

International Disaster Law in Practice



United Nations Bodies (2018)

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1 Introduction

This section analyses certain developments relevant to disaster law that occurred within generalist and specialised United Nations (UN) bodies during the course of 2018. In particular, it will address (1) the adoption of some UN General Assembly (GA) Resolutions and the connected debates; and (2) the adoption of a resolution at the 2018 Plenipotentiary Conference of the International Telecommunication Union (ITU), the UN's specialized agency responsible for information and communication technologies.

2 Developments at the UN General Assembly

14 December 2018 was a crucial day for the humanitarian community at the UN. The UNGA adopted three Resolutions on coordinating humanitarian and disaster relief aid, while Member States echoed concerns that global crises and attacks on humanitarian personnel kept increasing, as did the number of people forcibly displaced worldwide through the effects of conflicts and disasters. The Resolutions adopted are titled 'Strengthening of the coordination of emergency humanitarian assistance of the United Nations';¹ 'International cooperation on humanitarian assistance in the field of natural disasters, from relief to development'² and 'Safety and security of humanitarian personnel

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1 UNGA Res 73/139 (14 December 2018) UN Doc A/RES/73/139. The Resolution was adopted in light of the Report of the Secretary General bearing the same title, UN Doc A/73/78-E/2018/54, adopted on 9 April 2018.

2 UNGA Res 73/136 (14 December 2018) UN Doc A/RES/73/136. The Resolution was adopted in light of the Report of the Secretary General bearing the same title, UN Doc A/73/343, adopted on 27 August 2018.

and protection of United Nations personnel'.³ A further Resolution on 'Disaster Risk Reduction' was approved by the GA on 20 December 2018.⁴ The text underlined the need to address economic, social and environmental impacts of climate change, emphasizing that disaster prevention, preparedness, early action and resilience-building are, in most cases, significantly more cost-effective than emergency response.

All of the documents represent slightly amended versions of Resolutions that had already been adopted by the GA in previous years. However, while the 'Disaster Risk Reduction' Resolution was passed without a vote, the other three proved controversial among Member States as briefly outlined below.

Equally important for our purposes – although without immediate practical ramifications – was the adoption of the Resolution on 'Protection of persons in the event of disasters' on 20 December 2018. The Resolution follows a round of discussion that took place within the Assembly's Sixth (legal) Committee on the 'Draft Articles on the protection of persons in the event of disasters', adopted by the International Law Commission (ILC) in 2016.⁵ We will briefly analyse the debate and offer some remarks on the future of the Draft Articles (DAs).

2.1 *Resolution 73/139 on 'Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations'*

The Resolution on 'Strengthening of the coordination of emergency humanitarian assistance of the United Nations' confirms member States' awareness of the significant changes that have occurred in the humanitarian sector over the last few years. For instance, it clearly acknowledges the expanding scope of contemporary humanitarian activities, that now encompass economic, social and environmental rights and needs of the affected population. The Resolution also requires appropriate engagement by all relevant actors – at local, national and international level – and a more active cooperation with the beneficiary communities. In this respect, States have acquired a better appreciation of the different needs that individuals involved in armed conflicts and disasters may have, depending on their level of vulnerability. Also, a clear commitment

3 UNGA Res 73/137 (14 December 2018) UN Doc A/RES/73/137. The Resolution was adopted in light of the Report of the Secretary General bearing the same title, UN Doc A/73/392, adopted on 24 September 2018.

4 UNGA Res 73/231 (20 December 2018) UN Doc A/RES/73/231.

5 For the text of the DAs and the related commentaries, see ILC, 'Report of the International Law Commission – Sixty-Eighth Session' (2 May–10 June and 4 July–12 August 2016) UN Doc A/71/10, 13–73 <http://legal.un.org/ilc/reports/2016/english/a_71_10.pdf> last accessed (as any subsequent URL) on 2 July 2019.

to international law and humanitarian principles has been confirmed, representing the basic framework setting out State obligations and offering guidelines to be followed in humanitarian response activities.

However, before adopting the Resolution, the Assembly first acted on a draft amendment proposed by the United States of America.⁶ The amendment called for the inclusion in the text of a clear statement against the use of abortion as a possible option available to women in humanitarian emergencies. According to the US administration, in such contexts health care 'should not include abortion or the promotion of abortion as a method of family planning'.⁷ This effort is part of a larger campaign by the current US administration aimed at eliminating references to 'sexual and reproductive health' and 'sexual and reproductive health-care services' from UNGA resolutions, as they are understood to convey the idea that a right to abortion exists or even to encourage such practice.⁸ So far the US strategy has had little success, as demonstrated by the decision of the GA to reject the proposed amendment by a recorded vote of 102 against to 7 in favour (Belarus, Cameroon, Guatemala, Iraq, Qatar, Sudan, United States) with 27 abstentions.⁹

2.2 *Resolution 73/136 on 'International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, from Relief to Development'*

The Resolution titled 'International cooperation on humanitarian assistance in the field of natural disasters, from relief to development' reiterates that affected States have the primary responsibility for the initiation, organization and coordination of humanitarian assistance within their territories. The text then recognizes the clear relationship between emergency response, rehabilitation and development, and reaffirms that, to ensure a smooth transition from relief to rehabilitation and development, emergency assistance must be provided in ways that will be supportive of short- and medium-term recovery,

6 UNGA, 'United States of America: amendment to draft resolution A/73/L.61' UN Doc A/73/L.65, 12 December 2018.

7 United States Mission to the United Nations, Remarks at a UN General Assembly Humanitarian Debate, 14 December 2018 <<https://usun.usmission.gov/remarks-at-a-un-general-assembly-humanitarian-debate/>>.

8 Michelle Nichols, 'U.S. isolated at U.N. over its concerns about abortion, refugees', 17 December 2018 <<https://www.reuters.com/article/us-usa-un/u-s-isolated-at-u-n-over-its-concerns-about-abortion-refugees-idUSKBN1OG25Q>>.

9 UNGA, UN Doc A/73/PV.54, 14 December 2018, 8. An additional attempt by the US delegation to have the relevant paragraphs removed through a single, separate vote was defeated by an even stronger majority; *ibid.*, 9.

which will then lead to long-term development. The Resolution also addresses the growing scale and scope of natural hazards. It emphasises the need to enhance efforts to strengthen the capacities of communities and encourages an increased engagement by the private sector in disaster risk management activities.

Operative paragraph 59 of the draft Resolution again contained a reference to 'sexual and reproductive health' which the US deemed incompatible with its pro-life stances. It therefore submitted an amendment to the Resolution similar to the one proposed to Resolution 73/139,¹⁰ which was however again rejected by 6 votes to 110, with 22 abstentions.¹¹

2.3 *Resolution 73/137 on 'Safety and Security of Humanitarian Personnel and Protection of United Nations Personnel'*

The Resolution on 'Safety and security of humanitarian personnel and protection of United Nations personnel' takes note of the complex and dynamic security environment and of the significant risks faced by humanitarian personnel and United Nations and associated personnel. In its preamble the Resolution notes that 'in 2017, 1,473 persons were affected by safety and security incidents, with 22 fatalities, of which 9 resulted from acts of violence, namely, crime, acts of terrorism and armed conflict, 181 injuries, of which 70 resulted from acts of violence, 8 abductions, 63 arrests and detentions and 316 reported cases of intimidation and harassment'.¹² It therefore demands, inter alia, that States ensure that perpetrators of attacks committed on their territory against humanitarian workers do not operate with impunity, that such attacks are investigated promptly and effectively and that the perpetrators are brought to justice, as provided for by national laws and in accordance with obligations under international law.

It was precisely the issue of the prosecution of alleged perpetrators of crimes against humanitarian personnel that was the object of disagreements within the GA. In particular, the presence of a reference to the Statute of the International Criminal Court (ICC) in the twenty-ninth preambular paragraph of the draft resolution, and an exhortation to UN Member States to join the ICC contained in the seventh operative paragraph, prompted Sudan to call for a vote on the two provisions with the intention of having these mentions removed.¹³

10 UNGA, 'United States of America: amendment to draft resolution A/73/L.18/Rev.1' UN Doc A/73/L.64, 12 December 2018.

11 UNGA (n. 9) 5.

12 UNGA (n. 3) twentieth preambular paragraph.

13 UNGA (n. 9) 1–2.

It should be noted that references to the ICC in the preambular and operative parts of the Resolution have existed since the first resolution on that subject was adopted in 1999.¹⁴ Nonetheless, Sudan's increasingly fraught relationship with the ICC – due to the 2005 UN Security Council referral of the situation in Darfur to the ICC prosecutor¹⁵ – lead to the decision to object to the above passages.

Even this proposal was rejected by the GA, although with slightly narrower margins: the twenty-ninth preambular paragraph was retained by 93 votes to 13, with 26 abstentions,¹⁶ and operative paragraph 7 was retained by 95 votes to 14, with 25 abstentions.¹⁷ It remains to be seen whether the fall of Sudanese President Al-Bashir in April 2019 will put an end to the attempts of Sudan and the African Union to undermine the authority of the ICC.¹⁸

2.4 *The Debate on the ILC's DAs on the 'Protection of Persons in the Event of Disasters'*

Again in December 2018 the GA adopted the Resolution on 'Protection of persons in the event of disasters' without a vote. By its terms, the GA takes note of the views and comments expressed in the debates on this topic within the Sixth Committee during the seventy-third session, as well as the comments and observations received from Governments on the DAs. It then calls attention to the recommendation by the ILC that a convention be elaborated on the basis of the DAs.

On 1 November 2018, the Sixth Committee resumed debating the merits of the issue.¹⁹ Reactions to the ILC's recommendation were mixed. Many States openly supported the idea of negotiating a binding treaty regulating disaster prevention and response activities. Speaking on behalf of the 33 Member States to the Community of Latin American and Caribbean States (CELAC), El Salvador maintained that the adoption of an 'international legal framework

14 UNGA Res 54/192 (17 December 1999) UN Doc A/RES/54/192.

15 UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593. The referral was to investigate alleged crimes against humanity, war crimes and genocide committed since 2002 by Sudanese officials – including former President Omar Al Bashir – Janjaweed militia and rebel forces.

16 UNGA (n. 9) 6.

17 *Ibid.*, 7.

18 On the difficult relationship between the African Union and the ICC, see Gino Naldi and Konstantinos Magliveras, 'The International Criminal Court and the African Union – A Problematic Relationship' in Charles Chernor Jalloh and Ilias Bantekas (eds), *The International Criminal Court and Africa* (OUP 2017) 111–136.

19 Note that a few States had already given their opinion to the UN Secretary General, UNGA Res 73/299 (24 July 2018) UN Doc A/73/229.

would (...) be useful'.²⁰ Sri Lanka²¹ endorsed the codification of a binding convention as well, as did Togo,²² Portugal²³ and – although in less explicit terms – Singapore.²⁴ Generally in favour of the development of a treaty were Argentina,²⁵ the Philippines²⁶ and Peru, with the latter's delegation stating that 'a legal framework governing disaster preparation and management would be of great use to the international community' and praising the ILC for striking 'an appropriate balance (...) between the rights of persons affected by disasters and the principle of State sovereignty'.²⁷ Also in favour of the adoption of a binding instrument was Colombia, adding that the DAs 'had helped to create, and come to embody, the subject of international disaster response law'.²⁸ Iceland, Denmark, Finland, Norway and Sweden declared themselves open to discuss the elaboration of a convention,²⁹ as did Italy,³⁰ Japan,³¹ Honduras³² and Sudan, according to which 'it seemed appropriate to adopt an international legal instrument that took a human rights approach and was of particular relevance to the role of the affected State in ensuring the protection of persons and the provision of disaster relief assistance'.³³

On the other hand, some States were – more or less openly – against the idea of turning the DAs into a treaty. The Russian delegate affirmed that the DAs 'did not constitute codification of existing international law', adding that 'there was no agreement among States on the subject' and concluding that 'it would not be appropriate to consider the adoption of a legally binding instrument at the current time'.³⁴ This position was echoed by the US delegation, according to which the topic 'is best approached through the provision of practical guidance to countries in need of, or providing, disaster relief, and not through the elaboration of an international agreement'.³⁵ Also against the conclusion of a

20 UNGA, 'Sixth Committee – Summary record of the 31st meeting' (1 November 2018) UN Doc A/C.6/73/SR.31, 4.

21 *Ibid.*, 7.

22 *Ibid.*, 9.

23 *Ibid.*, 8.

24 *Ibid.*

25 *Ibid.*

26 *Ibid.*, 12.

27 *Ibid.*, 11.

28 *Ibid.*, 9.

29 *Ibid.*, 4.

30 *Ibid.*, 5.

31 *Ibid.*, 10.

32 *Ibid.*, 5.

33 *Ibid.*, 6.

34 *Ibid.*, 8.

35 *Ibid.*, 9.

universal treaty were Iran,³⁶ Israel³⁷ and Malaysia.³⁸ The Brazilian delegate criticised the DAs for conflating natural and human-made disasters, while the Swiss one expressed concerns about the ambiguity regarding the interplay between IHL and the DAs, adding that they could become legally binding customary law 'through their application and incorporation into regional agreements and domestic law',³⁹ a position which seems to exclude an interest in negotiating a universally binding instrument.

Thailand, the coordinator of the draft resolution, concluded the discussion by noting that a 'divergence of views remained regarding further action to be taken on the draft articles, as well as on the urgency of the matter'.⁴⁰ By the terms of the Resolution the negotiation of a treaty based on the DAs will be further discussed by the GA during its seventy-fifth session (September 2020). It is difficult to predict the final outcome of the debate. Yet the general lack of appetite for new multilateral treaties, the criticisms made by several States to the progressive character of some of the DAs, and the preference expressed by others for more flexible and operational soft law instruments seem to limit the prospects for a comprehensive flagship treaty on disaster management. On the other hand, the increasing frequency and magnitude of disasters and the availability of legal tools (notably treaty reservations) to exclude the binding nature of unpalatable provisions may convince States to finally adopt a much-awaited treaty in this area.⁴¹

3 Developments at the ITU

As is well known, the ITU⁴² plays a central role in using information and communications technology services (ICTS) for disaster risk reduction and

³⁶ *Ibid.*, 11.

³⁷ According to the Israeli delegate 'the undertaking to engage in protection missions should not be considered in terms of legal rights and duties. Instead, the articles on the protection of persons in the event of disasters should be formulated as guidelines or principles for voluntary international cooperation efforts', *ibid.*, 12.

³⁸ *Ibid.*, 10.

³⁹ *Ibid.*, 6.

⁴⁰ UNGA, 'Sixth Committee – Summary record of the 35th meeting' (13 November 2018) UN Doc A/C.6/73/SR.35, 6.

⁴¹ For further comment, see Giulio Bartolini, 'A universal treaty for disasters? Remarks on the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters', (2017) 99 *International Review of the Red Cross*, 1133.

⁴² On the ITU's functions and historical development, see Dietrich Westphal, 'International Telecommunication Union (ITU)' in Max Planck Encyclopedia of Public International Law <www.mpepil.com> (last updated in 2014).

management, through measures such as the design of national emergency telecommunication plans, the setting up of early warning and monitoring systems or the provision of emergency telecommunications equipment in the immediate aftermath of a disaster. Part of its work on emergency telecommunications and disaster relief consists in the development of Resolutions, technical Standards and Recommendations to assist Member States in the use of telecommunication services and systems for disaster risk reduction, disaster management and humanitarian response.

Once every four years the ITU holds its plenipotentiary meeting, the most recent of which took place in Dubai (United Arab Emirates) between 29 October and 16 November 2018. Amongst the many decisions, resolutions and regulations adopted at the Dubai meeting, was Resolution 136 (Rev. Dubai, 2018) on ‘The use of telecommunications/information and communication technologies for humanitarian assistance and for monitoring and management in emergency and disaster situations, including health-related emergencies, for early warning, prevention, mitigation and relief’.⁴³ The Resolution builds upon previous Resolutions by the ITU, the World Telecommunication Development Conference (WTDC) and the World Radiocommunication Conference (WRC) concerning disaster prevention and management,⁴⁴ climate change⁴⁵ and cooperation among telecommunication regulators.⁴⁶

The document seeks to revise existing instruments, bringing them up-to-date with the most recent developments in the area of disaster prevention and management. For instance – in line with the recent stronger emphasis on disaster preparedness – it recognizes the important role played by telecommunications/ICTs in establishing early warning mechanisms. Mindful for the need for closer cooperation in disaster management, it invites the Union’s Secretary General to collaborate with OCHA, the United Nations Office for Disaster Risk Reduction, the World Food Programme, and with other

43 For the text, see International Telecommunication Union, Final Acts of the Plenipotentiary Conference Dubai, 2018 (2019), 260–270.

44 See Resolution 34 (Rev. Buenos Aires, 2017) of the WTDC on the role of telecommunications/ICT in disaster preparedness, early warning, rescue, mitigation, relief and response; and Resolution 646 (Rev.WRC-15) of the World Radiocommunication Conference (WRC), on public protection and disaster relief.

45 See Resolution 66 (Rev. Buenos Aires, 2017) of the WTDC, on ICT and climate change; and Resolution 182 (Rev. Busan, 2014) of the ITU Plenipotentiary Conference, on the role of telecommunications/information and communications technologies (ICTs) in regard to climate change and the protection of the environment.

46 See Resolution 48 (Rev. Buenos Aires, 2017) of WTDC, on strengthening cooperation among telecommunication regulators.

relevant organizations 'to enhance the Union's participation in activities related to emergency communications'.⁴⁷

While, according to the ITU Constitution, the Constitution itself and the ITU Convention of the International Telecommunication Union⁴⁸ are legally binding on Member States (Art. 4 ITU Constitution), the decisions, resolutions and recommendations adopted by the Union are non-binding agreements.⁴⁹ However, it has been argued that even non-binding decisions of the ITU are commonly accepted by its members as if they were binding, mainly due to their role as standard-setting tools.⁵⁰

47 Resolution 136 (Rev. Dubai, 2018) (n. 43) 266.

48 For the texts see Constitution and Convention of the International Telecommunication Union (with annexes and optional protocol), 22 December 1992.

49 It is worth remembering that, in order for any decision of an organ of an International Organization to be binding, a provision for such binding effect is required in the Organization's constitutive document; see Ingrid Detter, 'The Effect of Resolutions of International Organizations' in Jerzy Makarczyk (ed) *Theory of International Law at the Threshold of the 21st Century – Essays in Honour of Krzysztof Skubiszewski* (Brill 1996) 385.

50 Jens Hinricher, 'The Law-Making of the International Telecommunication Union (ITU) – Providing a New Source of International Law?', (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 489–501.