technical conditions on which passage is permitted.
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API extends the provisions in GCIV on relief supplies to occupied territories (see below) to ‘the civilian population of any territory under the control of a Party to the conflict, other than occupied territory’. Control of territory is thus an important, and often complex, aspect of humanitarian assistance under IHL, particularly in situations where it may not be evident which party to a conflict controls a particular territory or where the entity in control may change often. Where the affected civilian population is not adequately provided with food and medical supplies, clothing, bedding, means of shelter and other supplies essential to the survival of the civilian population, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned to such relief actions. The provision does not specify by whom such actions shall be carried out. States, including those States party to the conflict, ‘shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided’, even if such assistance is destined for the civilian population of an adverse Party. This is a different obligation to that in Article 23 of GCIV, as a requirement to facilitate rather than merely allow the passage of relief. However, as with Article 23, this obligation is qualified by the right to provide such technical arrangements under which relief consignments are transported and required a Protecting Power to supervise the local distribution. Moreover, the parties to the conflict shall not divert relief consignments nor delay their delivery, except in cases of urgent necessity in the interest of the civilian population concerned. The parties to the conflict must also protect relief consignments and facilitate their rapid distribution and, together with States parties, encourage and facilitate effective international coordination of such actions.

API also includes provisions concerning (but not defining) relief personnel who may, where necessary, participate in relief operations subject to the approval of the Party in whose territory they will carry out their duties. Such personnel ‘shall be respected and protected’, must be assisted by each party receiving consignments ‘to the fullest extent practicable’ and may only have their activities or movements temporarily restricted ‘in case of imperative military necessity’. Relief personnel must not exceed the terms of their mandate and shall take account of the security requirements of the Party in whose territory they are carrying on their duties or risk the termination of their mission.

Occupied territory

GCIV contains the most specific provisions concerning humanitarian assistance. However, these provisions apply only in relation to relief consignments to the populations of occupied territories, thus their reach is limited. An occupying power has certain fundamental obligations towards the civilian population of the occupied territory. Article 55 of GCIV provides that:

"to the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate." 

Both the 1949 Geneva Conventions and the 1977 Additional Protocols contain provisions concerning humanitarian assistance to victims of armed conflict. These provisions apply in relation to relief consignments to populations of occupied territories or territories in situations of civil or international armed conflict, and in situations of internal armed conflict. The provisions are generally similar, but there are some differences in the scope of the obligations owed to the civilian population in occupied territories and in situations of civil or international armed conflict.

The provisions in GCIV and APs require States to provide relief to the civilian population of occupied territories and in situations of civil or international armed conflict. The provisions are generally similar, but there are some differences in the scope of the obligations owed to the civilian population in occupied territories and in situations of civil or international armed conflict.
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occupying power to accept relief in such circumstances. Relief ‘shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing’ and may be undertaken by states or by impartial humanitarian organisations such as the ICRC. Allowing relief consignments does not oblige the Occupying Power of its own obligations towards the population of the occupied territory; in particular, those under Article 55. All States parties are ‘bound to permit the free passage of these consignments and shall guarantee their protection’. However, a State party to the conflict that grants free passage for relief supplies headed to territory occupied by an adverse party to the conflict has the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.

Once relief consignments are allowed in, the Occupying Power cannot divert relief consignments, except ‘in cases of urgent necessity in the interests of the population of the occupied territory and with the consent of the Protecting Power’. Relief consignments must be exempt from all charges, taxes or customs duties in the occupied territory, ‘unless these are necessary in the interests of the economy of the territory’. Further, the Occupying Power ‘shall facilitate the rapid distribution of these consignments and shall allow individuals within the occupied territory to receive the individual relief consignments sent to them, subject only to imperative reasons of security’. All States parties shall endeavour to permit the transit and transport, free of charge, of such relief consignments on their way to occupied territories. Protecting powers play an important role in supervising the transfer and distribution of relief consignments to occupied territories. However, in practice, this responsibility is usually delegated to a neutral State, to the ICRC or to another impartial humanitarian organisation.

Non-international armed conflict

There are fewer provisions regulating humanitarian assistance in non-international armed conflicts. Common Article 3 to the Geneva Conventions recognises that an impartial humanitarian body, such as the ICRC, ‘may offer its services to the Parties to the conflict’. This is supplemented by Article 18 of Additional Protocol II (APII), which provides that relief organisations such as national societies may ‘offer their services for the performance of their traditional functions in relation to the victims of the armed conflict’. This is implemented by Article 10 of Additional Protocol II (APIII), which provides that relief organisations such as national societies may ‘offer their services for the performance of their traditional functions in relation to the victims of the armed conflict’. Moreover, where the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken.

Hence, both the provisions of treaties and relief actions are subject to the consent of the State.

Discussion of IHL provisions

This brief overview of the relevant IHL provisions permits several key conclusions. First, IHL is limited in its application to situations of armed conflict or occupation with temporal, personal and geographic restrictions. To determine whether IHL will apply to a particular situation,
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locations or individual requires important factual determinations, including as to the nature of an armed conflict and whether a particular actor is in control of territory. In certain situations, there may be more than one conflict in a territory, for example, an international armed conflict between two States and a non-international armed conflict within one of those States. Moreover, a donor does not expect State boundaries and may affect the territory of States not involved in an armed conflict as well as those involved, thus potentially leading to differentiated legal regimes applying to one relief effort.

Second, IHL does not define what constitutes humanitarian assistance, although its content has been somewhat clarified by practice. It suggests that the content of relief is components of foodstuffs, medical supplies and clothing, although this is expanded by Article 69 of API to include ‘the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship’, at least in respect of occupied territories. There are also suggestions that humanitarian assistance must have an element of urgency and be indispensable to the affected population. However, IHL does indicate important principles that suggest whether assistance is humanitarian in nature, namely, assistance should be consistent with the principles of humanity, to prevent unnecessary suffering and without distinction, impartiality and – potentially – neutrality. IHL also suggests that humanitarian assistance is expected to be immediate and indispensable needs of the population, as distinct from development assistance, which has a longer time frame. In the context of IHL, this means that IHL will not be suited (perhaps other than in situations of occupation) to addressing the recovery and rehabilitation phases of disasters.

Third, other than in the case of an occupying power, IHL does not set out clear obligations on the territorial State or the non-state actor in control of territory regarding the primary obligation to provide assistance to the civilian population within its own territory. While there is a presumption that ‘states are primarily responsible for organizing relief’ and relief societies ‘play an auxiliary role by assisting the authorities in their task’, IHL does not specify that disbursing obligations, which must be strict obligations, for example, as International Humanitarian Law (IHL) or international law. Obligations of States or parties to the conflict under IHL are limited to admitting and facilitating the distribution of humanitarian assistance and not withholding consent or interfering with external relief efforts. The focus of IHL appears to be on the provision of relief from outside the State or territory concerned, with key roles indicated for the ICRC and other impartial humanitarian organisations pursuant to the right of humanitarian initiative. The role of third or neutral States in relation to humanitarian assistance, separate from the concept of protecting powers that is rarely employed in current conflicts, is not clearly indicated. IHL certainly does not address directly the provision of humanitarian assistance by the militaries of third States. Although military assistance is meant to be the last option for international disaster response, the reality is that many States do rely on their own military to provide humanitarian assistance in disaster contexts. Nor does IHL specifically refer to the International Federation of Red Cross and Red Crescent societies (IFRC), UN agencies, regional organisations or non-governmental organisations that are often primary responders in a disaster. Although military assistance is meant to be the last option for international disaster response, the reality is that many States do rely on their own military to provide humanitarian assistance in disaster contexts. Nor does IHL specifically refer to the International Federation of Red Cross and Red Crescent societies (IFRC), UN agencies, regional organisations or non-governmental organisations that are often primary responders in a disaster. Nevertheless, there is no comprehensive regime in IHL concerning humanitarian assistance, as the legal framework varies depending on the nature of the conflict and includes non-international humanitarian assistance. Moreover, some concerns in IHL concerning humanitarian relief lack detail as to the legal, logistical and operational aspects of humanitarian assistance. The obligations to allow and to facilitate assistance are general, and the only specific – albeit important – provisions concerning distribution are those concerning the imposition of taxes or duties. Thus, IHL does not apply in all contexts, but even when it does apply relevant IHL provisions may not be comprehensive or address all key issues. This is particularly so regarding non-international
armed conflicts. Moreover, IHL provisions are subject to restrictions based on military necessity and security, for example the provisions on withholding relief supplies for imperative reasons of security. While these limits reflect the tension between humanitarian protection and military concerns inherent in IHL, these provisions may be subject to manipulation by States or armed groups or different interpretations by various actors, leading to situations where such concerns are not justified and should be treated with caution.

Finally, the significance of State consent to humanitarian assistance in IHL is clear. While IHL has focused on limiting the circumstances in which a State can withhold consent to humanitarian assistance, and the requirements vary depending on the relevant instrument, some degree of consent is still required for humanitarian actors. Moreover, as Barber notes, at least under the express obligations in IHL, the obligation to consent to and facilitate humanitarian assistance is limited to situations in which the failure to do so may threaten the survival of a civilian population. Barber argues that the obligation not to withhold consent might extend to other circumstances under customary international law. Yet, at least on its face and particularly in relation to non-international armed conflict, IHL would require the impact of a disaster to reach the threshold whereby the survival of the population is threatened, which may not always be the case. However, while recognizing the ambiguity about the extent of the obligations of domestic actors to consent to and facilitate international relief, Barber notes, there are substantially fewer conditions that must be met before humanitarian organizations can be allowed access in conflict settings under IHL than in disasters. The interaction between IHL and IHRL is also important. International human rights instruments may also operate in situations of armed conflict to the extent that such obligations have not been the subject of lawful derogation. Even where there has been a formal derogation, IHRL may still provide general human rights guarantees, as seen in recent jurisprudence. While IHL clearly ensures the primary legal framework applicable in armed conflict, IHRL continues to apply and is in fact more comprehensive in its approach to the interaction between the two applicable regimes. Examples of this interaction include looking to IHL to determine what constitutes a lawful death and to give further substance to provisions on detention in non-international armed conflict. Two key points arise from this brief discussion for the purposes of this chapter. First, although IHL is a specialist regime, IHL does not automatically displace other legal regimes, including IHRL. Second, IHRL will also continue to apply in armed conflict, including to those States in which a disaster has occurred, and is available as a further source of law.

The ILC's approach to the relationship between IHL and IDL

Provisions of IHL have clearly influenced the development of IDL. The ILC and the IFRC have recognized IHL as a source for many of the provisions in the IDL Guidelines and the ILC Draft Articles that effectively attempt to extend some of the IHL provisions discussed above to peacetime IDL. Examples of common principles include the right of humanitarian initiative of humanitarian organizations, the obligations of States to facilitate humanitarian assistance, the principles governing the provision of assistance and the circumstances in which consent to assistance can be withheld. However, the main question for this chapter is: in whose interest is IHL applied? IHL leaves any space for IDL to apply in situations of armed conflict. There have been two ways in which IHL leaves any space for IDL to apply in situations of armed conflict.
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IHL and assistance to disaster victims have been considered in relation to the applicability of IDL instruments. The first is a definitional one, namely, whether the definition of disaster for a particular instrument includes or excludes situations of armed conflict. That is, whether an armed conflict per se is a ‘disaster’ for the purposes of IDL instruments. The second is the inclusion of a specific clause regulating the relationship between armed conflict and IHL and IDL.

Armed conflict and the definition of disaster

Approaches to the inclusion of armed conflicts in the definition of disaster have been mixed. The IDRL Guidelines 94 and the Oslo Guidelines 95 exclude armed conflicts as such from the definition of disaster. Other instruments do not. 96 The issue of definition also received attention in the ILC. The IHL Special Rapporteur initially proposed that the definition of disaster specifically exclude armed conflict from the definitions of disaster, 97 on the basis that a ‘well-developed body of law exists to cover such situations’. 98 Following discussion in the drafting committee and Sixth Committee, the exclusion of armed conflict shifted from being a definitional issue to being one for the substance of the Draft Articles. 99 Accordingly, Draft Article 3 [now 3(a)] as adopted does not specifically exclude armed conflict from the definition of disaster. While it was clear that States did not consider that an armed conflict would, of itself, constitute a disaster, the ILC did not wish automatically to exclude armed conflicts from the definition of disaster largely because of the concern raised in the Committee, that a categorical exclusion would be counter-productive, particularly in situations of ‘complex emergencies’ where a disaster, whether emanating from natural or human causes, occurs in an area where there is an armed conflict. To simply exclude the applicability of the Draft Articles because of the co-existence of an armed conflict would be detrimental to the protection of the victims of the disaster, especially when the onset of the disaster pre-dated the armed conflict. 100

The reluctance to exclude armed conflicts per se from the definition of disaster thus reflects two concerns. First, can an armed conflict itself, and its consequences, reach the threshold required for a disaster? Second, what would be the justification for excluding armed conflicts from the scope of a disaster, particularly where a natural disaster that would otherwise meet the definition of disaster occurs in the same territory?

States largely endorsed this approach in their comments on the Draft Articles. 101 However, Mexico and the United States expressed concern that armed conflicts and their consequences were not excluded from the scope of the definition of disaster. 102 The ICRC also maintained its concern that the article did not expressly exclude armed conflict, which it suggested ‘creates overlap and contradictions between rules of international humanitarian law and the draft articles, enabling in conflicts and potential conflicts of interest’. 103 Despite these comments, the Special Rapporteur did not suggest any changes to Draft Article 3 to exclude armed conflict, and the draft version adopted by the ILC in 2016 did not expressly exclude armed conflicts per se or their consequences. The commentary to Draft Article 18 confirms this approach, noting that a blank exclusion of the applicability of the Draft Articles because of the coexistence of an armed conflict would be detrimental to the protection of the persons affected by the disaster. 104

A relationship clause

The Special Rapporteur and the ILC dealt with the relationship between IHL and IDL by the inclusion of a ‘relationship’ clause. This was introduced initially as Draft Article 4 of the Draft Articles and is currently Draft Article 18(2). Draft Article 21 was entitled ‘Relationship to international humanitarian law’ and remained substantively unchanged until its most recent

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iteration. It provided: 'The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable'. The provision followed on from Article 20 (now 18(1)), which concerns the relationship of the Draft Articles to other rules of international law. Article 20 was intended to clarify the relationship between the draft articles and international humanitarian law, giving precedence to the latter set of rules in situations where they are applicable.'105 While an initial reading of Draft Article 20 may suggest otherwise, it is clear from the drafting history of Article 20 that it was not intended to displace IDL completely where a disaster occurs in a situation in which there is an armed conflict. This position is supported by the ILC commentary to Draft Article 21, which states that '[T]he provision is formulated in a manner intended to clarify the relationship by giving precedence to the rules of international humanitarian law'. When a disaster occurs with an armed conflict, international humanitarian law shall be applied as lex specialis, whereas the rules contained in the present draft articles would continue to apply 'to the extent that legal issues raised by a disaster are not covered by the rules of international humanitarian law'.

Therefore, the ILC Draft Articles are not automatically displaced where a disaster occurs in a State experiencing armed conflict. Several States endorsed the approach reflected in Draft Article 21, namely that IDL would apply to the extent that IDL did not regulate a particular situation. However, States also expressed their concern about the wording of the draft article and the commentary, with the commentary more clearly reflecting the intended relationship.'107 The ICRC and the UNHCR argued that there should be an unambiguous statement that the Draft Articles do not apply in situations of armed conflict, while the UN Office for the Coordination of Humanitarian Affairs (OCHA) argued that the Draft Articles did not provide a clear understanding of the relationship between the draft articles and international humanitarian law.'108 The Special Rapporteur endorsed the suggestion that a 'without prejudice' clause might better represent the relationship the Draft Articles sought to create.'109 However, the draft article that emerged from the Drafting Committee, Draft Article 18(2), which was now amalgamated with the provision on other rules of international law, is not a 'without prejudice' clause.'110 Instead, it provides: '[T]he present draft articles do not apply to the extent that the response to a disaster is governed by the rules of international humanitarian law'. This provision represents a more nuanced approach to determining the applicable law in a given situation, which in many respects will require a similar approach to resolving the relationship between IDL and IHRL, as discussed above. However, the ILC, States and relevant international organizations have not considered fully how that relationship might work in practice. The next section explores this possible interaction.

Relationship between IHRL and IDL in practice

The above discussion demonstrates four possible scenarios for the relationship between IDL and IHRL where disasters occur in the context of armed conflict: (1) IDL does not or should not apply; (2) IHRL does not or should not apply; (3) IHRL applies, but is supplemented, complemented or
interpreted by reference to IDL, and (4) IHL applies, but is supplemented or complemented by IDL. This section provides some initial thoughts on these various options.

Regarding the first scenario, IDL would not apply on the basis that IHL is the lex specialis. However, this overstates the role to be played by lex specialis, equating this to excluding the application of an entire body of law without any consideration of the extent to which there is necessarily any conflict or overlap of rules between the two regimes. The absolute approach is no longer accepted in the realm of IHRL and has not been adopted in the ILC’s own study on the impact of armed conflict on treaty obligations. Therefore, unless the relevant IDL instruments expressly preclude IDL from applying in armed conflict situations, non-applicability should not be assumed merely because of IHL’s specificity in relation to armed conflicts. As outlined above, the ILC has not adopted this approach in the ILC Draft Articles.

Similarly, although IDL is also a ‘specialist’ regime in the sense that it is – as a general rule – only relevant where a disaster has occurred, this does not mean that the lex specialis rule results in the non-applicability of IHL. This would be contrary to the long-standing importance and impact of IHL in addressing armed conflict. However, there are several possibilities where IHL does not or should not apply to a particular disaster situation.

An obvious situation is when there is no armed conflict or occupation that would trigger the application of IHL. That is, the threshold for the application of IHL (discussed above) has not been met. The non-applicability of IHL must be evident; however, in some situations it will be unclear. For example, there may be significant unrest within a State, but whether the threshold for a non-international armed conflict has been met may be a matter of dispute. This is particularly the case where a government does not wish to recognise non-state actors as parties to a conflict, or the existence of a situation of non-international armed conflict and to accept that IHL, rather than domestic law, applies. Similar concerns may arise in relation to violence perpetrated by groups considered to be terrorist in nature. Where a disaster occurs in such a context, humanitarian responders will need to determine whether IHL applies or not to identify the relevant framework. This may place responders in direct conflict with government authorities that do not recognise the situation as one to which IHL applies.

As indicated above, the geographical location of the disaster and the armed conflict should also determine whether IHL applies. In principle, IHL will apply to all the territory of States parties to the conflict (in an international armed conflict), to all territory controlled by parties to a conflict (in a non-international armed conflict) and throughout an occupied territory. Yet where the disaster affects an area that is geographically removed from and does not impact, or is not impacted by the armed conflict, IHL should not regulate the provision of humanitarian assistance. Gavshon refers to the example of Hurricane Katrina in 2005, which affected part of the US at a time when the US was engaged in a non-international armed conflict with Al Qaeda. She notes that no one suggested (or perhaps even contemplated) that IHL would be the relevant legal framework, although IDL, technically, still applied to the entirety of US territory at the time. Another example would be the international armed conflicts in which the US and other States have participated, but which are fought in other territories. The idea that relief operations in the US should be conducted in accordance with IHL, which technically applies to the entire territory of the US, is absurd.

This concern also ties to the personal limitations of IHL. While those affected by a disaster are likely to be civilian (in the sense that they are not participating in hostilities), where the disaster victims are remote from armed conflict and otherwise unaffected by it, it is hard to turn disaster victims into also being victims of armed conflict and hence entitled to the protections of IHL.
Further, a technical reading of IHL provisions may suggest that a State’s own nationals cannot use IHL to access relief. One suggestion is that there must be a nexus to the armed conflict before IHL is considered the appropriate body of law for the provision of assistance after a disaster. A requirement for a nexus is certainly not express, with the relevant IHL instruments addressing only the suffering of the affected populations and not stipulating that the suffering needs to have been caused by the armed conflict. That is, the provision of humanitarian assistance in response to suffering caused by other factors, such as a disaster, is not necessarily excluded. IHL includes a requirement for a connection to an armed conflict in some contexts. For example, the war crimes regime requires a nexus between the alleged crime and the armed conflict and excludes incidents that have no connection to the armed conflict, although admittedly the nexus requirement is interpreted somewhat loosely. Similarly, where there is no connection between a disaster, the required humanitarian assistance and an armed conflict or occupation, even though IHL may technically apply, it may be more appropriate not to apply IHL. However, as with war crimes, a flexible approach to a nexus will be required to capture situations where the armed conflict might indirectly affect the disaster-related assistance, for example, where assistance would have to transit through areas controlled by non-state actors party to the conflict and its delivery might be affected.

Another possibility is that the parties to a conflict do not apply IHL to disaster-related humanitarian assistance, even though technically IHL applies. IHL provides a minimum set of standards and obligations that parties to the conflict must apply. It is open to the parties to a conflict by agreement or practice to apply a more beneficial and detailed framework(s). IDL, which has been designed predominantly to apply in peacetime and may have been given effect in national law, avoids the need to balance military and security interests required by IHL. This means that IDL may offer a less tense and political framework for the delivery of assistance than IHL. IDL may also facilitate the provision of assistance by military forces, both of the affected State and of third States. Venturini suggests that IDL plays a more limited role in facilitating disaster assistance and relief in some armed situations of disaster and armed conflict than might be expected. It is, however, somewhat difficult to draw firm conclusions regarding the extent to which States have considered IDL to be a framework for the delivery of humanitarian assistance after a conflict initiates armed conflict, as some relevant examples, such as the 2004 Indian Ocean tsunami, pre-date the adoption of the main IDL instruments and their implementation in national law by many States.

Under the third scenario, both IDL and IHL would apply, and a decision would be taken on a case-by-case basis as to which provision should be adopted. Arguably the more specific, relevant or beneficial provision should be preferred.

The final scenario is where IHL applies to a situation, but the relevant IHL provisions are not comprehensive as to not address the issue in question. In this situation, the specific rules of IHL would be complemented or supplemented by IDL, or interpreted by reference to IDL, as in the manner of customary international law. The status of the IDL provisions on humanitarian assistance, in particular the recognition of the right of humanitarian initiative, may also facilitate the provision of assistance in the first place. However, given that the IHL framework surrounding humanitarian assistance is not comprehensive or detailed, there is plenty of space to draw on IDL to fill the gaps or address the uncertainties of IHL. For example, the IDL Guidelines contain more detailed provisions addressing technical issues, such as the terms, conditions, and qualifications of relief personnel, that are not (fully) addressed, or addressed at all, by IHL. Even though these instruments are non-binding and do not necessarily have customary international law status, they may have been given effect in the national law of the State(s).
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concerned or may be a useful guide that a State may elect to follow. This approach depends on
the relevant government, humanitarian organisations and other actors being familiar with the
provisions of IHL, including those incorporated into national law. However, at present the point
at which IHL gives way to other areas of law to set the standards of assistance is uncertain. 121

Another, more controversial, potential gap is that IHL does not regulate the provision of assis-
tance to persons not protected by the conventions, in particular, combatants and those taking part
in hostilities. 122 In a disaster situation, there may be a need to provide assistance to civilians,
particularly where a combatant hostilities that may be to continue hostilities for a period.

Conclusion: is IHL appropriate to regulate humanitarian assistance in disasters?

There are clear advantages to applying IHL as the legal framework to regulate humanitarian
assistance in the context of a disaster. IHL contains binding and well-accepted obligations on
States and other parties to a conflict to accept and facilitate assistance, as well as obligations on
third States, including those to which assistance may need to transit. In contrast, most IDL
instruments are either limited in scope or non-binding. States do not yet accept their provisions
as constituting rules of customary international law, although self-help guidelines are increasingly
being incorporated into national laws and frameworks for disaster response. Despite its hard law
status, IHL is not necessarily applicable to disaster relief as this chapter suggests. First, IHL has
limited application (both as to the thresholds before IHL is triggered and in its temporal, geographic
and personal dimension). Second, the disparate and non-comprehensive provisions that apply
depend on the nature of the armed conflict or whether a situation amounts to an occupation.
Third, IHL is potentially susceptible to political and military tensions, for example, the restrictions
for military necessity or the prospect that the State concerned will dispute the existence of an
armed conflict and the applicability of IHL. These represent some of the challenges to using IHL
to regulate disaster relief.

Given these limits, it should certainly not be assumed that IHL is not relevant merely because
the disaster occurs in a State(s) affected by an armed conflict or occupation, that is, that IHL
should always play the exclusive or at least primary role in relation to humanitarian assistance.
In fact, IHL ought provide a more reliable, and perhaps less politicised, framework for regulating
humanitarian assistance, although many government legal advisers may not yet be at ease with
its provisions. While its provisions may not be binding, they could provide the basis for negoti-
at ed practical arrangements. Moreover, IHL is itself acknowledged to have a weak enforcement
mechanism, or simply because its obligations are ‘hard law’, does not necessarily mean they are
respected and implemented. 123 As Stoffels concluded, the ‘problem lies not in inadequate legal
definitions, but in the context in which humanitarian assistance is implemented and in the inter-
ests involved’. 124 An IHL-based approach is likely to be more useful in situations in which
humanitarian assistance is provided by a State to a non-state nationals in a peace-time setting,
such as in the aftermath of a disaster, or in a situation in which a State has become a party to
an armed conflict or occupation. 125

The aim of IDL is to ‘facilitate the adequate and effective response to disasters . . . so as to
meet the essential needs of the persons concerned, with full respect for their rights’. 126 Applying

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121 Id. 122 Id. 123 Stoffels, supra note 119, at 158. 124 Id. 125 Id. 126 Id.
IHL to the exclusion of IDL potentially undermines a key emphasis of IDL, which is to reinforce the prerogative – and responsibility – of the affected State to lead the disaster response and to regulate, control and coordinate international assistance. National authorities are the primary responders and international assistance is required only to the extent that national capacity is overwhelmed. The IHLRC, which has been leading the push for recognition of IDL, emphasises building national capacity and resilience to disaster, including through improving domestic legal frameworks. In contrast, IHL empowers the right of international organisations and third States to provide relief and assumes to be premised on the notion of an affected State that is unwilling or unable to provide humanitarian assistance to civilians in need. There is therefore a risk that IHL prioritises international rather than national responses inconsistently with the emphasis on building resilience through the development and implementation of national plans in IDL. Presenting the international (as IHL tends to) over the national (where IDL constitutes ‘hard law’) could preclude national authorities from fulfilling their role as the primary responder and coordinator of assistance.

However, this is not to suggest that IHL has no role in relation to the provision of humanitarian assistance after a disaster. IHL contains key provisions such as those detailing the provision of assistance in situations where there are military and security threats to the delivery of assistance or relief personnel from ongoing hostilities. IHL recognises the risk of interference with, or partiality in the distribution of, assistance to certain groups. Further, IHL regulates assistance that is required in areas controlled by non-state actors and addresses a refusal by parties to the conflict to allow assistance. Rather, this chapter suggests that IHL should be the key principles when there is a truly complex emergency, in particular, where the disaster and the armed conflict are connected and the armed conflict is interfering with the delivery of humanitarian assistance. Yet, as with IHL and IHRL, IDL assessing relevant and conflict complement or supplement IHL, where that body of law is unclear or not comprehensive or provides an aid for interpretation. However, IDL should defer to IHL in relation to more specific IHL provisions, for example, where assistance might be considered to be aiding a party to the conflict. It should also be recalled that IHL, continues to apply where there is both an armed conflict and a disaster. While the relationship of IDL to IHL and IHRL but not the key focus of this chapter, it must be that IHL should provide a more broadly speaking set of claims or IHRL in many cases where the role of IHL is not clear or the obligation of States and other actors to respect and facilitate assistance after a disaster, but also an equally challenging time of enforcement.

Moreover, the ILC was right not to categorically exclude armed conflict from the definition of disaster. In fact, while aiming to produce text that was simple and elegant, the ILC gave fairly superficial consideration to this relationship. In this sense, it was a missed opportunity to collect best practice and to explore the issues fully in an attempt to provide more clarity, consistency and uniformity in the area. Differences in scope and application between the two regimes suggest that IHL has been assumed, rather than established by a careful review of the key provisions and their application in practice. This lack of analysis is unlikely to change when the Draft Articles are adopted by the Sixth Committee of the UN General Assembly. As presently stands, the IHL Draft Articles have respondents to consider the applicability of each area of law on a case-by-case basis. This brings a real risk of delay and uncertainty in the applicable legal framework, which is not desirable in challenging conditions. Moreover, failing to examine the relationship between the two regimes fully does little to explore the gaps and inconsistencies across the two regimes and potentially leaves victims of disaster to face different rights and treatment depending on which regime is applied.
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Selected bibliography


Notes


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16 End note 6.


20 This need to consider the overlap between IHL and other norms is particularly relevant in the context of the Protection of Persons in the Event of Disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur, UN Doc. A/54/499 (5 May 2000).

21 ILC Draft Articles (n. 1).

22 For discussions on the point, see J. Kleffner, ‘Scope of Application of International Humanitarian Law’ (July 2004), available at www.icrc.org/eng/assets/files/other/what_is_ihl.pdf, accessed on 5 May 2016.


29 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations annexed to the Convention respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 20 May 1909) 205 CTS 277 (Hague Regulations), Regulation 42. See also: common art 2 of the Geneva Conventions of 1949;

30 Both the commencement and end of application of IHL are based on the factual circumstances. For discussion of how they operate, see: ILC, Fragmentation of International Law: Difficulties Related to the Executive Function of the International Law Commissions (Eleventh Report) (A/68/258-262) (21 April 2004) para 46; Report of the International Law Commission, sixty-third session, UN Doc. A/69/10 (16 April 2014) para 70.


33 Hague Regulations regulation, 42; Geneva Convention IV, art 2.


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Y. Dinstein, War, Aggression and Self-Defence (5th edn, Cambridge University Press, 2011) 19. IHL may also extend beyond the territory of the parties, in areas where there are actual hostilities outside the territory or territorial control of the parties to the conflict, for example, the high seas. 37

For an occupation, the ‘occupation extends only to the territory where such authority has been estab-

lished and can be exercised’: Hague Regulations, art 42.

38

The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukotic (Judgement) (ICTY, Appeals Chamber Case No II-A-01-32 & II-A-01-32-II, 13 June 2002) para 37. Common art 1 of the Geneva Conventions refers to acts that are prohibited ‘at any time and in any place whatsoever’. See also Tadic paras 50–51. The Prosecutor v. Laurent Semanza (Judgement and Sentence) (ICTR, Trial Chamber III, Case No. ICTR-97-20-T, 15 May 2003) para 367. (Their scope extends throughout the territory of the State where the hostilities are taking place without limitation to the “war front” or to the narrow geographical context of the actual theatre of combat operations.)

39 Art 4 of Geneva Convention IV (international armed conflict) states that:

‘Personnel protected by the Conventions are those who, at any moment whatever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

39

In contrast, common art 3 of the Geneva Conventions refers to ‘Personnel taking no active part in the hostilities’. Art 4 of Additional Protocol I incorporates the protection of all persons who do not take a direct part or who have ceased to take part in hostilities’. 10

40 IHL appears to be shifting from this position: see Tadic paras 163–169.


42 This was the conclusion of the ICRC Customary International Humanitarian Law Study, which found that customary international law had developed to fill the gaps left by IHL treaty law, particularly regarding non-international armed conflicts: J.M. Henckaerts, ‘Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflicts’ (2005) 1 International Review of the Red Cross 175, 188. See n. 20.

43 Geneva Convention IV art 10. See also Geneva Conventions I, II and III, art 9.

44 Additional Protocol I, art 81.


46 Geneva Convention IV, art 23. This duty also extends to ‘free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases’.

47 Geneva Convention IV, art 23.

48 Ibid.

49 Additional Protocol I, art 70.

50 Ibid drawing on art 69.

51 Ibid art 70(2).

52 See also ICRC Customary International Humanitarian Law Study (n. 42) rule 55.

53 Ibid art 70(3).

54 Ibid.

55 Ibid art 70(4).

56 Ibid art 71(1).

57 Ibid arts 71(2) and (3).

58 Ibid art 71(4).

59 Art 63 of Geneva Convention IV applies the same principles to the activities and personnel of special organizations of a non-military character, which already exist or which may be established, for the purpose of ensuring the living conditions of the civilian population by the maintenance of the essential public utility services, by the distribution of relief and by the organization of rescues.

60 Art 38 of Geneva Convention IV sets out the same principles to the extent and under circumstances of armed military combat, which already exist or which may be established, for the purpose of ensuring the living conditions of the civilian population by the maintenance of the essential public utility services, by the distribution of relief and by the organization of rescues.

61 Geneva Convention IV art 63.

62 Ibid art 38.

63 Ibid.

64 Ibid art 38.
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60 Ibid art 91.
61 Ibid art 91.
62 Ibid art 91.
63 Ibid art 91.
64 Ibid art 91.
65 Ibid art 91.
66 Ibid art 91.
67 Ibid art 91.
68 Ibid.
69 Ibid art 91.
70 Ibid art 91.
71 Ibid.
72 Ibid art 91.
73 Ibid art 91.
74 Ibid art 91.
75 Ibid art 91.
76 Ibid art 91.
77 Ibid art 91.
78 Ibid art 91.
79 Ibid art 91.
80 Ibid art 91.
81 Ibid art 91.
82 Ibid art 91.
83 Ibid art 91.
84 Ibid art 91.
85 Ibid art 91.
86 Ibid art 91.
87 Ibid art 91.
88 Ibid art 91.
89 Ibid art 91.
90 Ibid art 91.
91 Ibid art 91.
92 Ibid art 91.
93 Ibid art 91.
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92 Draft art 3 initially provided: ‘“Disaster” means a serious disruption of the functioning of society, excluding armed conflict, causing significant, widespread human, material or environmental loss’ (emphasis added).


95 Commentary to ILC Draft Articles (2016) art 18, para 9.

96 Eighth Report and Comments from States (n. 101 and 102).

97 Ibid para 379.

98 Ibid 101 and 381.

99 ILC Draft Articles (n. 1).

100 See ILC, Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries, UN Doc. A/66/10 (2011).


102 Ibid 251.

103 This is linked to ‘protected persons’ being required to be of different nationality. See ibid 256.

104 For example, arts 2 and 3 of the ICTY Statute require a nexus between the crime and the armed conflict, while the ILC Elements of Crime require that the conduct be part of the conflict. See ibid 252.


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121 Ibid.

122 Ibid.


125 ILC Draft Articles, draft art 2.

126 This obligation is reflected in draft arts 10[2], 12[1] and 11[2] of the ILC draft arts.

127 This is reflected in the aims of the IFRC IDRL Project, for example, which aim to enhance domestic capacities and promote technical assistance.

128 E.g. Sendai Framework: priority 3 of 4 is investing in disaster risk reduction for resilience and para 27 refers to national and local strategies and plans.

129 The Inter-Agency Standing Committee 1994 defined ‘complex emergency’ as

\[\text{a humanitarian crisis in a country, region or society where there is total or considerable breakdown of authority resulting from internal or external conflict and which requires an international response that goes beyond the mandate or capacity of any single agency and/or the ongoing United Nations country program.}\]