CAN INTERNATIONAL NORMS PROTECT US FROM NATURAL DISASTERS?

The panel was convened at 2:30 pm, Thursday, April 10, by its moderator, David Fisher of the International Federation of Red Cross and Crescent Societies, who introduced the panelists: Kirsten Bookmiller of Millersville University; Elizabeth Ferris of the Brookings Institution; Michael Gerrard of Columbia Law School; and Ingrid Nifosi-Sutton of American University Washington College of Law.

CAN INTERNATIONAL LAW SAVE US FROM DISASTERS? URBAN SEARCH AND RESCUE AND FOREIGN MEDICAL TEAMS ARE COUNTING ON IT!

By Kirsten Nakjavani Bookmiller[*]

INTRODUCTION

I am employing here a different entry point than traditionally seen within the public international law discipline regarding the question of whether international law can save us from disasters. I will discuss the efforts of the International Search and Rescue Advisory Group (INSARAG), and to a lesser extent, the nascent initiative by foreign medical teams (FMTs) to promote international legal standards related to cross-border relief. At first glance, this may appear to be a rather niche starting place for such a discussion. Yet I assert that by shedding light on the standard-setting efforts of INSARAG and FMTs, we gain greater insight into international law in general and specifically into international disaster response law (IDRL) in three different respects:

1. Both groups represent more atypical contributors to international lawmaking than commonly studied;

2. Their efforts together illustrate how soft law can address highly time-sensitive, practical challenges faced by responding and disaster-affected states related to transnational relief; and

3. When such standards reach their outer limits of efficacy, INSARAG's work, in particular, suggests that ongoing self-regulation (with United Nations facilitation) bolsters state confidence and therefore its willingness to open its borders to international relief.

As INSARAG has been in existence for over twenty years, and the FMT effort only began in earnest in 2011, I will primarily focus my observations here on the former.

INTRODUCTION TO INSARAG

A brief background is first required. Established in 1991, INSARAG is a worldwide professional network of over eighty urban search and rescue (USAR) teams and governments, with its secretariat housed at the United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA). Within the international humanitarian assistance field, USAR performs a very specific function: locating and extricating victims from collapsed structures. Within

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the first twenty-four hours of an event, local inhabitants and authorities are always the first to engage in search and rescue of victims trapped close to the surface. However, more deeply entombed victims will require an exceedingly specialized response, with few countries possessing such capability. This is where internationally available, ''heavy'' USAR may be of great value. Professional teams, with potentially over a hundred personnel each, arrive outfitted with sophisticated equipment for searching, retrieval, and pre-hospital medical support, and accompanied by trained search dogs. There is no standing United Nations capacity in this area.

USAR assistance, both domestic and international, emerged in tandem with the worldwide increase of ''megacities'' in the 1980s, with its corresponding construction boom in high-occupancy buildings. Two devastating earthquakes in the 1980s—Mexico City and Armenia—brought the issues of poorly constructed, high-density structures in seismically active zones to the forefront for the first time. USAR as a field had only recently begun to organize domestically in the United States and Western Europe. The loosely formed units were ill-trained to provide cross-border aid, with nine countries responding to Mexico City and double that number in Armenia. In both cases, the first international teams—with few mobilization protocols in place, vast distances to travel, and host governments that were nervous and sometimes hostile about customs, immigration, and countless other concerns—arrived in-country fifty plus hours after the quakes had taken place. Once there, total confusion reigned in the absence of any onsite coordination of arriving personnel or common rescue methodologies (fistfights even broke out over strategy between crews in Mexico). Subsequent studies determined that in Armenia, international USAR units had performed less than 1% of the live rescues, leading direct participants, relief analysts, and policymakers to question USAR's value.

AN EVOLVING FRAMEWORK OF ACTION: THE FOUR ''CS''

INSARAG was established in April 1991 under the auspices of the UN Disaster Relief Organization, against the larger backdrop of post–Cold War attention to disaster mitigation and response, including the launch of the International Decade for Natural Disaster Reduction in 1989, as well as global humanitarian response system reforms, most notably negotiations leading to the passage of UNGA Resolution 46/182 in December 1991. Since its inception, INSARAG's approach to strengthening its unique brand of international disaster relief can be characterized as the four ''Cs'': (1) coordination; (2) common methodology; (3) codification; and (4) classification. I will focus primarily on the third area, codification, but will also briefly address the others, as they have contributed to the sense of goodwill that INSARAG has cultivated with disaster-impacted states, enhancing its ability to enter an affected state when required.

Coordination and Common Methodology (1991–1999)

INSARAG's opening strategy was to improve overall deployment times and multinational coordination through technical self-regulation. INSARAG ultimately developed the United Nations Disaster Assessment and Coordination (UNDAC) framework, a rapid response mechanism involving a global roster of national and IGO-affiliated emergency management officials, and the On-Site Operations Coordination Center concept, providing a central rendezvous point for incoming international USAR teams. Together, these protocols pro-actively addressed issues that might impede the successful deployment of USAR personnel, including

needs assessment, customs and immigration negotiations, transportation logistics, and registration. These systems are now standard operating procedure for large-scale international relief operations, and the efforts have paid off, according to several studies.[1]

A different but equally important track to improving coordination has been the drafting and ongoing revision of the *INSARAG Guidelines and Methodology*. This document is a living handbook of common terms of reference and protocols for the transnational USAR community and for sending and recipient governments. Continually updated as the result of lessons learned in recent disasters, the latest revision was undertaken in 2012 and has grown to over two hundred pages in length.

Codification (1999–2002)

After four major 1999 earthquakes—two in Turkey, the others in Greece and Taiwan—INSARAG's efforts shifted away from its inward, technical focus to securing greater legal buy-in from states. Most national governments remained unfamiliar with INSARAG. For its part, Turkey had allowed UNDAC to set up, but mostly reached out bilaterally for international USAR assistance. Responders still faced numerous challenges at the point of entry in all four cases, including visa issuances, customs clearances, animal quarantines, and overflight permissions.

By the end of 1999, INSARAG's team leaders called for a ''USAR Convention,'' a recommendation supported by UN Secretary General Kofi Annan in his 2000 Report to ECOSOC. However, by 2001, the group adjusted its sights from a convention to a UNGA resolution. According to Arjun Katoch, a former INSARAG Secretary: ''it became fairly clear that the Governments of most countries were extremely unlikely to accept any legal framework that possibly involved ratification and amendment of their own laws. . . . The group took a wise decision to go for the achievable rather than the ideal.''[2]

On December 16, 2002, UNGA Resolution 57/150, ''Strengthening the Effectiveness and Coordination of International Urban Search and Rescue Assistance,'' was passed by consensus. The resolution accomplished multiple objectives simultaneously, including officially recognizing INSARAG and promoting wider state participation in its efforts; urging disaster-affected states to simplify border control procedures; recognizing the responsibility of USAR-contributing states in deploying suitable teams; and officially endorsing the *INSARAG Guidelines.*

Did INSARAG ''lose'' by not achieving the originally desired convention? Not at all, according to direct participants, asserting that the global attention garnered by Resolution 57/150's development and passage reaped immediate results in that an expanded pool of states were now aware of INSARAG and had begun to take the standards more seriously, even as soon as the 2003 Algerian earthquake occurring just five months later. Furthermore, the power of persuasion that the resolution held was more than a short-term bounce. According to Katoch:

> The beneficial effects of having 57/150 on the work of INSARAG cannot be overstated. It has given INSARAG and its Secretariat a master key to open doors in Governments . . . once they are informed that they themselves have signed up for it in a UN GA Resolution, the ''ownership'' issue is instantly resolved.[3]

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[1] *See, e.g.,* Costanza Adinolfi et al., Humanitarian Response Review 36 (August 2005), http://www.ennonline.net/humanitarianresponsereview.

[2] E-mail interview with the author (Oct. 8, 2013).

[3] *Id.*

Resolution 57/150 and the *Guidelines and Methodology* are now both recognized as constituent parts of IDRL. According to the defining survey conducted by the International Federation of the Red Cross/Red Crescent's David Fisher, INSARAG's contributions through Resolution 57/150 and the *Guidelines* have gone far to enhance the level of comfort among disaster-affected states related to response initiation, the transborder mobility of goods and equipment (particularly in relation to search dogs), and quality and accountability.[4]

Such soft-law instruments are in fact a cornerstone of IDRL. Yet the lack of formally binding instruments is not "equated to an absence of capabilities within IGOs and NGOs" pertaining to disaster relief, according to Professor David Fidler.[5] Professor Dug Cubie asserts that this may be attributed to the fact that such standards have "persuasive value when appeals for access to victims need to be made."[6]

Classification (2005–Present)

Following the initial success of Resolution 57/150, INSARAG's members continued to foster good faith with governments with the 2005 introduction of a peer-based evaluation and team classification system, known as International External Classification. It was designed to reduce the incoming flood of international teams of varying skill levels (including the notorious "disaster tourists" or "cowboys"), so that only the most able USAR teams would be deployed. It is the only classification system of its kind in the international humanitarian response system.

The INSARAG Model and Foreign Medical Teams

USAR personnel are not the only domestic-based emergency services personnel who may deploy on an episodic basis to international disasters. Emergency medical professionals—both doctors and nurses—also respond to the call. In 2011, the World Health Organization (in conjunction with the Global Health Cluster) established a new working group focusing on classifying individuals, establishing professional standards, and developing registration procedures for foreign medical teams. WHO was galvanized to act after numerous problems were observed during the responses to the 2010 Haitian earthquake and Pakistan floods in terms of training levels, professionalism, and coordination among medical personnel arriving from abroad.

The INSARAG model was used as an explicit template for this new initiative. While there are many substantive differences between the USAR and emergency medical fields—including the wider variety of actors involved on the medical side, domestic credentialing requirements, and the longer duration of in-country service—those involved in the FMT effort firmly believe that INSARAG's experience related to classification, coordination, and standard-setting is invaluable. At this juncture, there has been no discussion similar to INSARAG's in the late 1990s related to a sectorial convention or resolution; however, Arjun Katoch feels strongly that a 57/150-like resolution would be very advantageous for WHO as well, perhaps even more so than for INSARAG:

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[4] International Federation of Red Cross and Red Crescent Societies, Law and Legal Issues in International Disaster Response: A Desk Study 91, 113, 139 (2007).

[5] David P. Fidler, *Disaster Relief and Governance After the Indian Ocean Tsunami: What Role for International Law?* 462 (Maurer School of Law, Faculty Publication No. 398, 2005), *available at* http://www. Repository.law. indiana.edu/facpub/398.

[6] Dug Cubie, *An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?* 2 Journal of Int'l Humanitarian Legal Stud. 177, 214 (2011).

[T]he world has changed since 2002, and certainly not for the better. Issues such as Responsibility to Protect and the theory of humanitarian intervention have created an immense amount of suspicion in the minds of developing countries about hidden agendas behind humanitarian initiatives. Therefore, in my view, getting a UN GA Resolution such as 57/150 on the FMT initiative is almost an inescapable requirement for it to be effective.[7]

How Can International Human Rights Law Protect Us from Disasters?

By Elizabeth Ferris[*]

People do not lose their rights when disasters strike. In the past decade, there has been growing awareness of the relevance of international human rights law to prevention, response, and recovery from disasters. While the Convention on the Protection of Persons with Disabilities is the only human rights treaty explicitly to reference disasters, the applicability of human rights law to disasters is receiving greater attention from both the scholarly community[1] and intergovernmental bodies at the regional and international levels. The International Law Commission is working on Draft Articles on the Protection of Persons in the Event of Disasters and affirms that ''[p]ersons affected by disasters are entitled to respect for their human rights.''[2] As Walter Kälin points out, UN treaty bodies are increasingly taking up issues related to disasters in carrying out their monitoring duties.[3] The UN Human Rights Council, for the first time, devoted a special session to human rights issues arising from a natural disaster: the Haitian earthquake of 2010. Presently, the Human Rights Council is engaged in further work on the relationship between the promotion and protection of human rights in post-disaster and post-conflict situations.[4]

While there are many entry points to the issue of the relationship between human rights law and disasters, my remarks will highlight four different ways that international human rights law is being used to strengthen efforts at prevention, response, and recovery from disasters:

- The use of legal remedies as a way of holding governments accountable when they fail to prevent or reduce the risk of disasters;

- The use of international human rights law relating to gender as a way of understanding how gender should be incorporated into all phases of disaster risk management;

- The use of primarily ''soft'' international law as reflected in the Guiding Principles on Internal Displacement, as a way of upholding the rights of those displaced by disasters;

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[7] E-mail interview, *supra* note 2.

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[1] *See, e.g.,* Erica Harper, International Law and Standards Applicable in Natural Disaster Situations (2009); Walter Kälin, *The Human Rights Dimension of Natural or Human-Made Disasters*, 55 Ger. Y.B. Int'l L. 119–47 (2012).

[2] International Law Commission (ILC), Draft Articles on the Protection of Persons in the Event of Disasters, esp. arts. 6,7, 8 & 9, UN Doc. A/CN.4/L.776 (2010). For a listing of all relevant ILC documents, see http://legal.un.org/ilc/guide/6_3.htm.

[3] Kälin, *supra* note 1, at 127–28; *see also* Eduardo Valencia-Ospina, *Sixth Report on the Protection of Persons in the Event of Disasters,* 14–19, UN Doc. No. A/CN.4/662 (2013).

[4] Promotion and Protection of Human Rights in Post-Disaster and Post-Conflict Situations, G.A. Res. 22/16, UN Doc. A/HRC/RES/22/16 (Apr. 10, 2013), www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/A-HRC-RES-22-16_en.pdf.