
Techniques in International Law-Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief

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Abstract

This article traces the emergence of an international law of disaster relief from a patchwork of norms through to a holistic body of international law. It argues that, for many years, the international law of disaster relief existed in piecemeal fashion. Since there is no overarching treaty on the subject at the global level, a hodgepodge of instruments have been concluded, namely subject-specific and disaster-specific treaties at the global level, regional and sub-regional agreements, bilateral agreements as well as soft law. However, through the work of the International Law Commission and the International Federation of the Red Cross and Red Crescent, a holistic body of international law relating to disaster relief is in the process of emerging. This article argues that this holistic body is emerging primarily as a result of three techniques that, while unconventional, are used relatively frequently in the making of international law. The three techniques are: (i) extrapolation from a series of piecemeal instruments to form a generalized standard; (ii) the use of analogy and (iii) the conclusion of instruments that are soft in form but contain a mixture of hard law and soft law. The way in which the techniques have been used to develop a body of international law relating to disaster relief is analysed, their use in other fields of international law discussed and limitations on their use in the disaster law context identified.

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1 Introduction

Large-scale disasters affect millions of people each year.¹ In the decade between 2004 and 2014 alone, a number of major disasters took place, including the Indian Ocean tsunami (2004), Hurricane Katrina (USA, 2005), Cyclone Nargis (Myanmar, 2008), Typhoon Haiyan (Philippines, 2013), a major earthquake in Haiti (2010) and a major earthquake and tsunami in Japan (2011), not to mention the countless floods and cyclones that regularly affect states every year. These are only a few examples of sudden-onset disasters. Slow-onset disasters, such as droughts and desertification, are also numerous. Historically, the international law that applies during and in the immediate aftermath of a disaster has been a patchwork of norms rather than a coherent body of law. The field of disaster response law does not benefit from any overarching instruments akin to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in international human rights law or the Geneva Conventions and Additional Protocols in international humanitarian law.² Instead, it is made up of subject-specific treaties; disaster-specific treaties; regional, sub-regional and bilateral treaties and a host of soft law instruments. This piecemeal approach is the subject of the second part of this article.

Since the 2000s, there have been concerted efforts to develop a holistic body of international law that protects persons in time of disaster, focusing in particular on the international law relating to disaster relief. The work has been undertaken primarily by the International Law Commission (ILC), with its preparation of draft Articles on the Protection of Persons in the Event of Disasters, and by the International Federation of Red Cross and Red Crescent Societies (IFRC), with its work on international disaster relief law.³ The ILC has adopted the set of draft articles and recommended to the United Nations (UN) General Assembly that a convention be elaborated on the basis of them. In this way, a treaty of global application would come into being. For its part, the IFRC has drawn up guidelines and a model act, which it hopes will be used by states at the domestic level. In this way, a consistent body of law would be created, across states, albeit at the domestic level.

¹ For the purposes of this article, the International Law Commission's (ILC) definition of a disaster will be used – namely, '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'. ILC Draft Articles on the Protection of Persons in the Event of Disasters (Draft Articles on the Protection of Persons in Disasters), reprinted in Report of the International Law Commission, Sixty-Eighth Session (2 May–10 June and 4 July–12 August 2016), Doc. A/71/10 (2016), at 30, Art. 3(a).

² International Covenant on Civil and Political Rights 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3; Geneva Conventions 1949, 1125 UNTS 3; Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 6 August 1977, 1125 UNTS 3; Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 6 August 1977, 1125 UNTS 609.

³ Draft Articles on the Protection of Persons in Disasters, *supra* note 1.

Part 3 analyses the attempts to develop this holistic body of law and identifies three techniques used by the ILC and the IFRC to do so. The first technique involves the development of a generalized multilateral standard – that is to say, a multilateral standard that is developed through extrapolation from piecemeal standards. A second technique is the use of analogy, where one body of law is developed by analogy to another, related body of law. The third technique relates to the form-substance-authority nexus. It is evident in the creation of an instrument that is soft in form but that comprises a mixture of *lex lata* and *lex ferenda*. In such an instrument, a particular norm tends not to be identified as *lex lata* or *lex ferenda*, and the two are not separated out from one another. Even though it is soft in form, the instrument can have considerable authority.

The article explores each of these techniques in the disaster law context and in international law generally. It draws on the use of extrapolation in international investment law, which has developed as a system of law largely through numerous consistent bilateral treaties. It analyses the use of analogy in international humanitarian law and in the development of the Guiding Principles on Internal Displacement.⁴ And it explores the form-substance-authority nexus in the context of the ILC's Articles on State Responsibility.⁵ Finally, the article subjects each of the techniques to critical analysis, discussing the limitations on their use in developing a holistic body of international law relating to disaster relief. Accordingly, the article offers three principal contributions. First, it traces the emergence of an international law of disaster relief. Second, it identifies and analyses the techniques that have been used to develop that body of law and assesses the merits and limits of the techniques. Third, given that the techniques are used also in other branches of international law, it offers insights into the making and shaping of international law more broadly.

2 International Law Relating to Disaster Relief: A Piecemeal Approach

The international law regulating the provision of disaster relief is not governed by a grand overarching treaty but, rather, by subject-specific and disaster-specific treaties, regional and sub-regional agreements as well as a significant number of bilateral agreements and soft law instruments.⁶ Indeed, disaster relief law has been described as being composed of a 'pot pourri' of, or 'strewn with', instruments, all of which tend to regulate the same sorts of issues.⁷

⁴ Guiding Principles on Internal Displacement (Guiding Principles), annexed to GA Res. 46/182 (1991).

⁵ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles on State Responsibility), reprinted in Report of the International Law Commission, Fifty-Third Session (23 April–1 June and 2 July–10 August 2001), Doc. A/56/10 (2001).

⁶ See generally International Federation of Red Cross and Red Crescent Societies (IFRC), *Law and Legal Issues in International Disaster Response: A Desk Study* (IFRC Desk Study) (2007); de Guttry, 'Surveying the Law', in A. de Guttry, M. Gentry and G. Venturini (eds), *International Disaster Response Law* (2012) 3.

⁷ See, respectively, Allan and O'Donnell, 'A Call to Alms?: Natural Disasters, R2P, Duties of Cooperation and Unchartered Consequences', 17 *Journal of Conflict and Security Law* (2012) 337, at 345; Heath, 'Disasters, Relief, and Neglect: The Duty to Accept Humanitarian Assistance and the Work of the International Law Commission', 43 *New York University Journal of International Law and Politics* (2011) 419, at 447.

A *Multilateral (Global) Treaties*

A number of multilateral treaties exist in the area of disaster relief. However, they regulate the response either to specific types of disasters or to particular aspects of disasters. Certain treaties regulate assistance in the case of particular types of disasters – nuclear accidents,⁸ oil pollution⁹ and so on. Other treaties relate to the provision of specific types of assistance in the case of a disaster – for example, telecommunications assistance¹⁰ and civil defence assistance.¹¹ Yet others concern disasters that take place in particular locations, such as transboundary watercourses.¹²

A number of conventions of more general applicability contain specific provisions that relate to disaster relief, in particular, regarding modalities of delivering the assistance. For example, as its name suggests, the International Convention on the Simplification and Harmonization of Customs Procedures (as amended) is intended to simplify and harmonize customs procedures across states.¹³ The convention contains two annexes relating to disaster relief, which are intended to facilitate the provision of humanitarian assistance following a disaster through relief from import duties and taxes and modification of customs procedures.¹⁴

B *Multilateral (Regional and Sub-Regional) Treaties*

More common than treaties adopted at the global level are regional and sub-regional treaties.¹⁵ In the Americas, a regional convention has been concluded on the provision of assistance in the event of a disaster.¹⁶ Several sub-regional instruments also exist, including in the Caribbean¹⁷ and with respect to the Mercosur states (Argentina,

⁸ Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Nuclear Accident Convention) 1986, 1457 UNTS 133.

⁹ In particular, the International Convention on Oil Pollution Preparedness, Response and Cooperation 1990, 1891 UNTS 51.

¹⁰ Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (Tampere Convention) 1998, 2296 UNTS 5.

¹¹ Framework Convention on Civil Defence Assistance 2000, 2172 UNTS 213.

¹² Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992, 1936 UNTS 269. The convention was concluded under the auspices of the United Nations Economic Commission for Europe (UNECE) and was originally limited to UNECE states. However, it was subsequently amended to allow non-UNECE states to accede. UNECE, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Amendment to Articles 25 and 26 of the Convention, Doc. ECE/MP/WAT/14, 12 January 2004.

¹³ International Convention on the Simplification and Harmonization of Customs Procedures 1999, 2370 UNTS 27.

¹⁴ *Ibid.*, Annexes B.3, J.5.

¹⁵ For further details, see IFRC Desk Study, *supra* note 6, ch. 4; de Guttry, *supra* note 6, at 17–33. The regional, sub-regional and bilateral treaties cited in the pages that follow can be found in the IFRC database, available at <https://ifrc.org/en/publications/disaster-law-database/>.

¹⁶ Inter-American Convention to Facilitate Disaster Assistance (Inter-American Convention) 1991, OAS A-54.

¹⁷ Agreement Establishing the Caribbean Disaster Emergency Response Agency (Caribbean Disaster Agreement) 2008; Agreement between Member States and Associate Members of the Association of Caribbean States for Regional Cooperation on Natural Disasters 1999.

Brazil, Paraguay and Uruguay).¹⁸ In Asia, a regional convention does not exist, although several sub-regional conventions have been concluded by the states in the Association of Southeast Asian Nations and the South Asian Association of Regional Cooperation.¹⁹ The Middle East also benefits from a regional agreement; indeed, it was one of the earlier conventions on the subject.²⁰ For its part, Europe has a developed legal framework relating to disaster response primarily, although not exclusively, in European Union (EU) law.²¹ Sub-regional agreements of importance include those concluded by the Black Sea Economic Cooperation states,²² Nordic states²³ and the UN Economic Commission for Europe.²⁴

Fewer conventions in the area of disaster response have been concluded on the African continent.²⁵ Indeed, this continent does not benefit from a regional agreement specifically on disaster response or, indeed, sub-regional agreements on the subject. That is not to suggest that there are no instruments of relevance. The Constitutive Act of the African Union provides that '[t]he Executive Council shall coordinate and take decisions on ... environmental protection, humanitarian action and disaster response and relief'.²⁶ At the sub-regional level, the Agreement Establishing the Intergovernmental Authority on Development in Eastern Africa²⁷ and the Treaty of Economic Community of West African States are also important.²⁸ Numerous regional and sub-regional conventions have thus been concluded on the issue of disaster relief. However, they do not cover the globe, with certain areas of the world not benefiting from any such conventions.

¹⁸ Protocolo Adicional al Acuerdo Marco sobre Medio Ambiente del MERCOSUR en Materia de Cooperación y Asistencia Frente a Emergencias Ambientales 2004.

¹⁹ Association of Southeast Asian Nations Agreement on Disaster Management and Emergency Response (ASEAN Agreement) 2005, ASEAN Documents Series 2005, at 157; South Asian Association of Regional Cooperation Agreement on Rapid Response to Natural Disasters (SAARC Agreement) 2011.

²⁰ Arab Cooperation Agreement on Regulating and Facilitating Relief Operations 1987.

²¹ Treaty on the Functioning of the European Union, as adopted by the Treaty of Lisbon, OJ 2010 C 83/49, Arts 214, 196; also Arts 6(f), 196, 222(1). See further Euratom Establishing a Community Civil Protection Mechanism, Council Decision 2007/779, OJ 2007 L 314. See Civil Protection Mechanism (recast); Council Resolution on Improving Mutual Aid between Member States in the Event of Natural or Technological Disaster, OJ 1991 C 198; Council Joint Statement on the European Consensus on Humanitarian Aid, OJ 2008 C 25/01. For an analysis of disaster relief law in the European Union (EU), see Gestri, 'EU Disaster Response Law: Principles and Instruments', in de Guttry, Gestri and Venturini, *supra* note 6, 105; Stefanelli and Williams, 'Disaster Strikes: Regulatory Barriers to the Effective Delivery of International Disaster Assistance within the EU', 2 *Journal of International Humanitarian Legal Studies (JIHLS)* (2011) 53.

²² Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-Made Disasters (BSEC Agreement) 1998.

²³ Mutual Emergency Assistance Agreement in Connection with Radiation 1963.

²⁴ Convention on the Transboundary Effects of Industrial Accidents 1992, 2105 UNTS 457.

²⁵ On which, see IFRC, Regional (Africa) Survey of Disaster Response Laws, Policies and Principles, April 2007.

²⁶ 2000, 2158 UNTS 3, Art. 13(1)(e).

²⁷ 1996, Art. 13(q), (r).

²⁸ Revised Treaty, 2003, 2373 UNTS 235, Art 29(1).

C *Bilateral Treaties*

Compared to other areas of law and to the global treaties on the subject of disaster relief, the number of bilateral treaties concluded in the area is significant.²⁹ Indeed, bilateral treaties form the ‘bulk’ of the instruments in the area of disaster response.³⁰ Bilateral agreements concluded on the subject are between states – often, but not always, between neighbouring states – and between a state and an international organization. The bilateral agreements are as varied in their subject matter as the multilateral conventions. Some relate to specific types of disasters, such as forest fires,³¹ whereas others relate to disasters generally.³² Some concern assistance in defined and very specific areas, such as search and rescue³³ or civil defence,³⁴ whereas others regulate assistance generally.³⁵

D *Soft Law*

Leaving aside the work of the ILC and the IFRC for the moment, which will be considered in detail in Part 3, soft law has been particularly important in the field of disaster relief.³⁶ This is primarily a result of the gaps in hard law that existed for many years and that, to some extent, continue to exist today. The soft law has triggered the development of hard law, and many legal developments, particularly at the domestic level, have been influenced by soft law. The soft law that exists in the area is numerous and varied. Some instruments have been concluded by states but are not in binding form, such as the Guiding Principles on Humanitarian Assistance, which were annexed to UN General Assembly Resolution 46/182 (1991). Although not binding as a matter of law, the principles are a critical instrument – indeed, one of the foundational instruments of the UN’s work in the area. Indeed, in introducing the draft resolution before the General Assembly, the Guiding Principles were described as ‘landmark arrangements for putting in place a coordinated and effective system for humanitarian emergency assistance’.³⁷ The resolution was adopted by consensus and has since

²⁹ See the lists compiled by the ILC Secretariat, Protection of Persons in the Event of Disasters, Memorandum by the Secretariat, Addendum, Doc. A/CN.4/590/Add.2, 31 March 2008; de Guttry, *supra* note 6, at 715.

³⁰ IFRC Desk Study, *supra* note 6, at 80.

³¹ E.g., Exchange of Notes Constituting an Agreement between the United States of America and Canada on Mutual Assistance in Fighting Fires 1982.

³² E.g., Convention between the Government of the French Republic and the Government of the Kingdom of Belgium on Mutual Assistance in the Event of Disasters or Serious Accidents 1981.

³³ E.g., Agreement between the Government of the Republic of South Africa and the Government of the Republic of Namibia regarding the Co-ordination of Search and Rescue Services 2000.

³⁴ E.g., Agreement on Technical Cooperation and Mutual Assistance in the Field of Civil Defence between the Kingdom of Spain and the Kingdom of Morocco 1987, 1717 UNTS 143.

³⁵ E.g., Agreement between the Swiss Federal Council and the Government of the Republic of the Philippines on Cooperation in the Event of Natural Disaster or Major Emergencies 2001; Agreement between the Republic of Austria and the Federal Republic of Germany concerning Mutual Assistance in the Event of Disasters or Serious Accidents 1988, 1696 UNTS 61.

³⁶ De Guttry, *supra* note 6, at 10.

³⁷ GA, Provisional Verbatim Record of the 78th Meeting, Doc. A/46/PV.78, 8 January 1992, 37 (Sweden).

been recalled in numerous resolutions relating to humanitarian assistance.³⁸ The Guiding Principles contain principles relating to humanitarian assistance and the role and responsibilities of various actors. They also contain principles on prevention, preparedness and stand-by capacity. Importantly for UN purposes, the Guiding Principles also envisaged the creation of the position of an emergency relief coordinator and an inter-agency standing committee, both of which have been established.

Other instruments have been drafted by UN entities. Of particular note in the present context are the 1977 Recommendations Concerning Measures to Expedite Relief and the 1984 draft Convention on Expediting the Delivery of Emergency Relief, both concluded under the auspices of the Office of the UN Disaster Relief Co-ordinator.³⁹ Also of importance are the 1982 UNITAR Model Rules for Disaster Relief Operations.⁴⁰

Still other soft law instruments have been drawn up by influential non-state actors.⁴¹ Although soft law emanating from non-state actors has been described as '[p]erhaps the most controversial claimants to international soft law status',⁴² this type of soft law has proven significant in the field of disaster relief law. Of particular note is the 1994 Red Cross Code of Conduct. The Code of Conduct is a voluntary code, containing 10 principles together with recommendations to governments of affected states, donor governments and international organizations. In January 2017, it had been signed by 621 humanitarian organizations,⁴³ and many humanitarian organizations consider the code to contain 'binding principles'.⁴⁴ However, the organizations in question are predominantly European organizations, and few are located in Africa.⁴⁵ Although the Code of Conduct is open for signature only to the Red Cross and Red Crescent movement and to non-governmental organizations, it is also used by states and international organizations. Some entities, such as the European Commission's Humanitarian Aid

³⁸ See, e.g., GA Res 67/231, 9 April 2013.

³⁹ Office of the United Nations Disaster Relief Coordinator, Report of the Secretary-General, UN Doc. A/32/64, 12 May 1977, Annex II; Office of the United Nations Disaster Relief Co-ordinator, Report of the Secretary-General, Addendum, Proposed Draft Convention on Expediting the Delivery of Emergency Relief, UN Doc. A/39/267/Add.2-E/1984/96/Add.2, 18 June 1984.

⁴⁰ See M. el Baradei, *Model Rules for Disaster Relief Operations* (1982).

⁴¹ See, e.g., Institut de Droit International, Bruges Resolution on Humanitarian Assistance (2003); International Institute of Humanitarian Law, Guiding Principles on the Right to Humanitarian Assistance (1993), reprinted in 33 *International Review of the Red Cross (IRRC)* (1993) 519; Max Planck Institute, *International Guidelines for Humanitarian Assistance Operations* (1991); International Law Association, *Draft Model Agreement Relating to Humanitarian Relief Operations* (1982), reprinted in *International Law Association, Report of the Fifty-Ninth Conference Held at Belgrade, August 17th, 1980 to August 23rd, 1980* (1981) 520.

⁴² Chinkin, 'Normative Development in the International Legal System', in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) 29. See also Pronto, 'Understanding the Hard/Soft Distinction in International Law', 48 *Vanderbilt Journal of Transnational Law (VJTL)* (2015) 941, at 946.

⁴³ Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief. List of Signatories, available at www.ifrc.org/Global/Documents/Secretariat/Copy%20of%20Code%20of%20Conduct%20UPDATED_January%202017.pdf.

⁴⁴ Cubie, 'An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?', 2 *JIHLS* (2011) 177, at 195.

⁴⁵ *Ibid.*

Department, ‘require[] endorsement of the Code of Conduct as a condition of funding’, while others, such as the United Kingdom’s Disasters Evaluation Committee use the Code of Conduct ‘as the basis for evaluation of humanitarian responses by its constituent members’.⁴⁶ In 2006–2007, the IFRC undertook a survey of governments, international humanitarian organizations and national Red Cross and Red Crescent societies on a range of issues relating to disaster law. One such issue concerned their use of various instruments. In total, 76 per cent of respondents reported that they had used the 2004 Red Cross Code of Conduct, with 61 per cent of national societies, 53 per cent of governments and 82 per cent of international humanitarian organization headquarters reporting that they did so ‘frequently or always’.⁴⁷

Also influential in this regard are the Sphere Project’s standards (Sphere standards), which are ‘universal minimum standards’ in the area of humanitarian response.⁴⁸ They were designed to be a set of voluntary standards and to complement other relevant standards.⁴⁹ They apply generally to humanitarian response, specifically in areas such as water supply, sanitation and hygiene promotion, shelter, settlement and non-food items. In the same survey, 72 per cent of respondents reported that they had used the 2011 Sphere standards, with 50 per cent of national societies, 35 per cent of governments and 82 per cent of international humanitarian organization headquarters reporting that they did so ‘frequently or always’.⁵⁰ Of particular note, the Kampala Convention provides that states parties shall ‘[p]ut in place measures for monitoring and evaluating the effectiveness and impact of the humanitarian assistance delivered to internally displaced persons in accordance with relevant practice, including the Sphere Standards’.⁵¹ The Sphere standards have thus been singled out in a binding instrument as standards to be utilized by states parties to the Kampala Convention.

E Summary

A whole host of instruments thus exist on the issue of disaster relief. These instruments are hard law and soft law; multilateral and bilateral; international, regional and sub-regional; subject specific and general. National legislation is also in place in some states, which addresses some of the topics that are addressed in international instruments. Importantly, the instruments regulate the same sorts of issues, namely offers of humanitarian assistance, requests for assistance and the acceptance of assistance; the direction and control of assistance and modalities relating to the provision of assistance, such as the issuance of visas for relief personnel, the waiver of customs duties and taxes and freedom of movement. They also tend to approach the issues in

⁴⁶ *Ibid.*

⁴⁷ IFRC Desk Study, *supra* note 6, at 206, Appendix 3.

⁴⁸ Sphere Project, *Humanitarian Charter and Minimum Standards in Humanitarian Response* (2011), at ii.

⁴⁹ *Ibid.*, at 8, 31.

⁵⁰ IFRC Desk Study, *supra* note 6, at 207, Appendix 3.

⁵¹ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa 2009, Art. 9(2)(m).

largely the same way, though there are also areas of real difference.⁵² Nonetheless, it remains the case that an overarching treaty on the subject is lacking. The international law of disaster relief remains piecemeal.

3 The Emergence of a Holistic Body of International Law Relating to Disaster Relief

As is evident from the earlier discussion, a significant number of treaties and other instruments regulate the provision of disaster relief. As is also evident, these instruments are piecemeal in nature. Since the 2000s, concrete attempts have been made to identify and create a holistic body of international law relating to the provision of disaster relief. This was because, despite the existence of the piecemeal instruments, there was a ‘yawning gap’ at the core of disaster relief law.⁵³ Writing in 2000, the IFRC observed:

There is no definitive, broadly accepted source of international law which spells out legal standards, procedures, rights and duties pertaining to disaster response and assistance. No systematic attempt has been made to pull together the disparate threads of existing law, to formalize customary law or to expand and develop the law in new ways.⁵⁴

Gaps also exist, with certain states not being party to any instrument and there being relatively little by way of customary international law in the area.⁵⁵

The piecemeal nature of the law has meant that there is little clarity on the rights and obligations of the state affected by the disaster, of the individuals affected by the disaster or of those seeking to provide assistance. As a consequence, the response to disasters has varied considerably. In some instances, assistance has been provided to persons affected by the disaster in a timely manner. In other instances, however, assistance from outside the state has been delayed due to visa restrictions, backlogs

⁵² Areas of real difference exist, in particular, in relation to which party bears the costs of providing assistance and issues of liability. On the former, see de Guttry, *supra* note 6, at 13; on the latter, see Bartolini, ‘Attribution of Conduct and Liability Issues Arising from International Disaster Relief Missions: Theoretical and Pragmatic Approaches to Guaranteeing Accountability’, 48 *VJTL* (2015) 1029.

⁵³ IFRC, *World Disasters Report* (2000), at 145.

⁵⁴ *Ibid.*

⁵⁵ The ILC, in its work on the Protection of Persons in the Event of Disasters, has identified some customary rules. See Draft Articles on the Protection of Persons in Disasters, *supra* note 1, Commentary to Draft Article 11, para. 3. However, as is common to the ILC’s work, it tends not to distinguish between aspects of codification and progressive development. See further section 3.C.2 below. For its part, the IFRC indicated early on its work that ‘[r]esearch completed to date does not suggest the existence of a system of customary IDRL’ but noted that further research might prove otherwise. Hoffman, ‘What Is the Scope of International Disaster Response Law?’, in IFRC, *International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges* (2003) 16. See also ILC Secretariat, *supra* note 29, at para. 42. Annotations to the Draft Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (Annotations to the Draft Guidelines), 26 October 2007, at 6, available at <http://www.ifrc.org/PageFiles/125652/annotations.pdf>, the IFRC did identify some customary rules, however, these were few in number.

at customs or problems of coordination.⁵⁶ In still other instances, outside assistance has been refused.⁵⁷ There have also been cases of mismatch between the assistance required and the assistance provided.⁵⁸ Some of the responses have been due to the lack of law, with the affected state not being party to the relevant treaty or the relevant treaty not covering the particular disaster or intended assistance. Other responses have emerged as a result of a lack of clarity in the law or a lack of knowledge of the law. To quote the IFRC again, '[i]n the absence of commonly agreed standards, the disaster victim is at the mercy of the vagaries of humanitarian response, political calculation, indifference or ignorance'.⁵⁹ At times, there has been a sense of having to reinvent the wheel each time a disaster occurs.

Accordingly, there has been a considered attempt to create a holistic body of law. The work of the IFRC and ILC has been crucial in this regard. The ILC's Draft Articles on the Protection of Persons in Disasters identify and progressively develop the law on that subject. Likewise, the IFRC, the leading actor in the area of disaster response law, in general, and on the law relating to disaster relief, in particular, has identified and developed disaster relief law through the adoption of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (IFRC Guidelines) and the drafting of the Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (IFRC Model Act).⁶⁰ Both the ILC and the IFRC have done so in a holistic manner, addressing disaster relief generally. Their work is not limited to specific types of disaster, specific forms of disaster relief or specific regions of the world. These bodies are thus identifying and developing the international law of disaster relief as a body of law rather than as a patchwork of norms. In so doing, the initiatives follow the approach of other soft law instruments, which also operate in this direction.⁶¹

In 2001, the Council of Delegates of the International Red Cross and Red Crescent Movement adopted a resolution encouraging the IFRC to continue its work on the subject.⁶² This was followed by a request to the IFRC by the International Conference of the Red Cross and Red Crescent (International Conference) in 2003 to continue its 'compilation of the laws, rules and principles applicable to international disaster response', including 'identifying any outstanding needs in terms of the legal and regulatory framework' and 'developing ... models, tools and guidelines for practical use in

⁵⁶ IFRC Desk Study, *supra* note 6, at 98–99, 116–117.

⁵⁷ *Ibid.*, at 89.

⁵⁸ *Ibid.*, at 99–100.

⁵⁹ IFRC, *supra* note 53, at 145–146.

⁶⁰ Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (IFRC Guidelines), Doc. 30IC/07/R4 annex, 30 November 2007, available at www.ifrc.org/Global/Governance/Meetings/International-Conference/2007/final-resolutions/ic-r4.pdf; Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (IFRC Model Act), November 2011, available at [www.ifrc.org/PageFiles/88609/Pilot%20Model%20Act%20on%20IDRL%20\(English\).pdf](http://www.ifrc.org/PageFiles/88609/Pilot%20Model%20Act%20on%20IDRL%20(English).pdf).

⁶¹ See note 41 above.

⁶² Council of Delegates, Resolution 5 (2001). The Council of Delegates comprises the International Committee of the Red Cross (ICRC), the IFRC, and national Red Cross and Red Crescent Societies.

international disaster response activities'.⁶³ This initiative led to the IFRC Guidelines. Seeking to fill the gap that it had previously identified, the Guidelines cover all aspects of disaster relief, including the responsibilities of affected states and assisting actors; the initiation and termination of disaster relief and the modalities for delivering assistance. In so doing, the IFRC intended to develop a holistic body of law, augmenting the piecemeal one, which it had previously criticized. The IFRC Guidelines were adopted by the International Conference in 2007.⁶⁴ Since the International Conference comprises states parties to the Geneva Conventions, the International Committee of the Red Cross (ICRC), the IFRC, and national Red Cross and Red Crescent Societies, the Guidelines were also adopted by states. Although the Guidelines are explicitly described as 'non-binding', the IFRC has expressed the hope 'that States will make use of them to strengthen their laws, policies and/or procedures'.⁶⁵

Following the adoption of the IFRC Guidelines, the IFRC received requests from, and provided assistance to, states in the drafting of legislation and was frequently requested to provide 'model legislative language'.⁶⁶ The IFRC had also been requested by the International Conference to 'promote the mainstreaming of the Guidelines in all relevant existing legal-development, disaster management and risk reduction initiatives' and to continue its 'research and advocacy efforts, and the development of tools and models for the improvement of legal preparedness for disasters'.⁶⁷ As such, in 2013, the IFRC prepared the IFRC Model Act, which was specifically 'intended to help states to be prepared for the most common legal and regulatory issues that arise in major international disaster operations'.⁶⁸ The Model Act contains a series of detailed provisions on the initiation and termination of international disaster assistance, the coordination and preparedness of such assistance, the responsibilities of assisting actors and the modalities for the provision of such assistance. It, too, approaches the issues in a holistic manner. In 2011, the IFRC reported that nine states had adopted domestic legislation that was either 'inspired by or consistent with aspects of the IDRL [international disaster response law] Guidelines'.⁶⁹ By 2015, the number of states that had amended their laws and policies, drawing on the IFRC Guidelines, had risen to 21.⁷⁰ In this way, a consistent body of disaster relief law is emerging at the national level.

⁶³ Twenty-Eighth International Conference of the Red Cross and Red Crescent, Resolution 1 on the Agenda for Humanitarian Action (Agenda on Humanitarian Action) (2003), at 3.2.6.

⁶⁴ IFRC Guidelines, *supra* note 60, Resolution 4.

⁶⁵ *Ibid.*, Art. 1(1).

⁶⁶ IFRC Model Act, *supra* note 60, at 7.

⁶⁷ Thirtieth International Conference of the Red Cross and Red Crescent, Resolution 4 (2007), para. 5.

⁶⁸ IFRC Model Act, *supra* note 60, at 8.

⁶⁹ Finland, Indonesia, Netherlands, New Zealand, Norway, Panama, Peru, Philippines and USA. See International Federation of the Red Cross and Red Crescent Societies in Consultation with the International Committee of the Red Cross, Progress in the Implementation of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance: Background Report, October 2011, at 4–5.

⁷⁰ Twenty-Third International Conference of the Red Cross and Red Crescent, Strengthening Legal Frameworks for Disaster Response, Risk Reduction and First Aid: Background Report, 8–10 December 2015, at 4. Further details are available at www.ifrc.org/what-we-do/disaster-law/about-disaster-law/international-disaster-response-laws-rules-and-principles/idrl-guidelines/new-legislation-adopted-on-idrl/.

For its part, the ILC commenced its work on the international law regulating the provision of disaster relief in 2008, under the rubric of the protection of persons in the event of disasters. Its initial reports note the absence of a ‘universal convention comprehensively governing all the main aspects of disaster relief’.⁷¹ The draft Articles on the subject, which were adopted by the ILC in August 2016, include provisions on, *inter alia*, offers and the seeking of assistance, consent to the provision of assistance, modalities for the provision of assistance and the termination of assistance.⁷² The ILC recommended to the UN General Assembly the elaboration of a convention on the basis of the draft Articles.⁷³ Were such a convention to be concluded, a treaty of global application would come into being. Even if the General Assembly decides otherwise, with the conclusion of the draft Articles, a holistic body of international law relating to disaster relief is emerging at the international level.

The emergence of a holistic body of international law relating to disaster relief has taken place, consciously or subconsciously, through the utilization of three techniques: (i) the creation of a generalized multilateral standard through extrapolation from more specific instruments, be it from the subject specific to the general, the regional to the global or the bilateral to the multilateral and the preparation of a model act for incorporation into domestic law, thus creating consistent domestic legislation; (ii) analogy to related bodies of law, in particular, international humanitarian law and (iii) through the development of instruments that are soft in form, but which contain a mix of *lex lata* and *lex ferenda*. These three techniques are often utilized in the making and shaping of international law. They are used frequently in developing general international law, such as the rules of state responsibility, as well as in particular fields of international law, such as international investment law and the law relating to internally displaced persons. Accordingly, their use in the making of the international law of disaster relief is simply a further example of their use in the development of international law. At the same time, a certain care must be taken when using the techniques to develop a holistic set of rules.

A Generalized Multilateral Standards and Model Laws

1 International Law of Disaster Relief

Various attempts have been made over the years to conclude an overarching treaty on the subject of disaster relief. Such a treaty, in fact, was concluded in 1927 – the Convention Establishing an International Relief Union (IRU).⁷⁴ However, the operation

⁷¹ ILC Secretariat, *supra* note 29, para. 3; ILC Special Rapporteur, Preliminary Report on the Protection of Persons in the Event of Disasters (Preliminary Report), Doc. A/CN.4/598, 5 May 2008, para. 31.

⁷² Draft Articles on the Protection of Persons in Disasters, *supra* note 1. See also the reports of the special rapporteur, available at http://legal.un.org/ilc/guide/6_3.shtml.

⁷³ Report of the International Law Commission, Sixty-Eighth Session, *supra* note 1, para. 46.

⁷⁴ Convention Establishing an International Relief Union 1932, 135 LNTS 247. On which, see M.-A. Borgeaud, *L'Union Internationale de Secours* (1932); C. Gorgé, *The International Relief Union* (1938); Macalister-Smith, ‘The International Relief Union: Reflections on Establishing an International Relief Union of July 12, 1927’, 54 *Legal History Review* (1986) 363.

of the IRU was unsuccessful due to a lack of funding, ambivalence on the part of many states and institutional tensions.⁷⁵ Accordingly, and with the demise of the League of Nations, it largely fell by the wayside. Attempts were made to conclude a treaty on disaster relief again in the late 1970s and early 1980s under the auspices of the Office of the UN Disaster Relief Coordinator and a draft Convention on Expediting the Delivery of Emergency Relief was prepared.⁷⁶ However, a treaty on the subject failed to be concluded.

Instead of an overarching multilateral agreement on international disaster relief at the global level, as discussed above, a series of piecemeal treaties have been concluded as well as several bilateral agreements and soft law instruments. As also noted above, these agreements are largely similar in their approach and regulate the same sorts of issues. The ILC and the IFRC have used the general consistency of these instruments to establish generalized multilateral standards on disaster relief. They have extrapolated from the narrower instruments to form a broader standard. This is particularly evident in the reports of the ILC special rapporteur, which set out, sometimes in great detail, the reasons for the conclusion of a particular draft article. For example, the draft Article on the Right to Offer Assistance was preceded by relevant provisions of the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, the Inter-American Convention to Facilitate Disaster Assistance, the Tampere Convention, the Framework Convention on Civil Defence Assistance, the ASEAN Agreement, and resolutions of the Institut de Droit International, all of which take a largely similar approach to the issue.⁷⁷ On the basis of the consistency of these very particular instruments, the special rapporteur was able to propose a provision that was much the same in subject matter but of a broader, global, scope.

This is largely true also of the IFRC Guidelines, the Annotations to which note that certain provisions are 'similar' in their language to particular instruments or that the language of the provision is 'drawn from' particular instruments.⁷⁸ Indeed, the introduction to the Annotations notes that they 'summarize the legal precedents upon which [the Guidelines] are based'.⁷⁹ The ILC and the IFRC have thus extrapolated from subject-specific and region-specific treaties, bilateral agreements and soft law instruments to form a generalized multilateral standard. As discussed above, the IFRC has also prepared a Model Act, which is designed to assist states in the incorporation of the IFRC Guidelines into their domestic law. States have started to incorporate parts of

⁷⁵ See Hutchinson, 'Disasters and the International Order – II: The International Relief Union', 23 *International History Review* (2001) 253.

⁷⁶ On which, see P. Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (1985), ch. 9.

⁷⁷ Eduardo Valencia-Ospina, Special Rapporteur, Fourth Report on the Protection of Persons in the Event of Disasters (Fourth Report), Doc. A/CN.4/643, 11 May 2011, paras 88–95. Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency 1986, 1457 UNTS 133; Inter-American Convention, *supra* note 16; Tampere Convention, *supra* note 10; Framework Convention on Civil Defence Assistance 2000, 2172 UNTS 213; ASEAN Agreement, *supra* note 19.

⁷⁸ See, e.g., Annotations to the Draft Guidelines, *supra* note 55, at 30, 31.

⁷⁹ *Ibid.*, at 3.

the Model Act into their domestic legal systems. Should this continue, a generalized standard would be achieved but at the level of domestic law.

2 *Use of the Technique in International Law*

Treaties are generally considered to be the most important source of international law.⁸⁰ The advantages of treaties over customary international law and general principles of law are readily apparent. Treaties are easily identified. They can be located and read to discern their content. This is unlike custom and general principles, both of which have to be constructed. The existence of a customary rule is too often asserted without any proof. At the same time, when proof is provided and the methodology behind the determination set out explicitly, it is open to challenge. The existence of customary international law is thus both easy to assert and easy to deny. With relatively few exceptions, the practice and *opinio juris* of particular states tends to be privileged, not necessarily for ideological reasons but, rather, due to the availability of materials, familiarity with practice and linguistic capability on the part of the identifier. Likewise, the category of general principles is uncertain, including on fundamental matters such as precisely how a general principle is identified.

Despite – or perhaps because of – their importance, grand multilateral treaties have proven difficult to conclude in recent years.⁸¹ Accordingly, a number of techniques have been developed to circumvent this difficulty while staying as close as possible to the form and language of a treaty. One such technique is the development of a generalized multilateral standard; another is the conclusion of a model act. An example of the development of generalized multilateral standards from a series of consistent piecemeal standards has occurred in the field of international investment law. In this field, various attempts have been made to conclude a multilateral investment treaty. For example, following World War II, attempts were made to conclude the Havana Charter for an International Trade Organization, and states from the Organisation for Economic Co-operation and Development (OECD) also sought to conclude a multilateral agreement on investment.⁸² However, both attempts were unsuccessful. Instead, numerous bilateral investment treaties (BITs) have been concluded. Indeed, some 2,500 BITs have been concluded in the last few decades,⁸³ together with a number of regional treaties such as the North American Free Trade Agreement (NAFTA) and subject specific treaties such as the Energy Charter Treaty.⁸⁴

Although this network of bilateral agreements might suggest that international investment law is fragmented and piecemeal, this is not the case. On the contrary, a

⁸⁰ See, e.g., J. Crawford, *Brownlie's Principles of Public International Law* (2012), at 30.

⁸¹ This is true particularly of codification conventions.

⁸² See Vandevelde, 'A Brief History of International Investment Agreements', 12 *University College Davis Journal of International Law and Politics* (2005–2006) 157; Dattu, 'A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment', 24 *Fordham International Law Journal* (2000) 275.

⁸³ R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2012), at 13.

⁸⁴ North American Free Trade Agreement 1992, 32 ILM 289, 605 (1993); Energy Charter Treaty 1994, 2080 UNTS 95.

generalized framework is in place despite the absence of an overarching multilateral treaty. BITs tend to take the same form, composed as they are of three key parts – the first part containing the definitions of key terms; the second covering the substantive standards of protection – for example, a guarantee of fair and equitable treatment (FET), a guarantee of most-favoured-nation (MFN) treatment and a guarantee in case of expropriation – and the third on dispute settlement.⁸⁵ Indeed, on the basis of the similarities in the structure and content of the BITs – given that many BITs are based on model BITs, thus ensuring consistency between them – due to MFN clauses and in light of the relatively consistent interpretation on the part of arbitral tribunals, at least in certain respects, it has been suggested that the numerous bilateral treaties operate akin to a multilateral system.⁸⁶

The generalized framework is particularly evident insofar as the substantive standards of protection are concerned. For example, one of the substantive standards of protection that is contained in BITs is the FET standard. Some take the view that this simply refers to the historical international minimum standard of treatment in customary international law as reflected in cases such as *Neer*.⁸⁷ Others argue that the BIT standard of FET contributes to the modification of the customary international law standard.⁸⁸ Still others argue that the BIT standard reflects a customary international law standard on FET.⁸⁹ Others yet hold that the FET standard is an independent and autonomous treaty standard and includes notions such as transparency.⁹⁰ The ‘correct’ answer to the debate is of less interest for present purposes. Of more interest is the idea that a series of consistent bilateral treaties can form a multilateral standard, whether at the level of customary international law or in terms of a generalized multilateral standard. Indeed, one of the reasons why states concluded BITs was precisely in order to develop a multilateral standard. Thus, one individual who was involved in the negotiation of BITs has observed that ‘the United States hoped that the conclusion of a sufficiently large network of treaties embracing that standard [prompt, adequate and effective compensation for expropriation] would provide evidence that the standard was a norm of customary international law and thus applied to expropriations even in the absence of a treaty’.⁹¹

⁸⁵ *Ibid.*, at 13–14; S.W. Schill, *The Multilateralization of International Investment Law* (2009), ch. 3.

⁸⁶ See generally Schill, *supra* note 85.

⁸⁷ *LFH Neer and Pauline Neer v. United Mexican States*, Decision of 15 October 1926, reprinted in UNRIIAA, vol. 4, 60, at 61–62. See, e.g., NAFTA (UNCITRAL), *Glamis Gold Ltd v. United States of America*, Award, 8 June 2009, para. 616.

⁸⁸ E.g., ICSID, *Mondev International Ltd v. United States of America*, Award, 11 October 2002, ICSID Case no. ARB(AF)/99/2, paras 117, 125.

⁸⁹ ICSID, *Merrill and Ring Forestry LP v. Canada*, Award, 31 March 2010, ICSID Case no. UNCT/07/1, para. 213. See also I. Tudor, *The Fair and Equitable Treatment Standard in International Law of Foreign Investment* (2008), ch. 2.

⁹⁰ E.g., ICSID, *Metalclad Corporation v. United States of America*, Award, 30 August 2000, ICSID Case no. ARB(AF)/97/1, para. 76. This position was not upheld in the review of the award. *United Mexican States v. Metalclad Corporation*, [2001] BCSC 664, para. 72.

⁹¹ Vandeveld, *supra* note 82, at 171.

Thus, in the area of international investment law, it is largely a series of bilateral agreements that map the field rather than an overarching multilateral agreement. Over time, with an increasing number of agreements and an increasing number of states that are parties to agreements, and by virtue of their relative consistency, these agreements have arguably given rise to generalized multilateral standards. Furthermore, these generalized standards have stemmed from the inability of states to conclude a global treaty on the subject. The creation of a generalized standard through extrapolation from more specialized areas is by no means particular to international investment law. The ILC, in its Articles on State Responsibility, used a similar technique in formulating Article 16 on complicity. The ILC provides for a general rule on complicity – a state aiding or assisting another state in the commission of an internationally wrongful act by the latter – on the basis of international law rules on complicity in the specific areas of aggression, circumvention of sanctions imposed by the UN Security Council and human rights violations.⁹² From these three very particular subject areas, a generalized rule on complicity was formulated.⁹³

For their part, model laws have a variety of functions. At one level, they can be useful in translating a treaty commitment – for example, to assist with the incorporation of a treaty into domestic law. They also serve to ensure consistency in the statutory language of states that use them. At another level, model laws can serve to bypass the difficulties associated with the conclusion of multilateral treaties. As discussed above, in international investment law, OECD states attempted to conclude a multilateral treaty on investment, but the attempts failed. Despite that failure, the draft convention ‘was recommended to OECD Members as a model for the conclusion of bilateral treaties with developing countries’.⁹⁴ And the draft did indeed influence the BITs of a number of OECD states.⁹⁵

Nowhere can the use of model laws be seen more clearly than in the UN Commission on International Trade Law (UNCITRAL). UNCITRAL is mandated by the UN General Assembly to promote ‘the progressive harmonization and unification of the law of international trade’.⁹⁶ It does so, in part, by adopting model laws, which are designed to assist states in the development of their own domestic legislation. One such model law, the UNCITRAL Model Law on International Commercial Arbitration, has been used by some 67 states as a basis for their domestic legislation.⁹⁷ The use of a model

⁹² See Draft Articles on State Responsibility, *supra* note 5, Commentary to Article 16, paras 7–9.

⁹³ See further Nolte and Aust, ‘Equivocal Helpers: Complicit States, Mixed Messages and International Law’, 58 *International and Comparative Law Quarterly (ICLQ)* (2009) 1, at 7–8; M. Jackson, *Complicity in International Law* (2015), ch. 7.

⁹⁴ Schill, *supra* note 85, at 39.

⁹⁵ *Ibid.*, at 39.

⁹⁶ GA Res. 2205 (XXI), 17 December 1966.

⁹⁷ UN Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985, 24 ILM 1302 (1985). Status of legislation based on Model Act, available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

law in this area is considered to have been ‘at least as effective, if not more so, than traditional public international law techniques’ such as the conclusion of a treaty.⁹⁸ As a model law, states are provided with a greater degree of discretion in departing from the law than a treaty would allow.⁹⁹

Accordingly, although model laws are not binding, they have had in many cases a significant influence on the development of laws that are binding. Although operating at a vertical level rather than at a horizontal one, they have been used in a number of instances to bypass difficulties associated with the conclusion of treaties. They also contribute to the creation of a generalized multilateral standard but at the level of domestic law. Both approaches depart from the classic model of the multilateral treaty. However, in doing so, they serve to confirm its importance by sticking closely to the ideas behind it.

3 *Limits of the Technique*

As is evident from the preceding section, the development of generalized standards and the adoption of model acts are not particular to the international law of disaster relief. Rather, they can be seen as techniques that are used in international law as a result of the difficulty, sometimes inability, in concluding an overarching multilateral treaty on a particular subject, coupled with the importance of multilateral treaties in international law. The generalized multilateral standard approach – whether at the international level or, through model laws, at the domestic level – has the advantage of filling in gaps in the law. It moves away from piecemeal standards towards holistic ones that are based on those piecemeal standards. Insofar as model laws are concerned, there is also discretion on the part of the implementing state to tailor the law to meet the specificities of the relevant legal system.

The model act approach also has certain disadvantages. Model acts tend to be more useful for common law states, where stand-alone acts are adopted. For other states, which do not take the common law approach, they are far less useful, as different parts of the act might have to be incorporated into different parts of the relevant code. Furthermore, there is no obligation to follow the language or approach of a model act. The advantage of flexibility that model acts afford can also prove disadvantageous when seeking consistency as states can depart from them sometimes radically. Developing a multilateral standard from piecemeal standards in the area of disaster relief law also has the potential to mislead. It presents the situation as a holistic one when there are very real, and possibly very deliberate, gaps. For example, some disaster relief conventions, such as, at the time of writing, the 1999 Agreement between Member States and Associate Members of the Association of Caribbean States for Regional Cooperation on Natural Disasters, are not in force. Others, such as

⁹⁸ E. Gaillard and J. Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), at 108, para. 205.

⁹⁹ Kerr, ‘Arbitration and the Courts: The UNCITRAL Model Law’, 34 *ICLQ* (1985) 1, at 7–8. On the different approaches taken by states, see Sanders, ‘Unity and Diversity in the Adoption of the Model Law’, 11 *Arbitration International* (1995) 1.

the Tampere Convention,¹⁰⁰ and the Inter-American Convention to Facilitate Disaster Assistance,¹⁰¹ have few states parties. Thus, to generalize from them can be somewhat artificial, at least if generalization is intended to suggest that states have accepted the relevant approach, albeit at the level of the particular instrument.

Variations also exist between different regions of the world. As discussed above, in some areas of the world, such as Africa, there are few treaties on the issue of disaster relief.¹⁰² Accordingly, to generalize from treaties concluded in particular parts of the world to create a global standard overlooks gaps in, and specificities of, particular regions. A similar issue arises with respect to bilateral agreements. To generalize from bilateral agreements might be to overlook the reasons behind the conclusion of the particular agreement. A state might be willing to conclude a bilateral agreement with a state with which it shares a territorial border for reasons of self-interest, such as to prevent persons fleeing onto its territory or in order to be a good neighbour. It does not follow that a state would be willing to apply the standard set out in the agreement generally to all states.

Furthermore, the treaties do not take a common approach to certain issues. On the matter of which state bears the costs of disaster relief, different treaties take different approaches. Some treaties indicate that the sending state bears the costs; others hold that it is the receiving state; still others that the costs are to be shared; others yet take a different approach altogether.¹⁰³ On the matter of liability, some instruments request the state affected by the disaster to waive claims against the assisting state, with exceptions being made for wilful misconduct and gross negligence. Others provide that the assisting state is liable; still others that the affected state and the assisting state are to consult and coordinate with one another on any claims.¹⁰⁴ Accordingly, on certain issues, there is a lack of consistency between the instruments to allow for generalization.

Ultimately, the ‘generalized standard’ approach packages things neatly and presents a coherent picture when, in reality, the international law in the area is rather messy. Indeed, the field of disaster relief law is very different to international investment law. There are nowhere near the number of treaties in the area of disaster relief – it is by no means the case that nearly all states have concluded at least one such treaty – and courts and tribunals are involved infrequently and do not operate so as to homogenize standards. Accordingly, although the generalization approach might work in the area of international investment law, the suitability of the approach for disaster relief law is more open to question. Furthermore, to generalize tends to be to apply the

¹⁰⁰ At the time of writing, the Tampere Convention, *supra* note 10, had 48 states parties.

¹⁰¹ At the time of writing, the Inter-American Convention, *supra* note 16, had six states parties.

¹⁰² See section 2.B above.

¹⁰³ For illustrations of the different approaches, see, e.g., SAARC Agreement, *supra* note 19, Art. XV; Tampere Convention, *supra* note 10, Art. 7; Agreement on Mutual Assistance in the Event of Disasters or Serious Accidents (France/Switzerland Agreement) 1987, Art. 10. See further de Guttery, *supra* note 6, at 13–14.

¹⁰⁴ For illustrations of the different approaches, see, e.g., Inter-American Convention, *supra* note 16, Art. XII; ASEAN Agreement, *supra* note 19, Art. 12(3); France/Switzerland Agreement, *supra* note 103, Art. 11. See further Bartolini, *supra* note 52, at 1049–1050.

same standard, perhaps even the very same language, without analysis of whether the particular standard set out is the most appropriate one. The reports of the ILC special rapporteur do not explain in what way the standards of particular instruments that are set out in the reports are being used – for example, as relevant practice, sources of inspiration or something different. Instead, following the recitation of the standards, the reports often state, without more information, that ‘in the light of the foregoing, the Special Rapporteur proposes’ the draft article that is then set out.¹⁰⁵ In this way, without a proper explanation, the standard adopted seems to be used out of habit or convenience rather than following a search for the best possible solution. In many respects, this is a normal part of law-making. It might be seen as being more legitimate to refer to a standard that already exists than to ‘invent’ one. However, it also means that the standard is used uncritically; it is used simply because it has already been used elsewhere.

A useful illustration of the various limits of the technique of generalization relates to the ILC draft Article on the Termination of Assistance, which was adopted on first reading. Disaster relief instruments take a variety of approaches to the subject, including providing that the assisting state can terminate the assistance, providing that the receiving state can terminate the assistance and requiring consultation before the assistance is terminated.¹⁰⁶ In his discussion on the termination of assistance, the special rapporteur observes that ‘[i]nternational instruments bearing on this topic have addressed termination of assistance in a number of ways’, and he recalls the report of the Secretariat, which provided that ‘termination provisions contain subtle differences in formulation which could have a significant impact in practice’.¹⁰⁷ Yet, after setting out the standards of different instruments, which reveal some of the different approaches on the subject, the report simply states, without more, that, ‘[b]earing the foregoing in mind, the Special Rapporteur proposes the following draft article ... The affected State and assisting actors shall consult with each other to determine the duration of the external assistance.’¹⁰⁸ No explanation is given as to why the approach contained in the draft article was selected instead of the approaches of other instruments. This is particularly problematic because it suggests that the termination of assistance is conditioned on consultation and that a state is not entitled to terminate assistance at any time.¹⁰⁹ The draft Article on the

¹⁰⁵ See, e.g., Eduardo Valencia-Ospina Special Rapporteur, Sixth Report on the Protection of Persons in the Event of Disasters, Doc. A/CN.4/662, 3 May 2013, para. 162.

¹⁰⁶ For illustrations of the different approaches, see, e.g., BSEC Agreement, *supra* note 22, Art. 13(1); Tampere Convention, *supra* note 10, Art. 6; Agreement between the Republic of Austria and the Hashemite Kingdom of Jordan on Mutual Assistance in the Case of Disasters or Serious Accidents 2004, Art. 12.

¹⁰⁷ Eduardo Valencia-Ospina, Special Rapporteur, Fifth Report on the Protection of Persons in the Event of Disasters, Doc. A/CN.4/652, 9 April 2012, para. 183.

¹⁰⁸ *Ibid.*, para. 187.

¹⁰⁹ This is without prejudice to limits on the termination, such as in the case of an arbitrary revocation of consent.

Termination of Assistance was subsequently amended on second reading, following criticism by states.¹¹⁰

The critique is not to suggest that the technique of generalization can never be used or is inherently unsuitable for development of the law relating to disaster relief. Rather, care needs to be taken with respect to the instruments from which extrapolation takes place. It would be easier to extrapolate from a series of consistent piecemeal standards, for example, where there are large numbers of states parties from different geographic regions to numerous agreements containing the same provision. It might also be proper to generalize from a series of consistent domestic laws on disaster relief, where they are sufficiently numerous and similar in content. Likewise, on occasion, language used in one treaty can be found, sometimes verbatim, in other treaties. This is true, for example, of provisions requiring compliance with domestic laws and regulations.¹¹¹ Where a template can be identified, extrapolation from the template is more understandable. In essence, there needs to be an assessment as to whether generalization and extrapolation is appropriate in a particular circumstance, for example, with respect to a particular norm.

B *Analogy*

1 *International Law of Disaster Relief*

A second technique that has been used by the ILC and the IFRC is that of analogy. Many of the issues arising during a disaster are similar to those that arise during an armed conflict. Disasters and armed conflicts force large numbers of persons to flee their homes, causing them to be displaced. Large numbers of people are killed during a disaster or armed conflict, raising issues relating to their identification and burial. Many others go missing, requiring efforts to trace them and reunite them with their families. Certain groups of persons tend to be particularly vulnerable in time of armed conflict and disaster, such as children, the elderly and the disabled.

The commonalities in the issues arising during an armed conflict and following a disaster exist even at the level of detail. For example, in the area of humanitarian assistance, the issues raised are remarkably similar, including what constitutes humanitarian assistance, whether humanitarian assistance may be offered and by whom, the requirement of consent to assistance as well as the modalities concerning

¹¹⁰ See in Titles and Texts of the Preamble and Draft Articles 1–18 of the Draft Articles on the Protection of Persons in the Event of Disasters Adopted, on Second Reading, by the Drafting Committee, Doc. A/CN.4/L.871, 27 May 2016, Art. 17.

¹¹¹ See, e.g., the similarity between the Tampere Convention, *supra* note 10, Art. 5(7) ('duty to respect the laws and regulations of that State Party'); the Nuclear Accident Convention, *supra* note 8, Art. 8(7) ('duty to respect the laws and regulations of the requesting State'); the Caribbean Disaster Agreement, *supra* note 17, Art. 21(5) ('a duty to respect the law and regulations of the requesting State') and the Inter-American Convention, *supra* note 16, Art. XI(d) ('obligation to respect the laws and regulations of the assisted state'). Likewise, there is a similarity between the ASEAN Agreement, *supra* note 19, Art. 13(2) ('respect and abide by all national laws and regulations') and the SAARC Agreement, *supra* note 19, Art. X(1)(b) ('respect and abide by all national laws and regulations of the Requesting Party').

delivery of humanitarian assistance, such as facilitating entry and delivery.¹¹² Accordingly, the question arises as to whether, and, if so, to what extent, international humanitarian law (IHL) can be drawn upon to develop the law relating to disaster relief. Unlike international disaster relief law, which is in its infancy, the body of law that regulates armed conflicts – IHL – is well developed. The multilateral legal framework can be dated back to the 1860s, with important conventions adopted in 1949 and 1977, and a developed body of customary international humanitarian law is also in existence.¹¹³ These conventions and customary rules, together with other instruments, regulate the issues identified above as arising during armed conflicts. For example, there are detailed rules relating to the protection of the wounded and sick,¹¹⁴ the treatment of the dead¹¹⁵ and the provision of humanitarian assistance.¹¹⁶

In light of the similarity of issues that arise in armed conflicts and in disasters, and given that IHL is far more developed than the law relating to disaster relief, the ILC analogizes to IHL in identifying and formulating its draft Articles on the Protection of Persons in Disasters. Indeed, the special rapporteur of the ILC on the subject has variously described IHL as a ‘source’ of disaster relief law, a ‘useful[] guide’ in the development of disaster relief law and as containing rules that can be ‘applied by analogy’ to disaster relief law.¹¹⁷ And the reports of the special rapporteur make frequent use of IHL.¹¹⁸ The IFRC also refers to IHL in drawing up its Guidelines, albeit to a lesser extent. It considers certain of the guidelines to be ‘consistent with’ IHL and others to be analogous to it.¹¹⁹ It also draws on IHL provisions in addressing similar concerns that arise during disasters.¹²⁰ Elsewhere, the IFRC has noted that ‘it is instructive to look to IHL by way of analogy where it addresses the same issues confronted by IDRL, particularly in light of the fact that some of the origins of IDRL can be traced to the rise of IHL’.¹²¹

2 Use of Analogy in International Law

Analogy is another common technique in the development of international law. It is used primarily to fill gaps in the relevant body of law. In the context of IHL, for example, in which the law of non-international armed conflict was far less developed than the

¹¹² See further Fisher, ‘Domestic Regulation of International Humanitarian Relief in Disasters and Armed Conflict: A Comparative Analysis’, 89 *IRRC* (2007) 345.

¹¹³ Geneva Conventions, *supra* note 2; Additional Protocol I and II, *supra* note 2; J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, 2 vols (2005).

¹¹⁴ E.g., Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) 1949, 75 UNTS 31, Art. 12; Additional Protocol I, *supra* note 2, Art. 11; Additional Protocol II, *supra* note 2, Art. 7; Henckaerts and Doswald-Beck, *supra* note 113, Rules 109–111.

¹¹⁵ E.g., Geneva Convention I, *supra* note 114, Art. 34; Additional Protocol I, *supra* note 2, Art. 8, Additional Protocol II, *supra* note 2; Henckaerts and Doswald-Beck, *supra* note 113, Rules 112–116.

¹¹⁶ E.g., Additional Protocol I, *supra* note 2, Art. 70; Additional Protocol II, *supra* note 2, Art. 18; Henckaerts and Doswald-Beck, *supra* note 113, Rules 55–56.

¹¹⁷ Preliminary Report, *supra* note 71, paras 20, 20, 24.

¹¹⁸ See, e.g., the frequent invocations in the Fourth Report, *supra* note 77.

¹¹⁹ Annotations to the Draft Guidelines, *supra* note 55, at 14, 30.

¹²⁰ *Ibid.*, at 17.

¹²¹ IFRC Desk Study, *supra* note 6, at 36.

law relating to international armed conflicts, the International Criminal Tribunal for the former Yugoslavia developed the customary IHL applicable in non-international armed conflict by reference to the IHL applicable in international armed conflict.¹²² It observed that '[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife'.¹²³ Likewise, the ICRC has identified the customary IHL applicable in non-international armed conflict largely by drawing on that which was applicable in international armed conflict.¹²⁴

Use of analogy is by no means limited to international humanitarian law. In drawing up the Guiding Principles on Internal Displacement, the drafters analogized in certain places to refugee law.¹²⁵ The Annotations to the Guiding Principles note explicitly that 'refugee law, by analogy, can be useful to a certain extent in proposing rules and establishing guidelines to protect the needs of the internally displaced'.¹²⁶ Analogy to refugee law and to human rights law was used, in particular, in formulating a right of internally displaced persons 'to be protected against forcible return to or resettlement in any place where their life, safety, liberty or health would be at risk'.¹²⁷ Prior to the Guiding Principles, the prohibition of refoulement applied only in the context of refugee law¹²⁸ and with respect to certain human rights.¹²⁹ Through the use of analogy, the prohibition was extended in the Guiding Principles to internally displaced persons, to a broader range of rights and also to armed groups.

However, it is also crucial to take into account the differences between the two bodies of law. Accordingly, the Annotations to the Guiding Principles go on to note:

Nevertheless, one must take into account that, by definition, refugees are not citizens of the host country, whereas internally displaced persons remain in their own country. As many of the norms and guidelines relating to the status of refugees guarantee refugees equal treatment only with aliens in the country of refuge, an analogous application of these provisions would deprive many internally displaced persons of the rights they have as citizens of their own country and would thus be detrimental to the interests of such persons.¹³⁰

It might be suggested that, in both international humanitarian law and in the context of the Guiding Principles, the law could be developed by analogy because an analogy was being drawn from within the same broad subject area. That is true to a certain extent, but it also accepts that analogies can be used. The issue becomes not whether the law can be developed by analogy but, rather, in what circumstances it is appropriate

¹²² See S. Sivakumaran, *The Law of Non-International Armed Conflict* (2012), at 55–58.

¹²³ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-AR72), Appeals Chamber, 2 October 1995, para. 119.

¹²⁴ Sivakumaran, *supra* note 122, at 58–59.

¹²⁵ Deng, 'Preface to the First Edition', in W. Kälin, *Guiding Principles on Internal Displacement: Annotations* (2008) xi. Guiding Principles, *supra* note 4.

¹²⁶ Kälin, *supra* note 125, at 7–8.

¹²⁷ Guiding Principles, *supra* note 4, Principle 15(d).

¹²⁸ Convention Relating to the Status of Refugees 1951, 189 UNTS 150, Art. 33(1).

¹²⁹ E.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85, Art. 3(1).

¹³⁰ Kälin, *supra* note 125, at 8.

to do so. Furthermore, in other areas of the law – for example, in the field of international investment law – analogies are drawn from a far broader range of subject areas.¹³¹ Arbitral tribunals have analogized, *inter alia*, to general public international law in analysing the meaning of necessity;¹³² to international trade law in interpreting the standard of no less favourable treatment in like circumstances;¹³³ to human rights law in understanding the right to a court¹³⁴ and to a combination of comparative public law, EU law, European human rights law and public international law in giving content to the concept of legitimate expectations.¹³⁵ Analogies are also made at the structural level.¹³⁶

Analogy is also used as a technique in general international law. In the jurisdictional phase of the *Nicaragua* case, for example, the International Court of Justice (ICJ) had to consider whether an optional clause declaration could be terminated with immediate effect. There being no established rules on point, it held that '[i]t appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties'.¹³⁷ The ILC, in its Draft Articles on the Responsibility of International Organizations, largely based its approach on the analogy to the Articles on State Responsibility.¹³⁸ And many more examples could be given.¹³⁹ Possible analogies have also been rejected. For example, in the *Barcelona Traction* case, the ICJ rejected any analogy to 'the issues raised or the decision given' in the *Nottebohm* case.¹⁴⁰ In the *North Sea Continental Shelf* cases, the ICJ, in considering the rules relating to the delimitation of continental shelf areas between adjacent states, rejected analogy to the rules regulating delimitation of adjacent territorial waters.¹⁴¹ Again, then, the question is more whether a particular analogy is appropriate in the circumstances at hand rather than whether analogy is a legitimate technique of law-making. These examples from different fields of international law are contemporary in their nature. However, use of analogy is not new. Hersch Lauterpacht identified the use of analogy to private law sources in the field of public international law.¹⁴² Indeed, at one level, the very idea

¹³¹ See generally Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment System', 107 *American Journal of International Law (AJIL)* (2013) 45, at 45–57.

¹³² ICSID, *CMS Gas Transmission Company v. Argentine Republic*, Award, 12 May 2005, ICSID Case no. ARB/01/8, at paras 304–394.

¹³³ NAFTA (UNCITRAL), *SD Myers Inc v. Canada*, Partial Award, 13 November 2000, paras 243–251.

¹³⁴ *Mondev*, *supra* note 88, paras 143–144.

¹³⁵ ICSID, *Total SA v. Argentine Republic*, Decision on Liability, 27 December 2010, ICSID Case no. ARB/04/1, paras 128–134.

¹³⁶ Roberts, *supra* note 131.

¹³⁷ *Military and Paramilitary Activities in and against Nicaragua*, Judgment, 26 November 1984, ICJ Reports (1984) 392, at 420, para. 63.

¹³⁸ This was not without criticism. See, e.g., the joint submission of a number of international organizations, reprinted in *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, Doc. A/CN.4/637, 14 February 2011, at 10–11, para. 2.

¹³⁹ See further Lusa Bordin, 'Analogy', in J. d'Aspremont and S. Singh (eds), *Fundamental Concepts for International Law* (forthcoming).

¹⁴⁰ *Barcelona Traction, Light and Power Company, Limited*, Judgment, 5 February 1970, ICJ Reports (1970) 3, at 43, para. 70; *Nottebohm Case*, Judgment, 6 April 1955, ICJ Reports (1955) 4.

¹⁴¹ *North Sea Continental Shelf*, Judgment, 20 February 1969, ICJ Reports (1969) 3, paras 59, 80.

¹⁴² H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927).

that general principles of national law can be used by international courts and tribunals is to engage in the use of analogy. Of note today is the fact that analogies tend to be drawn from within public international law rather than from within domestic law. This may be due to the requirement that the two situations at issue – the one under consideration and the one to which reference is being made – must be similar, and the greater similarity is between the various sub-fields of public international law rather than between one such sub-field and domestic law. It also suggests that international law has matured since 1927 when Lauterpacht published his influential work, although the point was urged by Lauterpacht himself.¹⁴³

In many respects, resort to analogy should be unsurprising. If a gap is identified in the law, it will likely be seen as more appropriate to rely on an equivalent rule or a related understanding in a different body of law rather than to draw up a rule from scratch. The entity using the analogy is not ‘inventing’ the law; rather, it is suggesting that a general rule is applicable to the matter before it: ‘[An] argument by analogy is in effect an argument that specific rules reflect a broader (and often unstated) principle which is applicable not only to the circumstances governed by the specific rules but also to analogous circumstances.’¹⁴⁴

3 *Limits of Analogy*

As indicated above, an analogy can only be drawn where the relevant situations are similar. In certain respects, disasters are very different from armed conflicts, and it is not necessarily the case that the particular rule that exists in IHL will be appropriate for disaster relief law.¹⁴⁵ There are fundamental differences between situations of disaster and situations of armed conflict that might make analogy between the two inappropriate. The political considerations and operational environments of disasters differ significantly compared to those of conflicts.¹⁴⁶ In particular, in armed conflicts, but not in disasters, there are two warring parties – states and/or armed groups. These parties to the conflict are often concerned that the provision of humanitarian assistance will be diverted to fighters or combatants or will otherwise assist the other side. As such, they often seek to exert tight control over the content and distribution of humanitarian assistance. The same is less true of situations of disaster.

The absence of hostilities in situations of disaster also means that there is no need to balance ideas of humanity with those of military necessity, as is the case with IHL. This is not to suggest that humanity is the sole feature of situations of disaster; other principles, such as state sovereignty, will have to be taken into account. Nonetheless, the context of a disaster is ultimately very different from that of an armed conflict, even if the issues raised in both are similar. This means that IHL can be looked to for guidance on how issues are treated. However, the IHL rule should not simply be ‘copied

¹⁴³ *Ibid.*, at 85.

¹⁴⁴ Akehurst, ‘The Hierarchy of the Sources of International Law’, 47 *British Year Book of International Law (BYBIL)* (1974–1975) 273, at 279, n. 1.

¹⁴⁵ Expressing doubts on the analogy to armed conflict, see Allan and O’Donnell, *supra* note 7, at 361. See also Heath, *supra* note 7, at 456–457.

¹⁴⁶ Fisher, *supra* note 112, at 346.

and pasted' into an international law of disaster relief. The substantive rule should be closely analysed to see if it is the best fit – for example, how it balances humanity with military necessity and whether that balance is also appropriate for the application to disasters or whether another rule is better.

Even if the IHL rule is considered the most appropriate rule for the law of disaster relief, the detail or interpretation of that rule might be rather different. For example, in IHL, there is an obligation 'to allow and facilitate rapid and unimpeded passage' of humanitarian assistance.¹⁴⁷ A rule to similar effect can be found in the ILC's draft Articles on the Protection of Persons in Disasters, with draft Article 15(1) providing for an obligation of the affected state to 'take the necessary measures, within its national law, to facilitate the prompt and effective provision' of humanitarian assistance. What constitutes 'rapid' or 'prompt' provision of relief will differ depending on whether it is an armed conflict or a disaster. Likewise, whereas in both armed conflicts and disasters, a state might inspect the humanitarian assistance to be provided, the reasons for doing so and the corresponding time it takes to do so will likely differ in the two situations.

As with the development of the generalized standard, this is not to suggest that all uses of analogy to IHL in the development of the law relating to disaster relief are improper or that all uses by the ILC or the IFRC are inappropriate. Certain standards, such as the prohibition on the arbitrary withholding of consent to external humanitarian assistance, might well be correct, even if for different reasons.¹⁴⁸ However, resort to analogy might be inappropriate if the contexts are sufficiently different or if the standard to be used is not the most appropriate. Indeed, it is one thing for a court or tribunal to develop the law by way of analogy and another thing for the ILC or the IFRC to do so. The mandate of courts and tribunals is to decide disputes that are submitted to them.¹⁴⁹ By contrast, the role of the ILC is to codify and progressively develop the law,¹⁵⁰ and, in the present context, the IFRC was requested, *inter alia*, to 'develop[] ... models, tools and guidelines for practical use in international disaster response activities'.¹⁵¹ The different mandates of the bodies impose different constraints on the actors. Adjudication has been described as the 'natural habitat' of reasoning by analogy.¹⁵² The same is not true of non-judicial bodies.

Whether the technique of analogy is appropriate in particular cases for the ILC will depend, *inter alia*, on the extent to which the output is closer to codification or progressive development. It has been suggested, for example, that '[a]n objection that can be made to the carrying out of codification projects on the basis of analogy is that the topic may not be ripe for codification if practice and precedent is scant' and that

¹⁴⁷ Additional Protocol I, *supra* note 2, Art. 70; Henckaerts and Doswald-Beck, *supra* note 113, Rule 55.

¹⁴⁸ See Sivakumaran, 'Arbitrary Withholding of Consent to Humanitarian Assistance in Situations of Disaster', 64 *ICLQ* (2015) 501.

¹⁴⁹ See, e.g., Statute of the International Court of Justice 1945, 59 Stat. 1031, Art. 38(1).

¹⁵⁰ Statute of the International Law Commission (ILC Statute), GA Res. 174 (II), 21 November 1947, Art. 1(1).

¹⁵¹ Agenda for Humanitarian Action, *supra* note 63, at 3.2.6.

¹⁵² Lusa Bordin, *supra* note 139.

whether the ILC should instead ‘wait for practice and precedent to emerge is a delicate question involving a political judgment of the appropriateness and desirability of a codification of the subject matter at stake’.¹⁵³ The matter is different still for the IFRC. Insofar as the IFRC is concerned, it has the scope to be inventive in a way that courts and tribunals, and even the ILC, does not, not least because it was requested to develop tools for practical use.¹⁵⁴ Accordingly, a different solution to the one that already exists in another area of the law might very well prove more appropriate. Analogies should not always be the default position insofar as development of the law is concerned.

C Form, Substance and Authority

1 International Law of Disaster Relief

The form that disaster relief instruments take is also of importance given that the form of an instrument can affect its authority.¹⁵⁵ The international law relating to disaster relief is emerging as a holistic body of law through the conclusion of instruments that, while soft in form, contain a mixture of *lex lata* and *lex ferenda*.¹⁵⁶ A state cannot simply violate a norm contained in an instrument by virtue of its soft form. This is not because the instrument itself is binding on the state. Rather, it is because the instrument contains norms that are binding on states outside the context of that instrument – for example, because the norm is one of customary international law or because the norm is also contained in a treaty to which the state is party.

The mix of *lex lata* and *lex ferenda* in instruments that are soft in form is particularly apparent in the IFRC Guidelines. As noted above, the IFRC Guidelines note expressly that they are not binding.¹⁵⁷ However, the Annotations to the Guidelines observe that the Guidelines ‘draw[] on existing international norms’ and that ‘many of the provisions restate elements from existing binding international law’.¹⁵⁸ As a result, the Guidelines contain a mix of binding obligations and normative aspirations but in soft form. The same is true of the ILC’s draft Articles on the Protection of Persons in Disasters. The ILC Secretariat considered that the ILC’s work in this regard would be ‘primarily limited’ to the codification of existing law, with progressive development ‘as appropriate’.¹⁵⁹ For his part, the ILC special rapporteur noted that ‘given the amorphous state of the law ... striking the appropriate balance between *lex lata* and *lex ferenda* poses a singular challenge’.¹⁶⁰

¹⁵³ *Ibid.*

¹⁵⁴ Agenda for Humanitarian Action, *supra* note 63, at 3.2.6.

¹⁵⁵ See Caron, ‘The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority’, 96 *AJIL* (2002) 857.

¹⁵⁶ On the hard and soft distinction in form and in substance, see Pronto, *supra* note 42. See also d’Aspremont, ‘Softness in International Law: A Self-Serving Quest for New Legal Materials’, 19 *European Journal of International Law (EJIL)* (2008) 1075.

¹⁵⁷ IFRC Guidelines, *supra* note 60, Art. 1(1).

¹⁵⁸ Annotations to the Draft Guidelines, *supra* note 55, at 4.

¹⁵⁹ Preliminary Report, *supra* note 71, para. 59.

¹⁶⁰ *Ibid.*

2 Form, Substance and Authority in International Law

The conclusion of an instrument, which is soft in form but which contains provisions that are *lex lata* and *lex ferenda*, is not uncommon in general public international law or its sub-fields.¹⁶¹ In the instances in which the ILC drafts articles on a particular topic, it tends not to specify whether a particular provision is one of codification or progressive development. Rather, what is adopted is an instrument that is soft in form but that comprises some provisions that are *lex lata* and others that are *lex ferenda*. The instrument has ‘the look and feel’ of a treaty.¹⁶² It is drafted as if it were a treaty with articles or provisions, using the language of obligation, and with a commentary, but it remains soft in form.

The ILC’s Articles on State Responsibility are a good example of this phenomenon. The Articles are part codification and part progressive development,¹⁶³ and it is usually not apparent which parts are codification and which are progressive development.¹⁶⁴ Only rarely does the Commentary to the Articles on State Responsibility refer to a particular article as an instance of progressive development.¹⁶⁵ The failure to distinguish between the codification aspects of the Articles and the progressive development aspects of the Articles has been criticized by some.¹⁶⁶ However, for present purposes, it is an observation rather than a criticism; indeed, it appears to be a standard technique of international law-making. Neither the soft form, nor the mixed hard and soft content, of the Articles on State Responsibility has had a negative impact on the influence of the Articles. The Articles have been cited innumerable times by international, regional and domestic courts.¹⁶⁷ Indeed, even prior to the adoption of the Articles on State Responsibility, the draft Articles had been cited with approval by courts and tribunals, including the ICJ.¹⁶⁸

Subsequent to the conclusion of its work on a particular topic, the ILC recommends a particular course of action to its parent body, the General Assembly. This ranges from taking ‘no action, the report having already been published’ to convening a diplomatic conference for the preparation of a treaty on the subject.¹⁶⁹ With respect to the Articles on State Responsibility, there was considerable debate within the ILC on the recommendation to be made. Some members expressed a preference for recommending the conclusion of a convention or the convening of a diplomatic conference, while

¹⁶¹ See Pronto, *supra* note 42, at 953–955.

¹⁶² Caron, *supra* note 155, at 862, describing the Draft Articles on State Responsibility, *supra* note 5.

¹⁶³ Draft Articles on State Responsibility, *supra* note 5, General Commentary, para. 1.

¹⁶⁴ See also Caron, *supra* note 155, at 873.

¹⁶⁵ See, e.g., Draft Articles on State Responsibility, *supra* note 5, Commentary to Articles 41(1), 48(2)(b).

¹⁶⁶ See, e.g., Caron, *supra* note 155; Sloane, ‘On the Use and Abuse of Necessity in the Law of State Responsibility’, 106 *AJIL* (2012) 447.

¹⁶⁷ See generally Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies, UN Doc. A/62/62, 1 February 2007; and the updates thereto.

¹⁶⁸ See, e.g., *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997) 7, paras 47, 50–53, 58, 79, 83.

¹⁶⁹ ILC Statute, *supra* note 150, Art. 23.

others opted for the General Assembly taking note of, or adopting, the Articles.¹⁷⁰ Following debate, the ILC eventually recommended that the General Assembly take note of the draft Articles in a resolution, set out the draft Articles in an annex to the resolution and consider the adoption of a convention at a later stage.¹⁷¹ Mixed views on the subject were also expressed in the Sixth Committee.¹⁷² The General Assembly eventually took note of the Articles on State Responsibility, which were annexed to the resolution, and ‘commend[ed] them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action’.¹⁷³

Of particular interest for present purposes is the reason why a significant number of states and members of the ILC preferred to leave the Articles on State Responsibility in soft form. This was not because they did not want the Articles to have an enhanced normative weight but, rather, because the Articles were considered to have greater weight if they remained in soft form than if they were possibly embodied in a treaty.¹⁷⁴ If a diplomatic conference were convened, a number of states were concerned that debates about various articles would be reopened, and there was no certainty that agreement would be reached and a convention adopted.¹⁷⁵ Indeed, some states advocated for the convening of a diplomatic conference precisely in order that changes could be made to certain articles.¹⁷⁶ Even if a convention were adopted, there would be no guarantee that it would be widely ratified. More broadly, the failure to conclude a treaty on the subject would weaken the status of the Articles since it would demonstrate a lack of consensus on the law. Accordingly, the soft form was preferred due to its likely accruing a progressively harder status over time, as states, courts and tribunals increasingly cited the draft Articles on State Responsibility.¹⁷⁷

Over time, things have changed, and a significant number of states have indicated that they would be in favour of convening a diplomatic conference.¹⁷⁸ Several reasons have been put forward in favour of such an approach. Of particular relevance for present purposes is that treaties are considered to have a greater authority than soft law instruments and, thus, provide legal certainty and have a stabilizing effect

¹⁷⁰ Report of the International Law Commission, Fifty-Third Session, *supra* note 5, paras 61–66.

¹⁷¹ *Ibid.*, para. 67.

¹⁷² See Crawford and Olleson, ‘The Continuing Debate on a UN Convention on State Responsibility’, 54 *ICLQ* (2005) 959.

¹⁷³ GA Res. 56/83, 28 January 2002.

¹⁷⁴ See the statements of states, as recounted in Crawford and Olleson, *supra* note 172.

¹⁷⁵ See, e.g., the position of the Netherlands, in Sixth Committee, Summary Record of the 15th Meeting, UN Doc. A/C.6/59/SR.15, 23 March 2005, paras 52–56; and the United Kingdom, in *ibid.*, paras 70–71.

¹⁷⁶ See, e.g., Belarus, in *ibid.*, paras 62–64; the Russian Federation, in Sixth Committee, Summary Record of the 16th Meeting, UN Doc. A/C.6/59/SR.16, 9 March 2005, para. 14.

¹⁷⁷ See, e.g., Japan, in Summary Record of the 15th Meeting, *supra* note 175, paras 57–58; the United Kingdom, in *ibid.*, paras 70–71.

¹⁷⁸ See Pacht, ‘The Case for a Convention on State Responsibility’, 83 *Nordic Journal of International Law* (2014) 439, at 446, noting that 51 states have indicated that they are in favour of convening a diplomatic conference, as compared with eight states who have indicated that they are against such a measure, with 47 states taking a qualified, intermediate view.

on the law.¹⁷⁹ Furthermore, some states have concluded that the Articles on State Responsibility have been embedded sufficiently in state practice and the jurisprudence of courts and tribunals as to allow for a convention to be elaborated on the basis of the Articles.¹⁸⁰ Whether to convert the Articles into a treaty also raises the broader issue of who makes international law. The ILC was originally envisaged as an initiator of law-making, with the final decision being left to states. However, by continuously deferring a decision on whether or not to convene a diplomatic conference, the ILC is transformed into the finalizer of law-making.¹⁸¹ This has a knock-on effect for the role of states in the making of international law.

All this being said, there are a number of aspects of the Articles on State Responsibility that make them a special case. They were adopted by the ILC, which has a mandate to codify and progressively develop the law.¹⁸² They were used by courts and tribunals even prior to adoption on its second reading.¹⁸³ The possibility of convening a diplomatic conference was left open but postponed.¹⁸⁴ The General Assembly set out the Articles in an annex to its resolution, an approach that had previously been limited to texts that had been negotiated and adopted by the General Assembly, giving the Articles a greater weight.¹⁸⁵ The General Assembly also commended the Articles to the attention of governments, which, according to one view, was an invitation to 'law-applying organs, and that includes individual States attempting to resolve a dispute in which issues of State responsibility are relevant, to look to the draft articles as a statement of the law on the matter'.¹⁸⁶ Nonetheless, it remains the case that the Articles on State Responsibility were considered to have greater authority if they were kept in soft form than if attempts were made to translate them into conventional law. It has therefore been described as a paradox between form and authority.¹⁸⁷

The second example is the Guiding Principles on Internal Displacement. The Guiding Principles were drafted following a request by the UN Commission on Human Rights to the special representative of the Secretary-General on internally displaced persons

¹⁷⁹ See, e.g., Vietnam, in Sixth Committee, Summary Record of the 15th Meeting, UN Doc. A/C.6/65/SR.15, 3 December 2010, para. 17; Saudia Arabia, in Sixth Committee, Summary Record of the 15th Meeting, UN Doc. A/C.6/68/SR.15, 15 January 2014, para. 13. See further Pacht, *supra* note 178, at 467–468.

¹⁸⁰ See, e.g., Portugal, in Sixth Committee, Summary Record of the 15th Meeting, UN Doc. A/C.6/68/SR.15, 15 January 2014, para. 12; Russian Federation, in *ibid.*, para. 22. At the same time, the fact that the Draft Articles on State Responsibility have been used to a considerable extent is used as an argument that a treaty is not needed. See, e.g., USA, in Sixth Committee, Summary Record of the 15th Meeting, UN Doc. A/C.6/65/SR.15, 3 December 2010, at para. 18. See further Pacht, *supra* note 178, at 460–461.

¹⁸¹ Cogan, 'The Changing Form of the International Law Commission's Work', in R. Virzo and I. Ingravallo (eds), *Evolutions in the Law of International Organizations* (2015) 275.

¹⁸² ILC Statute, *supra* note 150, Art. 1. Pursuant to Art. 13(1) of the UN Charter, the General Assembly established the International Law Commission. The ILC Statute is annexed to GA Res 174 (II), 21 November 1947.

¹⁸³ See the text at note 168.

¹⁸⁴ Crawford and Olleson, *supra* note 172, at 971.

¹⁸⁵ The approach changed with the ILC's Draft Articles on the Nationality of Natural Persons in Relation to the Succession of States, Doc. A/54/610 (1999). See Pronto, 'Some Thoughts on the Making of International Law', 19 *EJIL* (2008) 601, at 610.

¹⁸⁶ Rosenne, 'State Responsibility: Festina Lente', 75 *BYBIL* (2004) 363, at 371.

¹⁸⁷ Caron, *supra* note 155.

to develop ‘an appropriate framework’ relating to the protection of the internally displaced.¹⁸⁸ The Guiding Principles cover all aspects of the displacement cycle – protection from displacement, protection during displacement as well as the post-displacement phase. According to the Annotations to the Guiding Principles, the Principles ‘reflect and are consistent with international human rights law and international humanitarian law and to a large extent thus codify and make explicit guarantees protecting internally displaced persons that are inherent in these bodies of law’.¹⁸⁹ This careful framing of the Principles’ contribution should not obscure the fact that the Guiding Principles do advance the law in a number of respects.¹⁹⁰ Indeed, were it not for areas of uncertainty, the Guiding Principles would not have been needed.

The compilation and analysis of legal norms, which preceded the Guiding Principles on Internal Displacement identified gaps in legal protection both in terms of the lack of ‘explicit norms ... to address identifiable needs of the displaced’ and in terms of the existence of a general norm but the absence of a ‘more specific right ... that would ensure implementation of the general norm in areas of particular need to internally displaced persons’.¹⁹¹ In certain respects, the Guiding Principles do advance existing law. For example, one principle provides for ‘[t]he right [of internally displaced persons] to be protected against forcible return to or resettlement in any place where their life, safety, liberty or health would be at risk’.¹⁹² As discussed above, the principle thus extends traditional understandings of non-refoulement, which prior to the Guiding Principles applied only to cross-border transfers and to states, to apply to situations of internal movement and to non-state armed groups. Indeed, one commentator has queried whether the drafters ‘intentionally framed the Principles as a restatement of existing law but, at the same time, surreptitiously introduced new provisions derived from existing ones’.¹⁹³ The Guiding Principles are thus another example of an instrument that is soft in form but that contains a mixture of *lex lata* and *lex ferenda*.

Much like the Articles on State Responsibility, the Guiding Principles on Internal Displacement were deliberately adopted as principles and not in the form of a treaty due to the difficulties in concluding a treaty in the area.¹⁹⁴ Nonetheless, the Guiding Principles have had a considerable effect on the behaviour of states. For example, the World Summit Outcome describes the Guiding Principles as an ‘important international framework for the protection of internally displaced persons’.¹⁹⁵ At the regional

¹⁸⁸ Commission on Human Rights, Resolution 1996/52, 19 April 1996.

¹⁸⁹ Kälin, *supra* note 125, at viii.

¹⁹⁰ Kälin, ‘The Guiding Principles on Internal Displacement – Introduction’, 10 *IJRL* (1998) 557, at 561–562, speaks of progressive development of the law in certain areas while, at the same time, not going beyond what can be based on existing law.

¹⁹¹ Report of the Representative of the Secretary-General, Compilation and Analysis of Legal Norms, UN Doc. E/CN.4/1996/52/Add.2, 5 December 1995, para. 411.

¹⁹² Guiding Principles, *supra* note 4, Principle 15(d).

¹⁹³ C. Phuong, *The International Protection of Internally Displaced Persons* (2005), at 61.

¹⁹⁴ Kälin, ‘How Hard Is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework’, 2–3, available at www.brookings.edu/wp-content/uploads/2016/06/20011219.pdf.

¹⁹⁵ GA Res 60/1, 24 October 2005, para. 132.

level, inter-governmental organizations have considered the Guiding Principles to be a useful tool or framework and have encouraged their use and adoption.¹⁹⁶ At the national level, domestic legislation of a number of states is based on the Guiding Principles.¹⁹⁷ National courts have also referred to the Guiding Principles, with the Colombian Constitutional Court describing the Guiding Principles as '*del cuerpo normativo supranacional*'.¹⁹⁸ The Great Lakes Protocol converts the Guiding Principles into hard law for states parties to the Protocol,¹⁹⁹ annexing as it does the Guiding Principles to the Protocol. States parties to the Protocol also undertake to 'adopt and implement' the Guiding Principles, to 'enact national legislation to domesticate fully' the Principles and even to use the Annotations to the Principles as 'an authoritative source for interpreting the application of the Guiding Principles'.²⁰⁰

3 *Limits of the Technique*

The development of instruments in the area of disaster relief, which are soft in form but which contain provisions that are *lex lata* as well as *lex ferenda*, are thus simply further examples of the use of the approach. Such instruments are created for a number of reasons. Many entities cannot create hard law; thus, out of necessity, they are left with instruments that are soft in form.²⁰¹ The mix of hard and soft norms also occurs because of the lack of strict distinction between codification and progressive development, because it is unclear whether a particular norm is, in fact, one of hard law or soft law²⁰² or due to a difference in opinion between the various drafters.

Failing to distinguish between the two can also be a way in which to harden the soft law components. The soft law components can become hardened by virtue of their association with hard law components. It is an incremental hardening over time; a hardening by osmosis. If 14 of 15 provisions in an instrument are reflective of customary international law, it will unlikely be long before the 15th provision is argued to be, then accepted as, custom.²⁰³ However, much will depend on the subject matter at hand, the type of instrument, the degree of controversy surrounding the customary status of the provisions and the proportion of soft norms to hard norms. The reverse is also true. The greater the proportion of progressive development, the longer it will

¹⁹⁶ See Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting', 10 *Global Governance* (2004) 459, at 469–470; Kälin, 'The Future of the Guiding Principles on Internal Displacement', *Forced Migration Review* (December 2008) 5, at 5.

¹⁹⁷ Orchard, 'Protection of Internally Displaced Persons: Soft Law as a Norm-Generating Mechanism', 36 *Review of International Studies* (2010) 281, at 294; Cohen, *supra* note 196, at 470.

¹⁹⁸ Sentencia T-327/01.

¹⁹⁹ See Protocol on the Protection and Assistance to Internally Displaced Persons (Great Lakes Protocol) 2006, Art. 2.

²⁰⁰ *Ibid.*, Annotation, Art. 6.

²⁰¹ See Pronto, *supra* note 42.

²⁰² Preliminary Report, *supra* note 71, para. 59, noting that the Commission has found it 'impracticable to determine into which category each provision falls.'

²⁰³ See also Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law', 63 *ICLQ* (2014) 535, at 556.

take for the incremental hardening to take place. Indeed, too much progressive development leads to the danger that the entire product will be considered non-binding, even those aspects that reflect custom. The balance between codification and progressive development in the framework is thus an important, but delicate, balancing act.

In the context of the ILC's draft Articles on the Protection of Persons in Disasters, a few states have expressed concerns about precisely this balance between *lex lata* and *lex ferenda*, taking the view that the draft Articles are too heavily weighted on the side of *lex ferenda*. For example, China remarked that '[t]he draft articles were regrettably short on *lex lata* and long on *lex ferenda*, some of them lacking the support of solid general State practice'.²⁰⁴ And Germany expressed the view that '[i]t was already an enormous challenge to collect and analyse existing practice in order to elucidate *lex lata*, so it would be wise for the Commission to refrain from developing new rules *de lege ferenda* which could only be highly controversial'.²⁰⁵ The proportion of *lex lata* to *lex ferenda* is particularly important insofar as the draft Articles on the Protection of Persons in Disasters are concerned for two reasons. First, there is an abundance of soft law on disaster relief.²⁰⁶ Thus, the added value of another instrument that is soft in form and contains a considerable amount of soft content is open to question. Indeed, in its observations on the draft Articles, adopted on first reading, the IFRC indicated that 'there is little point in issuing the draft articles as non-binding guidelines' since this would 'risk significant confusion and overlap with existing "soft-law" documents'. By contrast, '[i]f the draft articles were adopted in the form of a framework treaty, they could have a positive impact on accelerating the development of more detailed national laws and procedures' or stimulate law-making at the regional level.²⁰⁷

Second, in situations in which there is uncertainty about a particular matter, or a 'perceived insufficiency' in hard law, an instrument in soft form can prove useful by virtue of its mere existence.²⁰⁸ As David Caron puts it, 'when there is a "legal vacuum" of authority relevant on an issue, courts and arbitral panels will turn to whatever is available'.²⁰⁹ The instrument can be used as a shortcut by an entity that needs an answer rather than having to undertake the first hand research itself.²¹⁰ Instruments in soft form, which contain a mix of *lex lata* and *lex ferenda*, work best when there is a body of hard law already in existence to which it can attach. Insofar as disaster relief law is concerned, this hard skeleton is largely missing. It is thus notable that the ILC recommended to the General Assembly that a convention be elaborated on the

²⁰⁴ China, in Sixth Committee, Summary Record of the Twentieth Meeting, UN Doc. A/C.6/69/SR.20, 10 November 2014, para. 24.

²⁰⁵ Germany, in Sixth Committee, Summary Record of the Twenty-Third Meeting, UN Doc. A/C.6/66/SR.23, 14 November 2011, para. 28. See also Germany, in Sixth Committee, Summary Record of the Twenty-Fourth Meeting, UN Doc. A/C.6/68/SR.24, 20 November 2013, para. 60.

²⁰⁶ See section 2.D above.

²⁰⁷ Protection of Persons in the Event of Disasters: Comments and Observations Received from Governments and International Organizations, Doc. A/CN.4/696, 14 March 2016, at 62.

²⁰⁸ Lusa Bordin, *supra* note 203, at 547.

²⁰⁹ Caron, *supra* note 155, at 866.

²¹⁰ See Lusa Bordin, *supra* note 203, at 546.

basis of the draft Articles on the Protection of Persons in Disasters.²¹¹ And the General Assembly's decision on the matter will have important consequences.²¹²

Terminology is also important for the form-substance-authority nexus as it can affect the manner in which the instrument is received and the extent to which it is used. The IFRC's work is a case in point. As one of the IFRC's instruments is entitled 'Guidelines', it gives the impression that it is entirely soft in content or that states can depart from it as they see fit. With this impression comes the danger that the hard components of the instrument are overlooked or become softer over time and that the instrument itself is ignored. It also explains, perhaps, why relatively few states have used the Guidelines in the development of their domestic law²¹³ and why the manner in which the Guidelines have influenced certain domestic legislation has been rather modest, with relatively little shaping of the overall content.

There is a further aspect of the form-substance relationship that affects the authority of an instrument. As per its usual practice, the ILC left the decision as to the final form of the draft Articles on the Protection of Persons in Disasters until its work was completed.²¹⁴ While understandable, the content of an instrument – the way in which it is written, the language that is used, the level of detail provided, even whether or not to include particular articles – depends on its final form – for example, whether it is going to be a treaty or whether it is going to take another form such as guidelines. For example, if the instrument takes the form of guidelines, it would be more appropriate to use the language of 'should' rather than 'shall'. The reverse is true if the instrument is to be in treaty form, with the language of obligation being used and only strictly legal provisions being included. In leaving the decision as to the final form until the work was completed, the ILC did not know whether it was drafting for a treaty or for guidelines. This, in turn, has the potential to lead to an uneasy fit between the substance of the Articles and the recommendation to the General Assembly as to their final form.

More problematically, and perhaps inevitably with the move to a holistic body of law, the ILC's draft Articles on the Protection of Persons in Disasters are at a relatively high degree of generality. However, in order for the international law of disaster relief to serve its intended purpose – namely, to facilitate the response to disasters in order to meet the essential needs of persons affected by disasters – the body of law needs to be operational.²¹⁵ This, in turn, means that there needs to be detailed rules on the specificities of the provision of assistance. For example, Article 15 of the draft Articles provides that:

²¹¹ Report of the International Law Commission, Sixty-Eighth Session, *supra* note 1, para. 46.

²¹² In GA Res 71/141, 19 December 2016, the General Assembly invited governments 'to submit comments concerning the recommendation by the Commission to elaborate a convention on the basis of these articles'.

²¹³ For the figures, see the text at note 70.

²¹⁴ Preliminary Report, *supra* note 71, para. 60. The Secretariat had proposed that the final form be a convention. *Ibid.*

²¹⁵ Draft Articles on the Protection of Persons in Disasters, *supra* note 1, Art. 2.

[t]he affected States shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance, in particular regarding:

- (a) relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and
- (b) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and the disposal thereof.

Given the nature of the ILC's draft Articles, all the ILC can say is that 'the necessary measures' must be taken. Little detail can be given on exactly what measures are to be taken. However, in order for relief to be provided in a timely manner, it is precisely this sort of detail that is needed. Otherwise, a disconnect emerges between the holistic body of law and the problems that arise during the relief phase following a disaster.²¹⁶ The general rules need to operate alongside more specific guidance.

4 Conclusion

International disaster relief law started out as being comprised of a series of piecemeal instruments – disaster specific, assistance specific and region specific. This was due to the demise of the IRU and the inability to conclude an overarching treaty on the subject at the global level. However, through a series of techniques, this piecemeal approach is in the process of being converted into a holistic body of law, both at the international level through the ILC's draft Articles on the Protection of Persons in Disasters and at the national level through the IFRC's Guidelines and IFRC Model Act. Both the work of the ILC and the work of the IFRC involve the identification and development of norms that apply to all disasters and in all regions of the world rather than to specific types of disaster, specific types of assistance or specific regions. These techniques consist of (i) extrapolating from a series of regional, sub-regional and bilateral treaties and disaster- and assistance-specific treaties as well as a host of soft law instruments in order to develop a generalized standard and developing a model law on that same basis. It includes (ii) analogizing to the more developed body of international humanitarian law. And it comprises (iii) the drawing up of instruments that are soft in form but that contain provisions that are *lex lata* as well as *lex ferenda*.

Although at first sight unorthodox, these techniques are in fact used rather frequently in the making and shaping of general public international law as well as in its various sub-fields, such as IHL and international investment law. Indeed, in many ways, they are simply ordinary techniques of international law-making. These techniques reveal further that international law-making is flexible and develops according to the needs of the international community.²¹⁷ States, the International Red Cross and Red Crescent Movement and others have recognized the need to change the way

²¹⁶ On some of the difficulties that arise, see IFRC, Report on the Survey on Disaster Relief, Regulation and Protection, November 2015.

²¹⁷ For scepticism concerning the notion of an 'international community', see Kritsiotis, 'Imagining the International Community', 13 *EJIL* (2002) 961.

in which international disaster relief is regulated. There has also been awareness of the importance of multilateral treaties as well as recognition of the difficulties associated with their conclusion. As a result, certain techniques have been utilized that stay as close as possible to the form and language of a treaty without actually constituting a treaty. These are the techniques of extrapolation and the development of model acts. Likewise, instruments have been developed that 'look and feel' like a treaty but that are soft in form.²¹⁸ These instruments exhibit a normative pull while circumventing the difficulties associated with the conclusion of treaties. Through the uses of these techniques, international law has proven itself able to cater to particular problems in a creative manner. The way in which a holistic body of disaster relief law has emerged also reveals the considerable importance of actors such as the ILC and the IFRC and the central role that state-empowered entities play in the making and shaping of international law. International law is increasingly being made by entities other than states, in particular, expert bodies.

Particular uses of the techniques, however, are open to question. In order to create a generalized multilateral standard, there must be a sufficiency and consistency of instruments. Likewise, in order to properly analogize to a particular body of law, similarity of subject matter is insufficient. The context in which the norms apply is also important. Furthermore, analogy need not always be the 'go to' solution. Some entities have the mandate to be more creative in their design of the law. A technique that is used successfully in one area of the law will not always be the best technique to utilize in another area. Insofar as the form-substance-authority nexus is concerned, for example, much will depend on the balance between the *lex lata* and the *lex ferenda* in any instrument.

More generally, the move towards a holistic body of law assumes that it is better than a patchwork of norms. The principal advantage of the approach is that it provides clarity on the rights and obligations of states and other actors and fills gaps that exist in the piecemeal approach. The rights and obligations are not contingent on which part of the world the disaster takes place, the type of disaster, the type of assistance or the identity of the state seeking to provide assistance. There would also not be debate surrounding the hard or soft status of a particular norm. The holistic body approach thus systematizes matters and provides order to a rather messy area of the law.

However, the holistic body approach carries with it some risks. It assumes the existence of a multilateral instrument at the global level to which there is universal agreement. Yet there is no guarantee that a multilateral treaty at the global level can in fact be agreed upon. If it can be agreed on, there is no certainty that it would regulate issues at the level of detail required or that it would be widely ratified. Indeed, some of the regional and assistance-specific treaties on disaster relief have few states parties, and some states have decided not to ratify treaties or have concluded treaties with particular states, such as neighbouring states, on specific types of disaster.²¹⁹

²¹⁸ Caron, *supra* note 155, at 862, describing the Draft Articles on State Responsibility, *supra* note 5.

²¹⁹ See section 3.A.3 above.

If the instrument is not of a conventional character, disagreement might still arise relating to the legal nature of particularly norms. Failure to conclude a treaty also has broader consequences: '[A] failure undermines the power of previously-emerging patterns of principled conduct. The persuasiveness of an emerging norm increases every time states adhere to it. It diminishes when states, fearing that they may be bound by a written mandatory text, feel compelled to register their every reservation to each imaginable hypothetical scenario.'²²⁰ The holistic body approach might be to force order and uniformity in an area in which there is none. Ultimately, the extent to which the holistic body approach, in general, and the techniques, in particular, are accepted will depend on the extent to which states react to these techniques and how states respond to the emerging body of disaster relief law.

²²⁰ Franck, 'Non-Treaty Law-Making: When, Where and How?', in R. Wolfrum and V. Röben (eds), *Developments of International Law in Treaty Making* (2005) 425.