Introduction

The existence and content of a ‘human right to international humanitarian assistance’ during disasters has seen much debate since the end of the Cold War. Although there is little explicit support for this right in either treaty or customary international law, there is broad agreement that the rights to life, health, food, clean living, or social security, jointly and directly entitle individuals to receive various types of assistance, especially from their own States. What is less certain is whether International Human Rights Law (IHRL) also entitles individuals or their affected States to receive (particular types of) international assistance. This question is pertinent, since disasters typically overwhelm local response capacities and can severely disrupt the functioning of disaster-struck societies. Furthermore, it is a harsh reality that many disaster-struck States lack the adequate financial resources and expertise to protect the human rights of disaster-struck populations. Even today, many disasters are still ‘forgotten’, ‘overlooked’ or (severely) underfunded – a point highlighted by the United Nations General Assembly (UNGA) more than two decades ago. The Global Humanitarian Assistance (GHA) Reports reveal that in 2014 virtually all UN-coordinated appeals for international humanitarian assistance went (substantially) unmet, including those for disasters, whereas in 2015 no UN appeal was met. The UN Coordinated Appeal for the Nepal earthquake and typhoon Haiyan in the Philippines, for example, was met only 50% and 60% respectively. This global funding gap for humanitarian assistance (currently at 15 billion USD per year, for both conflict and disaster assistance) was recently condemned by the UN High-Level Panel on Humanitarian Financing as ‘too important to fail’. In 2015, this UN High-Level Panel also underscored that improved assistance and cooperation in disaster risk reduction (DRR) prevents the ‘much more expensive, long-term and recurring costs of humanitarian response’. The 2015–2030 Sendai Framework on Disaster Risk Reduction also unambiguously calls for enhanced provisions of coordinated, sustained and adequate international support for disaster risk reduction, particularly for vulnerable countries, through bilateral and multilateral channels. It specifically mentions ‘enhanced technical and financial support and
From a perspective of IHRL, States clearly carry a joint and individual obligation to cooperate and assist internationally on human rights, including ‘in providing disaster relief and humanitarian assistance in times of emergency’. These obligations derive from Articles 55 and 56 of the UN Charter, a range of UNGA resolutions and Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The latter provision, according to the Committee on Economic, Social and Cultural Rights (CESCR), requires States to contribute to human rights protection abroad to the maximum of their ‘capacity’, ‘ability’ or ‘position’13 while there rests a ‘special responsibility and interest’ on economically developed States to do so.14 The CESCR emphasised for the avoidance of any doubt:

‘...it is particularly incumbent on States parties, and other actors in a position to assist, to provide “international assistance and cooperation, especially economic and technical”, which enables developing countries to fulfill their core obligations. ... In the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries’.15

The key question addressed in this chapter is: what is the current state of these legal obligations in the context of disasters and, importantly, can any actor legally claim international assistance as a result of them?16 In the past, commentators have argued that it is ‘absurd to contend that every state in the world is duty bound to come up, on demand’ with humanitarian relief to any particular State17 or that there is ‘a legally binding obligation upon any particular State to provide any particular form of assistance to any particular actor’;18 yet, at the same time, it is ‘unjustified to go further and suggest that the relevant commitment is meaningless’ or that ‘inescapably all international assistance and cooperation fundamentally rests upon charity’.19 In particular circumstances, it may be possible to find obligations to assist that are mandatory, certainly for wealthy States or for those with particular resources. In fact, the European Union’s Instrument for Humanitarian Aid to third countries asserts in the preamble that ‘Victims of natural disaster ... have a right to international humanitarian assistance where their own authorities prove unable to provide effective relief’.20

As argued by Salomon recently, two types of benefits could derive from more clearly determining or ‘disaggregating’ the bases for international obligations in this area first, it would compel States to actually effectuate them, and second, it would facilitate actually determining an internationally wrongful act.21

This chapter offers a fresh perspective on the above questions by analysing in particular four recent legal developments in international (human rights) law: (a) the recent adoption of the International Law Commission (ILC) Draft Articles on the Protection of Persons in the Event of Disasters (ILC Draft Articles); (b) recent interpretive practices of UN human rights treaty bodies; (c) the adoption of new complaints mechanisms to UN human rights treaties; and (d) the work of UN Charter-based human rights mechanisms.

**The ILC Draft Articles**

In 2016, the ILC adopted its Draft Articles after nearly 10 years of drafting and debate. A possible ‘right to (international) humanitarian assistance’ was immediately considered, for example by the ILC Secretariat which noted that this right received considerable support as well as by...
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scholars, and to some marginal treaty law but that general positive international law remained
inconclusive. In 2008, the ILC Special Rapporteur, Mr. Valencia-Ospina continued to express
initial support by considering that present international law might not account for all of the
legitimate needs of persons affected by disaster but that the progressive formulation of a
dedicated right could help prevent fragmented approaches, in comparison to a set of separate
rights. He also buttressed earlier remarks by the UN Secretary-General stating that rights-based
approaches underscore society’s obligations to respond to the inalienable rights of individuals,
demanding justice as a right not as a charity. The ILC itself recalled the International Court of
Justice’s Nicaragua judgment, stating that:

There can be no doubt that the provision of strictly humanitarian aid to persons or
forces in another country, whatever their political affiliations or objectives, cannot be
regarded as unlawful intervention, or in any other way contrary to international law.

Nevertheless, Valencia-Ospina, various responding States, and ILC members all expressed their
doubts about an individual right to appeal for international relief, for it could raise tensions with
State sovereignty, non-intervention, the primary protective responsibility of affected States, or
with newly developing concepts at that time, such as the Responsibility to Protect. As a result,
by 2010, it seems the idea of formulating any individual right to humanitarian assistance in the
ILC Articles was abandoned. Instead, a so-called ‘dual-axis approach’ was favoured:

In the final draft, Draft Article 5 now affirms the general rights-based nature of the ILC Draft
Articles, since ‘[p]ersons affected by disasters are entitled to the respect for and protection of their
human rights in accordance with international law’. The remainder of the Draft Articles is
highly ‘duty-based’ and includes no further references to ‘rights’. In particular, Draft Article 7
starts by setting out a compulsory, reciprocal duty of cooperation for all States: ‘States shall, as
appropriate, cooperate among themselves, with the UN, with the components of the Red Cross
and Red Crescent Movement, and with other assisting actors in the application of the Draft
Articles’. This is followed by further specific duties for affected States, including a duty to ensure
the protection of persons under their jurisdiction or control, a duty to seek external assistance
when disasters manifestly exceed national response capacities, and the obligation not to arbitrarily
withhold consent to offers of international assistance – even if giving consent is in principle a
primary requirement for foreign aid to be brought in.

On the part of assisting actors, (the corresponding) duties are decidedly weaker however. Draft
Article 12 merely provides that assisting actors ‘may offer assistance’ (i.e. are authorised to do so,
but have no duty) and ‘shall expeditiously give due consideration’ to requests and ‘inform the
affected States of their reply’, supposedly in good faith. The Commentaries to the Draft Articles
explicitly clarify that any offer of assistance, whether unilaterally or in response to requests, are
essentially voluntary and should not be construed as recognition of the existence of a legal duty to
assist. During the drafting of this article several visions of Draft Article 12 were given, including
scenarios the provision as ‘a positive duty on the international community to offer assistance’. Others
considered this would go too far and that a specific legal obligation on third States or other...
organisations should not be recognised. Again others asked that Draft Article 12 more clearly define under which circumstances assisting States could decline offers.

The following paragraphs will attest that there is good reason to critique the ILC Draft Articles from a perspective of current IHRL, although the analysis also evidences that it may have been difficult for the ILC (as an advisory body) to focus on specific duties of assistance through such a relatively abstract document.

Work of UN human rights treaty bodies

UN human rights treaty supervisory bodies have played a key role in the further articulation of duties of assistance under IHRL. General Comments/Recommendations have proven especially instructive, as highly authoritative interpretative instruments on the content of treaty provisions, even if these statements are not binding. Concluding Observations also play a role in concretising duties in respect of specific countries and settings.

This chapter focuses on the practice of the CESCR, the Committee on the Rights of the Child (CommRC), and the Committee on Rights of Persons with Disabilities (CommRPD), for they monitor treaties that include provisions on international cooperation and assistance. It is immediately noted that the practice of the CommRPD is very young and includes few relevant statements.

General comments

First, while CESCR has taken the lead in clarifying obligations of international cooperation and assistance, recently the CommRC also affirmed in a fairly straightforward manner that:

States parties have an obligation to cooperate with one another in the promotion of universal respect for, and observance of, human rights. . . . States that lack the resources needed to implement the rights enshrined in the Convention and its Optional Protocols are obliged to seek international cooperation, be it bilateral, regional, interregional, global or multilateral. States parties with resources for international cooperation have an obligation to provide such cooperation with the aim of facilitating the implementation of such rights in the recipient State.  

The CommRC uses very strong, clear language here, and its work is consistent with earlier and ongoing work of the CESCR. The CESCR has held in several General Comments that:

States parties have an obligation to cooperate with one another in the promotion of universal respect for, and observance of, human rights. . . . States that lack the resources needed to implement the rights enshrined in the Convention and its Optional Protocols are obliged to seek international cooperation, be it bilateral, regional, interregional, global or multilateral. States parties with resources for international cooperation have an obligation to provide such cooperation with the aim of facilitating the implementation of such rights in the recipient State.
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The manner in which the examination of State reports takes place through the adoption of Concluding Observations is the subject of the next section. Yet, interestingly, as far back as General Comment 2 of 1990, CESCR concluded that Article 22 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides an important opportunity to States parties to identify in their reports any particular needs they might have for technical assistance or development cooperation. These needs may be directed at UN bodies and agencies, but in view of the present author, there is no reason why these needs could not be addressed directly to fellow States Parties of the ICESCR too. The next section demonstrates how the CESCR has further built on these General Comments in Concluding Observations.

Finally, the CESCR also provides further guidance on how assistance should be delivered, notably in a safe, sustainable, and culturally appropriate manner; not adversely affecting local markets; and facilitating the return to self-reliance of the beneficiaries. Aid should be based on the needs of the intended beneficiaries.

Concluding Observations

Concluding Observations are the outcomes of the aforementioned State Reporting procedures at human rights treaty bodies. Through reporting procedures, States are required to periodically justify how they have implemented relevant human rights treaties (or not). General Comments provide general guidance on the duties of States, and the ICESCR-Reporting Guidelines further ask States to indicate in their reports the impact of international economic and technical assistance and co-operation, as given or received, for the full realization of the ICESCR, including its impact on other countries, especially developing countries.

A very specific reference point in the practice of the Committees has become to assess whether States parties meet important, longstanding international financing commitments, such as the international target to devote 0.7% of Gross National Income (GNI) to Official Development Assistance (ODA) annually. Presently, these ODA commitments include humanitarian assistance in the context of catastrophes and disasters. The Sendai Framework notes that meeting such ODA targets is critical for effective disaster management.

Unfortunately, Committees often have to reprimand States for not meeting these targets, and seldom can they praise countries for spending sufficient resources. In 2016, only 6 of 29 OECD-DAC countries met the target, the overall level of ODA expenditure by these countries was 0.32% of their GNIs.

There remains some international scholarly debate about whether the 0.7% ODA target (by now) must be seen as a legal obligation under the ICESCR or CRC – even if most scholars (and possibly even States) would now concede that cooperation and assistance follows a logic of obligations, rather than a logic of charity, in IHRL. In other words, present a legal obligation as such. In general, however, there is considerable support for the Committees’ specific practice of appraising the 0.7% funding target as part of assessing whether States parties meet important, longstanding international financing commitments, such as the international target to devote 0.7% of Gross National Income (GNI) to Official Development Assistance (ODA) annually. Presently, these ODA commitments include humanitarian assistance in the context of conflicts and disasters. The Sendai Framework notes that meeting such ODA targets is critical for effective disaster management.

The key challenge in IHRL, in fact, may not be a lack of duty-bearers, but a lack of clear rights-holders that can claim assistance. In other words, could the Philippines, Tuvalu, or Mauritius claim from countries like Spain, Belgium, or Japan (three countries that consistently fail to meet international ODA targets) that they be given (particular kinds of) disaster assistance, when they can prove they lack sufficient resources themselves? Of course, this question can be
raised both for financial, technical, or technological assistance. Under which circumstances could developed States (still) legally refuse assistance requests?

Committees have generally not been reluctant to appraise efforts of both affected and assisting States in engaging in international cooperation and assistance. On the part of affected States, CESCR for example, in 2000, asked Mongolia to continue to address with urgency the immediate nutritional needs of the population, including through international humanitarian assistance in a result of droughts; whereas CommRC encouraged the Ukraine to take all appropriate measures, including seeking international cooperation to prevent and combat damaging effects of environmental degradation on children, including pollution of the environment and food products, with reference to the Chernobyl nuclear disaster. Towards small island States, the CommRC is very specific and for example asks to continue and strengthen [their] cooperation with bilateral, multilateral, regional and international partners including the UN Office of the High Commissioner for Human Rights, the UN Office for Disaster Risk Reduction and other relevant donor agencies and to seek bilateral, multilateral, regional and international cooperation in implementing a range of very specific DRR recommendations. On another occasion, the CommRC asked Afghanistan to reduce (costs in excess of) ODA to a list of highly specific, high-impact development programmes, mostly in the area of health and education. This illustrates that the practice of monitoring can reveal and endorse specific assistance needs, including for disaster assistance.

Towards assisting States, the CESCR recommends for example, in addition to the 0.7% target comment, that South Korea further unties its bilateral aid and takes on board recommendations by DAC-OECD to increase the grant element of bilateral ODA commitments to least developed countries. With respect to India, the CommRC commented on multilateral aid coordination, noting with concern that contributions to the UN Children’s Fund (UNICEF) were constantly declining. The CommRC expressed Japan’s desire not only spending very little on development assistance but also observed that Japan devoted about 40% of its 0.27% GNI/ODA to socio-economic rights. In 2010, the CommRC equally commented on Japan’s funding priorities, noting with concern that Japan’s funded its UN’s ODA target to 0.2%, although noting with approval that Japan opened up its commitments to finance climate change measures in developing countries, as well as support to African countries. Highly interesting for present purposes, Japan but also other countries were reported by CommRC to reconsider commitments to international ODA targets with a view to increasing the provided resources and take into account the concluding observations and recommendations of the Committee on the Rights of the Child for the recipient country in question.

This latter comment is of particular interest, since it shows how the practice of Concluding Observations can help to steer ODA expenditures towards particular IHRL aims and underpin claims to particular kinds of assistance by affected States. It should be remembered that General Comment 2 of 1990 specifically indicated that reporting procedures should be used to this end.

Some concluding scenario

In summary, the above analysis clearly affirms that international assistance is considered a legal obligation under IHRL treaties. Committees have tried to give further meaning to these open-ended duties by relating to important (repeated) international agreements for cooperation, assistance, and financing, including the 0.7% UN’s ODA target – recently affirmed in the Addis Ababa Action Agenda, the Sustainable Development Goals, and the 2015–2030 Sendai Framework.
Monitoring bodies can further use such commitments, along with assessments of challenges in national human rights protection by affected States, to shape assistance requests and offers and to help affected States formulate clear, specific assistance needs. Of course, Committees do and should appraise the efforts of affected States themselves as well, in line with their obligations to mobilise and allocate maximum available resources domestically.

Drafting processes for optional protocols

This section addresses the question whether a lack of international assistance, e.g. under the 0.7% norm, or a particular refusal to honour a specific aid request can lead to a complaint before international supervisory bodies and to a determination of a violation of Article 2(1) ICESCR. Such options were certainly entertained during the drafting processes of a number of new complaint mechanisms recently notably the 2006 Optional Protocol to the CRPD (OP-CRPD) (adopted 2006, entered into force 2008); the 2008 Optional Protocol to the ICESCR (OP-ICESCR) (adopted 2008, entered into force 2013); and the 2011 Optional Protocol to the CRC on communication procedures (OP-CRC III) (adopted December 2011, entered into force 2014). These drafting processes therefore merit close consideration.

CRPD and OP-CRPD

First, the CRPD is one of the latest additions to the corpus of substantive human rights treaties while OP-CRPD pre-dated OP-ICESCR and OP-CRC III. The drafting process of the CRPD in particular included debates on the inclusion of obligations of cooperation and assistance in the new treaty. Although initially there were debates between those opposing and those favouring such obligations in the CRPD, it is remarkable that the original discussions focused on very specific and programmatic ‘soft approach’ regarding international cooperation and assistance. Ultimately, a highly detailed provision was not included but a set of international obligations of cooperation and assistance were eventually included in Article 23. This is heralded in literature as a strong affirmation of the existence of international obligations in IHRL as such. The OP-CRPD itself, unlike the later treaties discussed below, does not include further reference to international cooperation and assistance. Such debates on this.

OP-ICESCR

The drafting process of the OP-ICESCR in 2002–2007 is of great interest here, first of all, because only very few States disputed outright and explicitly throughout drafting that the ICESCR includes a legal obligation to cooperate or assist. Instead, what was challenged is whether obligations of international assistance are suitable for an international complaints procedure specifically. To illustrate this point further, in the United Kingdom, the Czech Republic, Canada, France, and Portugal were put on record in 2005, as believing that ‘international cooperation and assistance was an important moral obligation but not a legal entitlement’ under the ICESCR or that the Covenant could not be interpreted to ‘impose a legal obligation to provide development assistance or give a legal title to receive such aid’. Moreover, in 2005, both Portugal and Czech Republic also supported the inclusion of Article 2(1) ICESCR. 

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in the OP-ICESCR, with Portugal adding that this new ‘procedural instrument’ would be able to accommodate different views on obligations of international assistance. 75 On the other hand, Ecuador, Angola, Egypt, Ghana, Indonesia, Iran, Morocco (on behalf of the Group of African States), and Nigeria (on behalf of the CESCR) added that, in their view, such a mechanism would be acceptable but also emphasised that ‘the importance of including a human rights approach to development assistance’. 76

The contribution on behalf of NGOs explicitly suggested that the 0.7% GNI/ODA target could play a role in assessing the implementation of Article 2(1) ICESCR. They pointed out that, if it could be established that the lack of international assistance was a cause of specific violations under an individual communications procedure, the UN should be able to increase States’ ability to protect individuals. The latter position appears to be supported by African States, who voiced particular concern about international cooperation. 77 NGOs also acknowledged the difficulty of establishing a causal link between the lack of international assistance and specific violations under an individual communications procedure, but that the lack of international assistance could be a mitigating factor in assessing States’ ability to guarantee the rights in the Covenant. 78

Ultimately, the African group maintained that different States simply had different capacities to realise rights and that an international trust fund had to become part of the new OP-ICESCR as a way of securing the fulfilment of rights. This was objected to by another small group of States that considered the fund to be a reward for failing to implement human rights in the first place. 79 The challenge was not to the obligation to assist as such but rather to the way it might be operationalised as a claimable right under ICESCR. In the end, Article 14 of the OP-ICESCR came to include a trust fund, with voluntary contributions, aimed at providing expert and technical assistance. The establishment of this fund was necessary to secure support for the OP-ICESCR by developing States, though it is not in operation yet. The Committee can try to seek to activate the fund in any State failing to comply with the Covenant. 80 NGOs also acknowledged the difficulty of establishing a causal link between the lack of international assistance and specific violations under an individual communications procedure, but that the lack of international assistance could be a mitigating factor in assessing States’ ability to guarantee the rights in the Covenant. 81

Finally, the Committee shall, as appropriate, communicate its views and recommendations to UN agencies and other competent bodies – with the consent of the State concerned – as to what ‘technical advice or assistance’ might be helpful and help such bodies to decide which ‘international measures likely to contribute’ to achieving progress in implementing the ICESCR might be necessary. 82 As a result, through the back door, it seems possible that an individual complaint of an individual against their State, or an inter-State complaint, could lead to access to international assistance through the fund or from UN agencies with an appropriate mandate. This assistance is ultimately geared towards States, not individuals directly, and it is mostly of an expert or technical nature. This is a very indirect, and somewhat limited, route, but disaster victims or other individuals similarly affected by a lack of international assistance could seek to use this mechanism to secure assistance.
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improperly protected persons in disaster-prone areas, could certainly try to formulate a claim before the CESCR, given that the OP-ICESCR has been in force since May 2013. Certainly in the area of DRR and given the new Sendai Framework, such claims could be of great interest. All in all, the drafting process of the OP-ICESCR seems to firmly underscore that cooperation and assistance is a legal obligation but that further work is necessary for its operationalisation.

OP-CRC III

Finally, the drafting process of the OP-CRC III in 2009–2011 deserves brief discussion. The preparatory works for this treaty only revealed that drafters opined that the issue of international assistance and cooperation to States had been dealt with in the OP-ICESCR and §14(a) appealed for resources in that respect could be made in the future in connection with the optional protocol to the Convention on the Rights of the Child if adopted. Two years later, during the second session, the drafting history demonstrates some views in favour and some against establishing a similar trust fund for the CRC—°but this fund was not ultimately created. Similar to OP-ICESCR, however, the OP-CRC III does include a mandate for the Committee to indicate a need for assistance to UN agencies. Buck and Wabwile have further argued that it would be properly within the mandate of the CRC to adopt a Recommendation which creates an institutional framework for the Committee to operate a global trust fund similar to the one established under the terms of Article 14(c) of OP-ICESCR, i.e. a fund that can be applied to finance the work of the Committee and provide assistance to States where there is need. The authors also suggested that the trust fund could “recruit and mobilize various resources in the global community including the corporate sector, civil society organizations, regional bodies and supportive States”, in this way providing “an alternative platform for global resource mobilization”—i.e. one that would arguably more firmly recognize and give effect to a “right to claim assistance” for States that lack capacity, although aimed at the international community more broadly.

Some concluding remarks

All in all, the drafting processes of the new instruments offer an interesting, more nuanced picture on the content of present human rights treaty law. Certainly it seems possible to conclude that international cooperation and assistance is a matter of international legal obligation and that claims about failure to fulfil these obligations could be made before supervisory bodies, and to some extent give rise to claims to be provided with assistance. At the same time, the manner in which the relevant provisions have been operationalised (i.e. at best through a voluntary fund so far) seems fairly poor. Time will tell us how bodies may deal with any complaints or requests regarding international assistance.

UN Charter-based mechanisms

Finally, this section briefly appraises the work of UN Charter-based mechanisms on international cooperation and assistance, with a special focus on disaster settings.

The work of special procedures

Over the previous years, a considerable range of disaster situations has been scrutinized by Special Rapporteurs with relevant thematic or country mandates (e.g. Haiti, Myanmar, internally displaced persons (IDPs), housing, water, food, and health). The monitoring practice of Special Procedures is

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typically includes annual reports, country visits, and communications exchanges, though the latter are uncommon in the area of disaster management and international cooperation. Another key feature of the work of Special Rapporteurs is standard setting initiatives, two of which are discussed below.

### Standard setting initiatives

First, the UN Guiding Principles on Internal Displacement were adopted by the UN Secretary-General’s Special Representative on IDPs in 1998. They are now 20 years old but still very much respected and referred to. Guiding Principle 3 affirms that national authorities have the primary duty and responsibility to protect IDPs and to provide them with humanitarian assistance. In addition, although IDPs have the right to request and to receive protection and humanitarian assistance, their care, claims, and assistance specifically from their national authorities. At the same time, humanitarian organizations and other appropriate actors have the right to offer their services, which shall not be regarded as an unfriendly act or an interference in a State’s internal affairs and shall be considered in good faith. Basically, the Guiding Principles reflect the ILC Draft Articles (or vice versa), with the exception that the ILC did not ultimately formulate any ‘right’ to receive assistance or to offer it. Instead the ILC highlighted the applicability of IHL generally and placed a general (though ill-defined) duty to cooperate on all issues concerned. Second, the former Special Rapporteur on housing and property restitution in the context of the return of refugees and internally displaced persons, Mr. Pinheiro, drafted the UN Principles on Housing and Property Restitution for Refugees and IDPs in 2005 (Pinheiro Principles), which are also applicable to disaster. Pinheiro Principle 10.4 requires affected States, when necessary, to request from other States or international organizations financial and/or technical assistance required to facilitate the effective voluntary return, in safety and dignity, of refugees and displaced persons. A 2007 UN Handbook further elaborates that States, as needed, ask for financial assistance from the international community to facilitate returns if national resources are insufficient to achieve this. Although seemingly inspired by situations of armed conflict, the Handbook equally answers the questions of who should pay for voluntary repatriation and restitution programmes? by providing that donor countries and UN and other agencies should contribute to funding needs for these purposes. Specifically, Pinheiro Principle 22: the international community should work with national Governments and share expertise on the development of national policies and programmes in line with relevant IHL standards. Of course, none of the work of Special Rapporteurs is formally binding; it is soft law.

### Country visits

Special Procedures have also addressed specific disaster settings and international cooperation and assistance through country visits, sometimes in considerable detail. For example, after a visit to the Maldives, the Special Rapporteur on the human rights of IDPs (SR on IDPs), for example, proposed a broad range of disaster risk-related measures to be implemented by the Government and called upon the international community to take actions and provide increased international support in order to strengthen local and national capacities, as well as to domestic legal frameworks and policies to address disaster risk reduction. This support includes particularly ‘exchange of best practices and expertise’, ‘technologies for addressing coastal erosion, protection measures against flooding, and reclamation projects’, ‘specific cooperation and assistance frameworks supportive of climate change adaptation strategies’, at the bilateral, multilateral, and regional level. Specifically, cooperation agreements could pertain to international and national cooperation and assistance.

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emergency assistance during the initial phase of a disaster or support durable solutions; moreover, with regard to all of the above, the international community should ensure coordination of international support at the national level. 100

This report clearly conveys a sense of urgency and the specificity of these recommendations is remarkable. Similarly detailed observations can be found in the SR on IDP’s report regarding typhoon Haiyan in the Philippines, which considered that:

[int]ernational assistance remains a vital component of the overall response and to ensuring durable solutions for internally displaced persons in the Philippines. The international community is urged to maintain its technical and financial support, particularly for environmental risk assessment and disaster management. 101

In addition:

[the] international community should stand ready to respond effectively to disaster-related displacement in the Philippines, in line with the recommendations contained in the Nansen Initiative Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change. It should equally provide support to the Philippines for the effective implementation of the Sendai Framework for Disaster Risk Reduction 2015–2030 as well as measures of adaptation to climate change under the 2015 Paris Agreement on climate change. 102

It is clear that the Special Procedures have been in a range of important international agreements for cooperation and assistance. It is recalled that the UN appeal target for typhoon Haiyan was only 60% met. In fact, Special Procedures have very critically remarked on poor responses to UN appeals and other essential funding needs for disaster assistance on other occasions. 103 The Special Rapporteur on the Right to Food reminded us in his report in Niger that governments bear an obligation to provide assistance, to the extent that their resources permit, where individuals are suffering in another country, such as situations of drought and famine – this includes obligations to cooperate in providing disaster relief and humanitarian assistance in times of emergency. 104

Besides the above statements, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in the context (SR on housing) also has considered disaster assistance in considerable detail. 105 For example, after a country visit to Algeria, she urged the international community (including states, international organisations and non-governmental organisations) to provide sufficient funding to ensure decent living conditions, including adequate housing, for Saharan refugees in the Tindouf camps, noting that in 1995 the refugee camps needed to be replaced at least every five years, but the international organisations active there were unable to do so due to lack of funds. The shelters that refugees were build from straw are very prone to regular flooding events in the region. 106 Furthermore, in 2006, the SR on housing observed that enormous disaster impacts in Iran impacted joint efforts of the Government, national non-governmental actors and the international community alike. 107 The international community was called upon to provide technical cooperation to facilitate an increase in the construction of earthquake-proof homes and cooperatives in the area of disaster preparedness across the Country; to collaborate in the immediate improvement of the living conditions in the survivor camps in Bam and accelerate the reconstruction efforts in the city, to ensure funding to building projects, especially for vulnerable groups; to monitor and report all funding provided; and to increase support for training and capacity building for civil society. 108 Again, the great specificity in these country recommendations, far beyond the detail included in Concluding Observations, stands out. In fact,
the SR on IDPs also made further specific remarks in response to the situation in Haiti, such as requiring the harmonisation of funding cycles between humanitarian and development agencies, with a view to increase the chances of smooth transition between the largely humanitarian approach adopted up to that point and a more development rights-based approach. The SR on IDPs also observed that Haiti is highly reliant on aid and loans provided by the international community, including international financial institutions, the provisions of loans and aid must be in line with the States human rights obligations and international human rights law. The SR specifically added that the reconstruction and rehabilitation of communities affected by disasters is a challenge for authorities, both in terms of technical and financial resources, and Haiti’s situation became more complicated because it recently changed its status from Least Developed Country to Middle-Income Country, resulting in difficulty in accessing international aid and loans.

Finally, in respect of Cabo Verde, the SR on housing observed very recently that the country is highly dependent on aid and loans provided by the international community, including international financial institutions, the provision of loans and aid must be in line with the States human rights obligations and international human rights law. The SR specifically added that the reconstruction and rehabilitation of communities affected by disasters is a challenge for authorities, both in terms of technical and financial resources, and Cabo Verde’s situation became more complicated because it recently changed its status from Least Developed Country to Middle-Income Country, resulting in difficulty in accessing international aid and loans.

The argument can be made here that the monitoring work of Special Procedures adds to the clarification of assistance needs and provides in-depth instructions to both affected and assisting actors as to the modes, types, and extent of cooperation and assistance needed, and perhaps even required, for the protection of human rights.

The Human Rights Council

Finally, the UN Human Rights Council (HRC) could perhaps not lag behind in addressing disasters, i.e. considering the ample engagement with this topic in other fora. Two aspects of the work of the UNHRC stand out: recent reports on disasters and the considerations in the Universal Period Review (UPR) on disaster assistance.

Reports/analytical studies

In 2015 and 2016, the HRC published its first specific reports on human rights protection in disaster settings. The 2015 analytical study on human rights protection in post-conflict and post-disaster situations does not address international cooperation, but the HRC subsumes in passing that affected States have the primary responsibility for coordinating humanitarian assistance, and are at least under a moral duty to accept bona fide offers of assistance by States or other relevant organizations. This report also includes a heading called ‘Multi-Level Approaches’, which further affirms that [g] regional organizations and mechanisms have significant expertise and resources to offer when dealing with disaster situations. The report does not speak of obligations to assist, or rights to be furnished with assistance.

Three fairly careful statements stand in marked contrast with the HRC’s 2015 study on climate change and the human right to health. This study not only affirms the links between climate change and disasters, but also underscores that:

States should enhance cooperation and development assistance on the basis of principles of equity and common but differentiated responsibility to ensure adequate funding of, and research into, adaptation actions that help the poorest countries and those particularly vulnerable to the adverse effects of climate change. Specific measures could include adequate financial support and technological assistance, including if necessary the lowering of intellectual property standards and facilitation of transfer and implementation of technologies, policies for climate change mitigation and adaptation; and establishment of a special climate change fund to finance climate mitigation and adaptation policies.
While none of the work of the HRC is legally binding, and the language employed is also not strongly legally worded, i.e. ‘should’ (perhaps for that reason), the Council’s work nevertheless reaffirms the dire need for enhanced international cooperation and assistance for human rights in the context of disasters and for climate change as a related issue. International regulatory frameworks, such as the Sendai Framework, the UN Framework Convention on Climate Change or the 2015 Paris Climate Change Agreement, could bolster and provide further understanding about how burden-sharing can be envisioned (e.g. through a fund; through common but differentiated responsibilities; through a principle of equity etc.) or what type of financing and technology-sharing commitments are necessary – also per the Addis Ababa Action Agenda or Sendai Framework.

Universal Periodic Review
Finally, international disaster assistance has been addressed in several UPRs as well. For example, in Cuba’s UPR, the Russian Federation and Bangladesh respectively recommended that Cuba provide ‘humanitarian assistance at the extent possible to neighboring countries which need assistance because of man-made or natural catastrophes’, and to provide ‘support to countries requesting assistance in case of natural disasters and other ravages of nature’. In the UPR of Bhutan, the Solomon Islands recommended the development and submission of proposals for assistance ‘to improve capacity for disaster management, from a human rights perspective’. Uganda also asked Bhutan to ‘call for technical assistance in disaster management’, and the Maldive Islands recommended that it should ‘specify technical assistance and international cooperation in its efforts relating to disaster management and preparedness as well as climate change mitigation’. In turn, Bhutan recommended that Bangladesh ‘continue and strengthen, with international support and cooperation, its efforts to mitigate the negative impact of climate change, as well as disaster management programmes’. Finally, Kuwait received several positive recommendations to continue humanitarian disaster assistance to developing countries or to multilateral funds. The UPR thus affirms a practice of requiring particular States to engage in particular types of cooperation and assistance for the protection of human rights, including very specifically for disaster settings.

Conclusions
In summary, this chapter analyzed whether individuals or States can claim international (humanitarian) assistance in disaster situations under current IHRL, as a legal entitlement. Clearly, despite poor recognition of this fact in the final ILC Draft Articles, obligations of cooperation and assistance have long been acknowledged in IHRL, and in the UN Charter. To some extent these have been reflected in ILC Draft Article 7. Regrettably, analysis of non-cooperation or non-assistance in IHRL (the ILC has generally failed) has been subject to extreme criticism by sudden and too abrupt assistance when needed is a problem that no corresponding ‘specific duties of assistance’ for assisting actors have been included. In addition, the ILC neglected to clarify under which circumstances developed States could refuse requests for assistance (or not), as called for by some drafters. As recently considered by Salomon, positive IHRL does not consider cooperation and assistance discretionary, but a better delineation of what is required, when, and by which State(s), is needed for rights and obligations of assistance to be operationalized. She considers that the difficulties of determining breaches of these obligations stem from a variety of judicial difficulties, including ‘whether States have to act in a particular situation, and how’.
Yet, this chapter has evidenced that IHRL monitoring mechanisms do actually – in a highly practical manner – provide elucidations of the legitimate needs of disaster assistance in concrete settings. Treaty bodies, Special Procedures, and States in the UPR all engage rather extensively and in considerable detail with efforts of international (disaster) assistance, and their monitoring outputs include clear instructions on the types and levels of assistance needed and what needs to be provided by international actors.

The argument is made here, backed up by repeated international assistance agreements, including specific disaster management regimes, that disaster-affected States are able to stake claims to specific international assistance, from specific States. Such claims are especially relevant when it can be adduced that States fail to (consistently) meet international assistance targets, and there is an obvious or "objectively" capacity to assist in some manner. 122

In this sense, new IHRL complaints procedures offer unexplored potential to place the onus on assisting actors to justify why they do not or have not come forward with assistance in response to legitimate, reasonable requests for assistance. The same actually counts for a claim before the ICJ. All in all, time will tell whether it is indeed possible to use IHRL monitoring mechanisms for operationalising the open-ended legal obligations of international cooperation and assistance; yet, it seems there is reason to argue this could be a possible way to concretely effectuate assistance and to ensure that human rights protection does not remain an unfulfilled aspiration in many countries. 123

For – in the words of the UN High-Level Panel on Humanitarian Financing – it is unacceptable that anybody should die or live without dignity because we cannot find the resources required to help people in need . . . , when global resources are plenty. 124

Selected bibliography


Notes


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17. Dinstein (n. 1) 78.

18. P. Alston and G. Quinn, ‘The Nature and Scope of States Parties’ Obligations under the Interna-

19. Ibid. (n. 1) 78; Jansen-Wilhelm (n. 1) 138–139; see also Hesselman (n. 16) Salomon (n. 10) 368;
Alston and Quinn (18) 191; HRC, Report of the Special Rapporteur on the Right to Health, Final
report, 2008, para 133, including Hunt’s now famous critique of the need to ensure that there is no legal obligation in stare.

20. Alston and Quinn (18) 191.


22. Salomon (n. 10) 367.

final draft articles and Commentaries adopted through: ILC, Report of the International Law Commiss-
ion of its Sixtieth Session, UN Doc. A/71/10 (2016) ch IV.

24. See (n. 2) above, although the ILC Secretariat did not refer to all instances.

25. ILC Secretariat (n. 1) paras 257–258.

26. ILC Special Rapporteur (n. 2) para 54.

27. Ibid.

28. Ibid para 12; see McDermott’s chapter in this book.

para 222, 242–243; ILC, Third Report on the Prevention of Discrimination and Protection of Victims of

30. ILC Special Rapporteur (n. 2) para 54; ILC (n. 29) paras 222, 242–243; ILC, Third Report on the Pro-

31. Ibid.

32. ILC, Draft art 5 (n. 23) 15.

33. Ibid art 7 (n. 23) 15. The word ‘shall’ was maintained, despite several States expressing reservations to
the consortium formation.

34. ILC, Draft arts 10, 11 and 13 (n. 23) 15–16. It means that an ILC’s determination of cooperation based on its
own consent is not an analysis of the obligation to accept assistance as HRR. James Wilder (p. 5).

35. ILC, Draft on 14 (n. 23) 15–16.


37. Ibid para 297.

38. Ibid paras 297, 299, 300, 301.

39. Art. 22.1 and 13.1.1. ILC, Draft art 5 ILC, Draft art 7.2; see also ILC, Draft art 11.

40. Convention On the Rights of the Child, UN Doc. CRC/C/OPREC/4 (2011) 5 para 14: ‘The principle of cooperation is based on the voluntariness of the cooperation agreement. The cooperation agreement must not be used to impose conditions, whether financial or otherwise, on the rights of the child.’


42. Ibid, para 15.

43. Ibid para 15.

44. Ibid para 15.

45. Ibid para 15.


47. Ibid paras 14–15.

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by States. In 2018, 15 EU countries agreed to meet the target by 2023, but this ambition is still
progressing. In contrast, the EU has met its 0.7% ODA target since 2005. In 2021, the bey-
ond the 0.7% ODA Target, available at www.oecd.org/
dac/stats/officialdevelopmentassistancedefinitionand
coverage.htm#Coverage, accessed on 1 March 2017.

refugees-doubles.htm, accessed on 1 March 2017; in 2015, of the total amount of ODA leveraged by OECD-
DAC countries (at 131.6 billion USD), 13.6 billion was devoted to humanitarian assistance in conflicts and
disasters. Also consider UNGA, Resolution 60/1, UN Doc. A/RES/60/1 (2005) para 51.

Sendai Framework (n. 10) para 19(1).

51  CESCR, Concluding Observations on the Sixth Periodic Report of Finland, UN Doc. E/C.12/FIN/
CO/6 (16 December 2014); and in that same year also Slovenia, Romania, Portugal, Czech Republic,
and Monaco received reprimands. See for an elaborate further analysis and discussion of the Concluding
Observations practice in Hesselman (n. 16).

52  E.g. CESCR, Concluding Observations on the Fifth Periodic Report of Norway, UN Doc. E/C.12/NOR/
CO/5 (13 December 2013) para 3. Norway devotes 1% of GNI to international development assistance.

53  OECD, 'Development Aid Rises again in 2016 but Flows to Poorest Countries Dip' (2016), available
at www.oecd.org/dac/financing-sustainable-development/development-aid-rises-again-in-2016-but-

54  See for specific analysis Hesselman (n. 16), and paragraph 4 of this chapter.

55  See Hesselman (n. 16), Sepúlveda Carmona (n. 18) 89, 93 considering cooperation and assistance a legal
obligation, but the 0.7% target as something that requires a ‘timetable’ – these timetables have repeatedly
not been met through halving out the discussion. Similarly in (n. 10) 376 Salomon considers it a ‘general
duty amongst developed states’ to meet the 0.7% target.

56  E.g. Hesselman (n. 16) for further discussion; Jansen-Wilhelm (n. 5) 138–139; Vandenhole (n. 48)
23, 61–62; Sepúlveda Carmona (n. 18) 93, 102.

57  Sepúlveda Carmona (n. 18) 93–94; similarly Salomon (n. 10) 376.

58  See on this point also Sepúlveda Carmona (n. 18).

59  CESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights on

60  CommRC, Concluding Observations: Ukraine, UN Doc. CRC/C/15/Add.191 (9 October 2002) para
56.

61  CommRC, Concluding Observations on the Initial Report of Tuvalu, UN Doc. CRC/C/TUV/CO/1
(29 October 2013) paras 56, 67; CommRC, Concluding Observations on the Combined Third to Fifth
Periodic Reports of Mauritius, UN Doc. CRC/C/MUS/CO/3–5 (26 February 2015) paras 57–58, 75; see for similar
questions raised, and evidence adduced, that general obligations of assisting States are discussed by
CommRC, Vandenhole (n. 48) 44–45.

62  CommRC, Concluding Observations on Mozambique, UN Doc. CRC/C/MOZ/CO/2 (4 November

63  CESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Repub-
lic of Korea, UN Doc. E/C.12/KOR/CO/3 (17 December 2009).


65  CESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights, UN

66  CommRC, Concluding Observations: Singapore, UN Doc. CRC/C/SGP/CO/2–3 (4 May 2011) paras
23–24; CommRC, Concluding Observations: Norway, UN Doc. CRC/C/NOR/CO/4 (3 March 2010) para 12;
CommRC, Concluding Observations: Australia, UN Doc. CRC/C/AUS/CO/4 (28 August 2012) paras 21;
CommRC, Concluding Observations: Italy (n. 64).


noted that in theory such cases might arise’; OEWG on OP-ICESCR, Report of the Second Session, UN

69  See on this topic earlier, e.g. Sepúlveda Carmona (n. 18).

70  See e.g. UNGA, Report of the Third Session of the Ad Hoc Committee on a Comprehensive and Inte-
gral International Convention on the Protection and Promotion of the Rights and Dignity of Persons

with Disabilities, UN Doc. A/AC.265/2004/5 (2004) 69–71; see debate and proposals via: Daily Sum-
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Right to Food on Her Mission to Philippines, UN Doc. A/HRC/31/51/Add.1 (24 December 2014) and as discussed below.

99  Ibid 72(b).
100  Ibid 72(c).
102  Ibid para 126.
105  See also Rolnik’s chapter in this book.
107  Ibid paras 9, 68.
108  Ibid.
111  Ibid para 95.
112  Ibid paras 96, 97. Regarding assistance, there were references to very specific amounts of funding allocated (see paras 96, 97 and 115).
115  Ibid paras 118.97, 118.102.
117  Salomon (n. 10) 280.
118  CESCR, General Comment 3, paras 10, 14.
119  UN High-Level Panel on Humanitarian Financing (n. 8) 4.