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INTERNATIONAL LAW IN THE NEXT TWO DECADES:  
FORM OR SUBSTANCE?  
SPECIAL ISSUE EDITORS: PETRA BUTLER AND  
ALBERTO COSTI

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# INTERNATIONAL CLIMATE LAW AND THE PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

*Teresa Thorp\**

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*This article contextualises the first principles of international climate law and proposes how to mobilise them to protect people in the event of disasters. Normative contextualisation may help to grasp the nettle of the adverse effects of climate change as a global commons problem; and it helps to appreciate why legitimising a unified and universal approach to disaster prevention, preparedness, response and recovery is worthy of consideration. Although important, the scope of this article does not extend to legislative or institutional solutions per se. Debating governance issues when flooding, drought, salinity ingress or a storm surge hits, is probably not the best time for rushing through parliamentary decisions. Many institutions provide disaster relief and better co-ordination of their activities is clearly necessary. Work is proceeding in these areas. Notwithstanding, work towards developing a globally cohesive normative agenda is scant. The need for cohesive normative international governance is not so evident when states are capable of responding to isolated small-scale disasters. Under certain conditions, local institutions may already have the necessary laws, systems and resources at their disposal. When multi-dimensional actors and institutions prepare for, and respond to, multi-faceted disasters, or disasters involve cross-border dimensions, then giving meaning and purpose to a unified body of normative "trans-centric" first principles is essential if the global community is to govern disasters in a more effective way. Directing informal ad hoc responses to disasters and developing diverse regional standards is one way. Unifying interdependent legal processes to govern human dignity through the facilitation of new insurance mechanisms is another. This article focuses on the latter. It flags why discourse on*

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\* Head of Climate Law & Policy, Insight International; Researcher Environmental Law, Institute for Constitutional and Administrative Law, Centre for Environmental Law and Policy/Netherlands Institute for the Law of the Sea, Faculty of Law, Economics and Governance, Utrecht University, The Netherlands. This article is an update of an earlier version written in 2011 for the 20th Annual Conference of the Australian and New Zealand Society of International Law held in Wellington, 5-7 July 2012. The 2011 paper proposed developing a universal climate process *applicable to all*. The paper was presented under the title "Giving Meaning and Purpose to the Normative Principles of International Climate Law to Improve Governance in Times of Natural Disasters".



*normative co-ordination is worthwhile; it proposes a new process/model/theory; and it sets out a framework for a cohesive approach and structured dialogue that could feed into negotiating post-2015 climate, disaster risk reduction and development agreements.*

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## **I INTRODUCTION**

### **A Definitions and Meaning**

The words "disaster" and "natural disaster" have always conveyed different meanings to different people. Perceptions are malleable. For the purposes of this article, "disasters" refer to "situations of calamity due to *force majeure* [an act of God]".<sup>1</sup> "Public" disasters concern public misfortunes.<sup>2</sup> A "natural disaster" refers to a disaster that has its proximate cause in an environmental event or physical phenomenon, such as an earthquake, flood, heat wave or hurricane.<sup>3</sup>

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1 Peter MacAlister-Smith "The International Relief Union of 1932" (1981) 5 *Disasters* 147 at 148.

2 A similar language was used by virtue of art 3 of the *International Relief Union Statutes* (1926) 7 *League of Nations Official Journal* 348 at 348.

The disasters referred to in these Statutes in respect of which first aid is to be given shall be interpreted as meaning public misfortunes due to *force majeure* [an act of God], the exceptional gravity of which exceeds the limits of the powers or resources of the stricken people.

3 The International Federation of Red Cross and Red Crescent Societies [IFRC] defines "disaster" at <[www.ifrc.org](http://www.ifrc.org)> as a:

... sudden, calamitous event that seriously disrupts the functioning of a community or society and causes human, material, and economic or environmental losses that exceed the community's or society's ability to cope using its own resources. Though often caused by nature, disasters can have human origins ...

For the Intergovernmental Panel on Climate Change, disasters are:

... severe alterations in the normal functioning of a community or a society due to hazardous physical events interacting with vulnerable social conditions, leading to widespread adverse human, material, economic, or environmental effects that require immediate emergency response to satisfy critical human needs and that may require external support for recovery.

See Christopher B Field and others (eds) *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change (IPCC)* (Cambridge University Press, Cambridge (UK), 2012) at 5. The Centre for Research on the Epidemiology of Disasters (CRED) classifies natural disasters as biological, geophysical, hydrological, meteorological or climatological disasters. It makes a distinction between "natural" and "technological" disasters in Regina Below, Angelika Wirtz and Debarati Guha-Sapir "Disaster Category Classification and Peril Terminology for Operational Purposes" (CRED and Munich Reinsurance Company, Working Paper 264, 2009) at 4.

## ***B Why Introduce a Unified Process to Protect Persons in the Event of Disasters?***

"Natural" disasters have plagued the world from time immemorial. Mount Vesuvius erupted in AD 79 and destroyed the cities of Pompeii and Herculaneum.<sup>4</sup> The black plague ravaged Europe in the Middle Ages and altered European demographics.<sup>5</sup> Natural disasters are not new but exposure to more intense, frequent and complex climate extremes seems to be increasing. The subject is topical because the implications have profound effects for individuals and society as a whole.

Unprecedented climatic extremities and dramatic climate-related disasters marked the first decade of the 21st century. It was the warmest decade on record since modern measurements began around 1850.<sup>6</sup> The European heat wave of 2003 caused more than 66,000 deaths.<sup>7</sup> The Asian tsunami of 2004 triggered a seabed rise of up to five metres in some places,<sup>8</sup> limited access to drinking water and sanitation<sup>9</sup> and affected regional groundwater sources.<sup>10</sup> In 2005, Hurricane Katrina was the deadliest hurricane to strike the United States of America since 1928.<sup>11</sup> From 2009–2010, the Russian Federation, North America (the United States being particularly noteworthy) and parts of Asia experienced an extremely cold winter. An intense long-lasting heat wave struck the Russian Federation in 2010 and caused over 55,000 deaths.<sup>12</sup> A pre-monsoon heat wave brought a record temperature of 53.5°C to Mohenjo Daro in Pakistan in 2010 and with it the highest temperature in Asia since at least 1942.<sup>13</sup> According to the World Meteorological

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4 Centre for Environment Education, South Asia Youth Environment Network Secretariat and Swiss Agency for Development and Cooperation *Understanding Disasters: Internship Series* (Centre for Environment Education, 2007) vol III at 7.

5 See generally Marilyn Sandidge "Forty Years of Plague: Attitudes toward Old Age in the Tales of Boccaccio and Chaucer" in Albrecht Classen (ed) *Old Age in the Middle Ages and the Renaissance: Interdisciplinary Approaches to a Neglected Topic* (Walter de Gruyter, Berlin, 2007) 357.

6 World Meteorological Organization *The Global Climate 2001–2010: A Decade of Climate Extremes – Summary Report* (Geneva, 2013) at vi, 2 and 92.

7 At 7.

8 See Sisira Jayasuriya and Peter McCawley *The Asian Tsunami: Aid and Reconstruction after a Disaster* (Asian Development Bank and Edward Elgar, Cheltenham (UK), 2010) at 1.

9 At 103.

10 See Gabriel E Eckstein "Commentary on the UN International Law Commission's Draft Articles on the Law of Transboundary Aquifers" (2007) 18 *Colo J Intl Env'tl L & Poly* 537 at 605.

11 World Meteorological Organization, above n 6, at 12.

12 At 8.

13 At 9.

Organization, "the world's glaciers lost more mass in 2001–2010 than in any decade since records began".<sup>14</sup>

Long-term droughts in the Amazon Basin, Australia and East Africa, and an unprecedented melting of Arctic sea ice cover, blighted the first decade of the 21st century. The trend continues into the second decade. In October 2012, Hurricane Sandy blasted America's east coast with strong gales and catastrophic flooding. Hurricane Sandy "left 181 people dead from the Caribbean to Canada".<sup>15</sup> In June 2013, heavy precipitation triggered devastating flash floods and massive landslides that obliterated entire villages in the North Indian states of Uttarakhand and Himachal Pradesh, and some regions of Western Nepal.<sup>16</sup>

China has also been subject to severe weather events. The National Development and Reform Commission of the People's Republic of China reports:<sup>17</sup>

Since 2012, China has suffered from frequent extreme weather conditions. Many areas in the south have experienced extremely high temperatures, and there have been increased urban, regional and mountain floods, landslides and mudslides. Many typhoons have hit land at the same time, affecting a broad area. Frequent storm surges have caused great damage. For the past four consecutive years there have been moderate to severe droughts in central and north-western Yunnan Province, taking a heavy toll on agriculture and people's lives.

The statistics alone compel attention; but it is the potential failure to protect human life which requires urgent normative solutions and decisive collective action. The inventory of disastrous events is selective; but it shows "that no country or city – rich or poor – is immune".<sup>18</sup> Disasters strike indiscriminately. They strike the most developed and best-prepared countries as well as the poorest and most vulnerable ones.

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14 At 13.

15 "Superstorm Sandy's Victims" (9 November 2012) CNN <<http://edition.cnn.com>>.

16 See "India floods: Rescue Operations Resume in Uttarakhand" (26 June 2013) BBC News India <[www.bbc.co.uk](http://www.bbc.co.uk)>: "Nearly 100,000 people have been evacuated from the affected areas in Uttarakhand"; and "Uttarakhand Floods: 5,000 May Be Killed, Says Govt" (23 June 2013) The Indian Express <[www.indianexpress.com](http://www.indianexpress.com)>.

17 The National Development and Reform Commission, The People's Republic of China *China's Policies and Actions for Addressing Climate Change (2013)* (2013) at 1.

18 Ban Ki-moon "Opening Statement" (Third Session of the Global Platform for Disaster Risk Reduction and World Reconstruction, Geneva, 10 May 2011). The CRED maintains a global database on natural and technology disasters. The EM-DAT database contains core data of more than 17,000 disasters around the world from 1900 to present: CRED "EM-DAT: The International Disaster Database" <[www.emdat.be](http://www.emdat.be)>.

## C *Scientific Assessments*

The intensity and frequency of natural disasters are consistent with climate change science.<sup>19</sup> However, throughout the last decade, the extent to which the root causes of these disasters is "purely natural" or "man-made" has been uncertain and disputable. Scientific assessments are improving. A final draft of Working Group I's contribution to the Intergovernmental Panel on Climate Change's fifth assessment report may reinforce the scientific conclusion that human activity is a dominant feature.<sup>20</sup> According to an Intergovernmental Panel on Climate Change press release of 27 September 2013:<sup>21</sup>

Human influence on the climate system is clear. This is evident in most regions of the globe, a new assessment by the Intergovernmental Panel on Climate Change (IPCC) concludes.

It is extremely likely that human influence has been the dominant cause of the observed warming since the mid-20th century. ...

Warming in the climate system is unequivocal and since 1950 many changes have been observed throughout the climate system that are unprecedented over decades to millennia.

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19 See generally Intergovernmental Panel on Climate Change *Climate Change 2007: The Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge (UK), 2007) [*Climate Change 2007*].

20 Intergovernmental Panel on Climate Change *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge (UK), in press). See "Final Draft (accepted)" Intergovernmental Panel on Climate Change <[www.climatechange2013.org](http://www.climatechange2013.org)>:

The Final Draft Report, dated 7 June 2013, ... was accepted but not approved in detail by the Twelfth Session of Working Group I and the Thirty-Sixth Session of the IPCC on 27 September 2013 in Stockholm, Sweden. It consists of the full scientific and technical assessment undertaken by Working Group I.

The Final Draft Report has to be read in conjunction with the document entitled "Climate Change 2013: The Physical Science Basis. Working Group I Contribution to the IPCC 5th Assessment Report – Changes to the Underlying Scientific/Technical Assessment" to ensure consistency with the approved Summary for Policymakers (IPCC-XXXVI/Doc.4) and presented to the Panel at its Thirty-Sixth Session. ...

Publication of the Report is foreseen in January 2014.

The report has to be read in conjunction with the document entitled *Climate Change 2013: The Physical Science Basis – Working Group I Contribution to the 5th Assessment Report – Changes to the underlying Scientific-Technical Assessment* to ensure consistency with the approved *Summary for Policymakers* IPCC XXVI/Doc 4 presented to the Panel at its 36th session.

21 Intergovernmental Panel on Climate Change "Human influence on climate clear, IPCC report says" (press release, Stockholm, 27 September 2013).

Negotiations towards a post-2015 climate accord should respond to scientific advances, including understandings to be set out in the Intergovernmental Panel on Climate Change's fifth assessment report. A summary of that report is due for finalisation in October 2014. In the meantime, it would be inappropriate to rationalise the findings herein by citing the Intergovernmental Panel on Climate Change's draft report. Besides being an embargoed draft, legal causation differs from scientific causation. Despite scientific uncertainty, negotiating legal decision-making processes ought to proceed due to a duty to protect persons in the event of disasters. This point has its difficulties.

To quote a 2010 report of the United Nations Environment Programme:<sup>22</sup>

... experts estimate that emissions need to be around 44 Gt of CO<sub>2</sub> equivalent by 2020 to have a likely chance of pegging temperatures to 2°C or less.

However, if only the lowest ambition pledges are implemented, and if no clear rules are set in the negotiations, emissions could be around 53 Gt of CO<sub>2</sub> equivalent in 2020 – not that different from business as usual – so the rules set in the negotiations clearly matter.

Irrespective of negotiating under difficult conditions concerning scientific uncertainty, taking concrete actions in a cohesive way remains central to implementing national disaster prevention and mitigation plans. The absence of a higher degree of scientific precision does not necessarily justify inertia. National impact assessments outlining adaptation measures at social, cultural, economic, eco-civilisation and policy levels should still align *first principles* to consequential rules. That national authorities develop and agree to a cohesive process by which to reach consensus on a unified normative framework to facilitate consequential rules is pivotal for a number of other reasons. Normative consensus should advance planning, systems and working mechanisms at all levels. By extension, this article also argues that governance issues at the regional level should extend well beyond the narrow confines of mitigation. Reflection on these issues may occur statically, in isolation from the broader legal system; or they may evoke the need for launching an agreed process/model/theory, which jurists refer to as doctrine. Protecting human livelihoods from climate-related disasters, while developing the green economy and promoting sustainable development, poses an increasingly prominent doctrinal challenge for the global community.

### ***D Doctrinal Challenges***

Enormous normative challenges remain. On considering the protection regime in its broader context, international law currently falls well short of being able to prepare for, and respond to, climate-related disasters. It is highly doubtful whether the Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) will achieve the Convention's

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22 United Nations Environment Programme *The Emissions Gap Report: Are the Copenhagen Accord Pledges Sufficient to Limit Global Warming to 2° C or 1.5° C? – A preliminary assessment* (Nairobi, 2010) at 3.

ultimate objective without developing a dynamic way of interpreting and applying international law. Achieving the UNFCCC's objective does not reside in isolation from the broader dynamics of other regimes, sustainable economic development included.<sup>23</sup>

The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

In a similar way, governing climate-related harms ought to entail a dynamic systematic process to protect persons in the event of disasters. This perspective on responding to a systematic normative problem with a systematic normative solution is consistent with other findings. Many local repercussions from climate-related disasters manifest from a failure to govern multi-faceted, multi-nodal and multi-actor problems in the global commons. Fast tracking the regional harmonisation of seemingly ad hoc or informal insurance standards is unlikely to resolve these issues by ignoring them. It is unlikely to resolve them in the absence of an agreed process/model/theory.

In short, governing a global commons problem that concerns protecting persons in the event of disasters may require a shared process *applicable to all* so that society as a whole may mitigate and adapt to the worst effects of climate change. Without a shared process/model/theory, there is no evidence that a global outcome with legal force is within reach. Various multifarious framework approaches may even undermine the intended objective: national gains in one area may offset losses in another.

This article aims to widen and sharpen the focus on the complexity of governing a dynamic normative climate-disaster nexus. It proposes a "first principles" approach and examines consequential commitments that may derive therefrom. It finds that significant protection gaps exist in the global commons. These gaps have ramifications for protecting persons in the event of disasters. Several ramifications fall outside the bounds of established inter-state or inter-regional laws. In response, this article emphasises the pressing duty to legitimise and "realise" a coherent process *applicable to all*.

### ***E Towards "Launching a Process" Applicable to All***

By the end of 2011, the UNFCCC Conference of the Parties had also recognised the need for due process when deciding to:<sup>24</sup>

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23 United Nations Framework Convention on Climate Change 1771 UNTS 107 (adopted 9 May 1992, entered into force 21 March 1994), art 2 [UNFCCC].

... launch a process to develop a protocol, another legal instrument or a legal outcome under the Convention applicable to all Parties, through a subsidiary body under the Convention hereby established and to be known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action.

The decision to "launch a process" vis-à-vis "ratify a new protocol" has a distinctive meaning. Negotiating parties are making positive efforts to reach an agreement by no later than 2015, but they are not necessarily working towards launching a cohesive normative process. In consideration of the 2015 target, key stakeholders are making important drafting contributions at domestic, regional and international levels. Significant effort is required to consolidate those contributions so that an agreed outcome with legal force may come into effect in, and be ready for implementation from, 2020.

With these pressing timeframes in mind, this article addresses a most glaring gap. It pays attention to launching a principled process before drafting national positions on diverse rules and standards. In reversing current thinking on the subject, the first phase of building architecture to protect present and future generations of humankind may entail designing a unified process from the dynamism of a "first principles" approach. This approach, as suggested here, rejects unfounded legal arguments about remote industrial historical responsibility. It sidesteps pitting people in the North against those in the South. It bypasses improvised donor-recipient debates. It considers governing the dynamics of normative interaction by unifying the aspiration of all nations to tackle climate-related disasters for the benefit of all people. I hope that the shared normative process proposed herein will make a significant contribution to developing an agreed outcome on post-2015 climate, disaster and development agreements.

The article tackles a series of complex issues by drawing attention to the importance of governing a normative nexus between climate, disaster and development in post-2015 agreements. It highlights the rationale for developing a normative process on the basis of "already agreed" first principles, such as equity and solidarity. The article also shows how a new form of constitutionalism, one founded on a "first principles" approach, may facilitate harmonisation pathways to resolve the current untidy patchwork of negotiating machinery and individual relativism that do not naturally lead to an agreed outcome with legal force under the UNFCCC.

### ***F Overview of Structure***

The article contextualises these challenges in the following sequence. It explains why understanding the climate-disaster nexus is important in the first place. (Climate change is a factor that aggravates disasters.) The article then assesses how to govern the climate-disaster nexus by highlighting "already agreed" first principles that could govern international climate law. (International climate law has its own static normative framework of dynamic norms.) Next, the article features highlights of the normative frameworks that govern international disaster law, again

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24 UNFCCC Conference of the Parties *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action – Proposal by the President FCCC/CP/2011/L.10* (2011) at [2].

from a more or less static perspective. It then draws these two strands together: it proposes how to unify and strengthen the dynamic climate-disaster normative nexus; and it illustrates several concrete actions to help implement the results.

Static perspectives are essentially academic. Nevertheless, a snapshot in time helps to isolate the investigation to critical points and is useful for explanation. The article shows that kaleidoscopic normative interaction depicts a more realistic framework, but the dynamics are far more complex. Dynamic normative interaction is uncertain because it is forever changing. Understanding how to govern dynamic legal systems would, therefore, benefit from a certain type of complex system modelling. In parallel, implementation must be practical for institutions and people working on the ground. The process/model/theory proposed herein introduces one such network model. The design of a "first principles" approach postulates a unified and universal process to govern climate-related disasters. It contextualises dynamic normative interaction and it uses unified elements and constructs to govern the normative nexus. This paper presents a brief summary of the proposed process/model/theory.

Contextualisation starts by identifying the normative nexus under examination. To anchor an explanation, the article concentrates on the climate-disaster nexus first. To analyse the dynamics, the inquiry places a kaleidoscopic lens on the interactions between first principle norms at that nexus.

The article then flags the existence of a more complex normative nexus and shows how to bring this nexus into the analytical frame. It uses the climate-disaster-water nexus as an example. A unified and universal governance approach to a new form of constitutionalism, labelled a "first principles" approach, could reach out to govern other dynamic normative interactions as well. For brevity, examples are simplified and scenario-based. The article uses them as vehicles for illustration and explanation.

## ***G Outline***

The article comprises five parts. It moves directly from the introduction to present the context and rationale for normative cohesion in Part II. Part III presents baseline-unifying principles of international climate law, which I have introduced elsewhere and still refer to as "first principles".<sup>25</sup> Part IV shows how the first principles of international climate law relate to, and interact with, the first principles of international disaster law. Part V synthesises the key findings, highlights the importance of "constitutionalising" a cohesive "first principles" approach, as opposed to "informal frameworks for various approaches", and it offers some further suggestions to enhance the negotiating process.

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25 See Teresa Thorp "Climate Justice: A Constitutional Approach to Unify the *Lex Specialis* Principles of International Climate Law" (2012) 8 Utrecht Law Review 7.



## **II CONTEXT AND RATIONALE FOR A COHESIVE GLOBAL PROTECTION ORDER**

### **A Disaster and Climate Risk Pose Governance Challenges in the Global Commons**

United Nations Secretary-General Ban Ki-moon expressed concerns about governing disasters at the Global Platform for Disaster Risk Reduction Conference in May 2011.<sup>26</sup> He emphasised three key points. First, efforts to advance work in disaster risk reduction and efforts to respond to weather-related disasters stemming from global climate change must speed up. Secondly, there should be a broader coalition for action. People must work together to create communities of resilience. Thirdly, "no development effort will be equitable or sustainable unless disaster and climate risk measures are a part of the picture".<sup>27</sup>

Climate change aggravates natural disasters. The Intergovernmental Panel on Climate Change concurs: there are "greater impacts of extreme events on sectors with closer links to climate, such as water, agriculture and food security, forestry, health, and tourism."<sup>28</sup> Upon weighing the leading points of evidence, Margareta Wahlström concluded in 2009 that "in coming decades, [climate change] will become one of the primary drivers of disaster risk".<sup>29</sup>

Climate change is a global commons problem when its adverse effects seep across borders. The Intergovernmental Panel on Climate Change points to a number of difficulties in governing disaster risk in the global commons:<sup>30</sup>

In addition to the UNISDR [United Nations International Strategy for Disaster Reduction] and the UNFCCC, other areas of international law and practice are being used to address climate change adaptation and disaster risk management. The relationship between legal aspirations and obligations in these areas of international action and management is complex and neither is well understood or agreed upon (*high confidence*).

It is, therefore, hardly surprising that developing a co-ordinated legal response to manage natural disasters is challenging.<sup>31</sup> John Holmes (United Nations Under Secretary-General for Humanitarian

26 Ki-moon, above n 18.

27 Ki-moon, above n 18.

28 Field and others, above n 3, at 16.

29 Margareta Wahlström "Disaster Risk and Its Reduction: Who is Responsible?" (2009) 33 *Fletcher Forum of World Affairs* 153 at 155.

30 Ian Burton and others "Managing the Risks: International Level and Integration across Scales" in Field and others, above n 3, 393 at 396.

31 See generally Richard A Posner *Catastrophe: Risk and Response* (Oxford University Press, New York, 2004).

Affairs and Emergency Relief Coordinator (2007–2010)) reflected similar sentiments when he recalled the difficulty that states and the international community experienced in responding to the sheer scale of the 2010 Haitian earthquake and Pakistani floods:<sup>32</sup>

It became clearer that the international system as it then stood was not really a system at all ... the inevitable fragmentation of the "system" as it currently stands has once more been exposed ...

While this article does not delve into the issue of normative fragmentation, it does argue that exposure to an increasing frequency, intensity and complexity of climate extremes and disasters may compound exposure to "disorientation" in the rule of law.

### ***B Evolving Exposure to a Disoriented International System***

Statistics recording the frequency, intensity and complexity of climate extremes and disasters are accumulating. According to an Intergovernmental Panel on Climate Change study:<sup>33</sup>

The United Nations Office for the Coordination of Humanitarian Affairs and the Internal Displacement Monitoring Centre have estimated that around 20 million people were displaced or evacuated in 2008 because of rapid onset climate-related disasters.

Moreover, "physical exposure ... to tropical cyclones is estimated to have increased from approximately 73 million in 1970 to approximately 123 million in 2010".<sup>34</sup> In citing the United Nations International Strategy for Disaster Reduction (UNISDR), the Intergovernmental Panel on Climate Change study elaborated further: "about 800 million people are currently living in flood-prone areas, and about 70 million people currently living in flood-prone areas are, on average, exposed to floods each year".<sup>35</sup> The study estimated that "[b]eyond 2060, ... at least 300 million people could be affected by substantial flooding even in years with relatively low flooding".<sup>36</sup> The

32 John Holmes "Humanitarian Response in the 21st Century" (2011) 17 *Brown Journal of World Affairs* 113 at 114–115.

33 United Nations Office for the Coordination of Humanitarian Affairs and International Displacement Monitoring Centre *Monitoring disaster displacement in the context of climate change* (Geneva, 2009) at 12 and 15 as cited in Omar-Dario Cardona and others "Determinants of Risk: Exposure and Vulnerability" in Field and others, above n 3, 65 at 80.

34 John Handmer and others "Changes in Impacts of Climate Extremes: Human Systems and Ecosystems" in Field and others, above n 3, 231 at 240.

35 At 241 (referring to United Nations International Strategy for Disaster Reduction [UNISDR] *Global Assessment Report on Disaster Risk Reduction: Revealing Risk, Redefining Development* (Geneva, 2011) [*Revealing Risk, Redefining Development*]).

36 Handmer and others, above n 34, at 244. See also Thomas Kleinen and Gerhard Petschel-Held "Integrated assessment of changes in flooding probabilities due to climate change" (2007) 81 *Climatic Change* 283.

Centre for Research on the Epidemiology of Disasters reveals an exponential increase in the number of natural disasters reported between 1900 and 2011.<sup>37</sup>

Disasters are not new but the consequences of spills, chronic pollution, tsunamis, landslides and earthquakes are seemingly more frequent and intense.<sup>38</sup> Many disasters manifest in multiple events.<sup>39</sup> The Intergovernmental Panel on Climate Change links climate to other hazards, such as earthquakes. Cited studies suggest increases in seismicity at the end of the last glaciations.<sup>40</sup> Ice reduction may increase seismicity when earthquake faults are at the threshold of failure.<sup>41</sup> Climate change may also aggravate cyclones, tsunamis and ocean acidification.

The frequency, intensity and multi-faceted nature of disasters reinforce the need for effective national, regional and international co-ordination, collaboration and legal coherence. A good example is Hurricane Sandy. In Bangladesh, acts of God, such as floods, salinity ingress, erosion, cyclones and storm surges often result in disastrous consequences.<sup>42</sup> Oceania is not immune: Australia and New Zealand have also suffered the effects of natural disasters. These are localised examples but they all have global ramifications for the international legal order.

### ***C Global Consequences for Human Security, Prosperity and Posterity***

The global ramifications of climate-related disasters may influence political, social, cultural, economic and eco-civilisation stability, all of which have consequences for human security, prosperity and posterity. The 2010 eruptions of the Eyjafjallajökull volcano in Iceland had far-reaching political, social and economic consequences. Drought and bush fires in Russia, Ukraine

37 See CRED, above n 18.

38 Burton and others, above n 30, at 398–399.

39 Field and others, above n 3, at 16–17.

40 See for example Iain S Stewart, Jeanne Sauber and James Rose "Glacio-seismotectonics: Ice sheets, crustal deformation and seismicity" (2000) 19 *Quaternary Science Reviews* 1367; and Robert Muir-Wood "Deglaciation seismotectonics: A principal influence on intraplate seismogenesis at high latitudes" (2000) 19 *Quaternary Science Reviews* 1399 (referred to in Sonia I Seneviratne and others "Changes in Climate Extremes and their Impacts on the Natural Physical Environment" in Field and others, above n 3, 109 at 188).

41 See for example Jeanne M Sauber and Bruce F Molnia "Glacier ice mass fluctuations and fault instability in tectonically active Southern Alaska" (2004) 42 *Global and Planetary Change* 279; and Diane I Doser, Katy R Wiest and Jeanne Sauber "Seismicity of the Bering Glacier region and its relation to tectonic and glacial processes" (2007) 439 *Tectonophysics* 119 (referred to in Seneviratne and others, above n 40, at 188).

42 See generally World Bank "The Social Dimensions of Adaptation to Climate Change in Bangladesh" (Discussion paper No 12, 2010).

and Kazakhstan have led to spikes in global food prices and could have fuelled spring uprisings in other parts of the world.<sup>43</sup>

Disasters may disrupt food supply chains and relief services. Economic losses may lead to social and cultural upheaval if appropriate measures are not in place.<sup>44</sup> Reporting on loss and damage in 2012, UNISDR stated that:<sup>45</sup>

Between 2002 and 2011, there were 4130 disasters recorded, resulting from natural hazards around the world where 1,117,527 people perished and a minimum of US\$1,195 billion was recorded in losses. In the year 2011 alone, 302 disasters claimed 29,782 lives; affected 206 million people and inflicted damages worth an estimated US\$366 billion.

The ramifications are vast. They often span complex supply chains and spread throughout the disaster management cycle. Whether "acute" or "slow" in their onset, the ramifications complicate the capacity to respond to disasters and may diminish state capacity. Issues concerning state capacity in this regard often trigger a controversial debate about sovereignty versus a global duty to protect people.

### ***D A Shared Commitment to Protect Humanity***

Another reason for building a cohesive global protection order is to avoid institutional clumsiness on the ground. Many disaster relief agencies are now global in scope, but their actions may overlap or not consider unique local characteristics. Many countries make honourable pledges to support those suffering from climate-related harm, but questions remain about institutional cohesion, effective co-operation and implementation. At the same time, civil society intervention may unintentionally impinge on sovereignty. Finding the right balance between a shared commitment to protect humanity and sovereignty is clearly important. Developing the modalities by which to achieve this outcome is less clear.

The International Federation of Red Cross and Red Crescent Societies (IFRC) has made strides in this area by strengthening community capacity and disaster risk reduction at the centre of the disaster management cycle. Founded in 1919, the IFRC co-ordinates national societies and manages

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43 See generally Sarah Johnstone and Jeffrey Mazo "Global Warming and the Arab Spring" (2011) 53 *Survival, Global Politics and Strategy* 11; and Sarah Johnstone and Jeffrey Mazo "Global Warming and the Arab Spring" in Caitlin E Werrell and Francesco Femia (eds) *The Arab Spring and Climate Change: A Climate and Security Correlations Series* (Centre for American Progress, Stimson, The Centre for Climate and Security, 2013) 15.

44 See generally Debarati Guha Sapir *The Economic Impacts of Natural Disasters* (Oxford University Press, Oxford, 2012); and UNISDR "Towards a Post-2015 Framework for Disaster Risk Reduction" (2012) <[www.unisdr.org](http://www.unisdr.org)> at [12] ["Towards a Post-2015 Framework"].

45 UNISDR "Towards a Post-2015 Framework", above n 44, at [8].

large-scale relief assistance missions.<sup>46</sup> The International Committee of the Red Cross, founded in 1863, is a private humanitarian organisation holding a special authority and responsibility under international humanitarian law to protect the life and dignity of victims of international and internal armed conflicts.<sup>47</sup>

Disaster cycle management is important but it does not necessarily provide a universal or unifying normative framework for disaster law. Logic dictates the opposite: a unifying international legal framework should govern and trigger operationalization of the "disaster management cycle". In other words, effective "disaster cycle management" is a consequence of an effective normative framework that underpins human security in the event of disasters. Some states recognise these issues. In 2009, in view of the extent of national calamities, including worsening desertification and climate change, Kenya established an institutional, policy and legal framework to manage the full cycle of disasters.<sup>48</sup>

Concrete localised actions are required on the ground but other issues concerning the extent to which a state transfers certain competencies to the regional and international spheres still require attention. Changing global dynamics make people more aware of the implications as evidenced in changing lifestyle choices and moves towards low carbon societies. In turn, society is likely to seek new operational mechanisms for addressing climate change. Certain mechanisms may no longer merit episodic judge-led rules of laws confined within state borders.

David Fidler expands on the subject of managing episodic, short-lived, peacetime natural disasters. He seems to recognise a changing global dimension insofar that future laws will not necessarily be episodic or confined within state borders. The ever-increasing unco-ordinated body of actors, including non-governmental organisations and inter-governmental organisations, gives impetus to move from makeshift responses to unified disaster preparedness and protection.<sup>49</sup>

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46 IFRC "Who we are" <[www.ifrc.org](http://www.ifrc.org)>; and IFRC *World Disasters Report 2009: Focus on early warning, early action* (Geneva, 2009) inside front cover.

47 International Committee of the Red Cross "Who we are" <[www.icrc.org](http://www.icrc.org)>. See for example Daniel Palmieri "An institution standing the test of time? A review of 150 years of the history of the International Committee of the Red Cross" (2012) 94 IRRC 1.

48 Government of Kenya *National Policy for Disaster Management in Kenya* (Ministry of State for Special Programmes Office of the President, 2009).

49 David P Fidler "Disaster Relief and Governance after the Indian Ocean Tsunami: What Role for International Law?" (Indiana University Faculty Publications, Paper 398, 2005) at 461.

Nonetheless, many national regimes are still ill-prepared to respond locally. For some, this type of disorientation may arise from disorientation in international disaster law. In discussing this type of legal gap, Fidler refers to statements made by the IFRC:<sup>50</sup>

The International Federation of Red Cross and Red Crescent Societies, ... the mission of which is to provide assistance to populations affected by peacetime disasters, has called disaster response a "long-neglected facet of international law" and argued that "it is unlikely that any other challenge looming so large in world affairs has received so little attention in the legal realm".

Fidler seems to recognise the problem that arises due to legal disorientation, but concludes that there will be little development in international law with respect to disaster preparedness, protection and response in the near future due to the absence of political will. While this article recognises that a duty to protect humanity may often clash with sovereign discretion to respond, it also argues that the international community may not be responding in a cohesive manner because it is yet to know how to respond. The international community may not have the capacity to respond in the absence of a cohesive process/model/theory by which to build a universal and unified framework applicable to all.

The difference between the capacities of countries like the United States to respond to a flooding disaster, versus certain Asian countries, may also point to the need to reframe certain aspects of international law to facilitate the ability of the global community to respond in a more effective and efficient manner. Reliance on national governments to formulate policy for the benefit of their citizens may not always be the best solution. States may direct their interests elsewhere. Some states may have far greater interests in inter-galactic space programmes or nuclear energy programmes than in investing in disaster risk management or protecting people from disasters. These are state prerogatives that touch on questions of state sovereignty. There is a sound argument to leave them well alone insofar that the political will may evolve eventually of its own accord. Yet, the upshot for many people is that policy changes at the local level are unlikely to happen any time soon. A new normative impetus could emerge from the global community; but it too requires recognition and integration at the local level. To sum up, any new process will need to nest the plurality of national law in international law if global citizens are to mobilise their political will to respond effectively and efficiently to natural disasters.

### ***E Incongruous Approaches to Protect Persons in the Event of Disasters***

Humanitarian agencies and academics often debate whether the approach to protect people in the event of disasters should be "rights-based" or "needs-based",<sup>51</sup> but I find this argument rather

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50 IFRC *World Disasters Report 2000: Focus on public health* (Geneva, 2000) at 157 as cited in Fidler, above n 49, at 459.

51 International Organization for Migration "Ensuring Rights of Trafficking Victims and Exploited Migrants Are Protected" (7 July 2009) <www.iom.int>: "This more generalized exploitation, likely to affect a much

superfluous. In 2009, Eduardo Valencia-Ospina, the International Law Commission's Special Rapporteur for the "Draft Articles on the Protection of Persons in the Event of Disasters", also emphasised that a "rights-based" approach was not exclusive: "[it has] to be informed by other considerations when appropriate, including the needs of disaster victims. Needs and rights are two sides of the same coin."<sup>52</sup> In 2010, the International Law Commission commented on:<sup>53</sup>

... the juxtaposition of "needs" versus "rights". ... The prevailing sense of the Commission was that the two approaches were not necessarily mutually exclusive, but were best viewed as being complementary. The Commission settled for a formulation that emphasized the importance of a response which adequately and effectively meets the "needs" of persons affected by the disaster. Such response has to take place with full respect for the rights of such individuals.

One concern is that a "rights-based" approach is theoretical: it often divides international law according to subjects and objects; or duty-bearers (the state) and rights-holders (victims of disaster). As a consequence, a "rights-based" approach such defined fails to integrate law as process. It may undermine broader non-state actor participation and citizenship empowerment. The affected state's capacity, or host state's capacity (to borrow a term from international investment law), may diminish but it remains the primary guarantor of substantive rights. This issue is problematic in the absence of a co-ordinated framework. Many non-state actors realise or give effect to rights and they need a unified operating framework too.

"Needs-based" approaches are equally controversial. State consent is pivotal to uphold sovereignty, but states are often ill-prepared to undertake needs assessments. In part, failure to reconcile rights- and needs-based approaches has prompted international actors to develop their own guidelines and standards.

Juxtaposing "needs-based" and "rights-based" approaches seems somewhat misconstrued. Juxtaposing new norms in a vacuum is not ideal. It does not resolve the legal deficit. Responsible authorities must be able to recognise needs in order to respond to them. Assessing needs depends on

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bigger share of the migrant population, requires a more needs-based approach to effectively protect and assist migrants". AS Halls and others "Impacts of flood control schemes on inland fisheries in Bangladesh: guidelines for mitigation" (2008) 609 *Hydrobiologia* 45 at 47 reference hydrological needs of inhabitants. See also Jakob Kirkemann Boesen and Thomas Martin *Applying a rights-based approach: An inspirational guide for civil society* (The Danish Institute for Human Rights, Copenhagen, 2007).

52 *Report of the International Law Commission on the work of its sixty-first session A/64/10* (2009) at [154].

53 *Report of the International Law Commission on the work of its sixty-second session A/65/10* (2010) at 323:

Article 2  
Purpose

The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

the group in question. Another tricky question arises as to who decides that the needs of one group should prevail over another. These questions have normative dimensions.

The International Law Commission recognises these issues insofar that its approach is neither entirely rights-based nor needs-based. It is more about finding complementarities between rights and needs.<sup>54</sup>

The proposed constitutionalism of a law of the global commons is also complementary insofar as the proposed constitutional theory mobilises shared normative elements of a certain type, although each norm only accounts for some of the elements. Thus, provided the legal system continually reorients itself on its elements by virtue of a unified and congruous normative process, negotiators harness agreed normative elements to derive normative specifications, which are subject to authentication by competent authorities, and the system facilitates the dynamic interaction between norms within normative networked systems. The idea is one of a process-based normative complementarity between legal "oughts" rather than complementarity between rights and needs, which are vastly different things.

Another upshot of the analysis is that society can no longer think about new disaster governance norms as entirely independent elements. All norms in question have a contextual relationship with other networked norms that give meaning and purpose to "first principles". A "first principles" approach thereby underpins a new form of constitutional construction, interpretation and application. Constitutionalism in this sense refers to the networked legal system to which a "first principles" approach applies as a *jus gentium*, which is a type of reformulated "law of the global commons". It is a law *applicable to all* but with "bound flexibilities" for many.

### ***F Towards a Congruous Normative Approach***

The rest of the article shows how to "constitutionalise" a unified and universal "first principles" based approach to govern the climate-disaster nexus. As mentioned, there are other normative nexuses, such as the climate-disaster-water nexus. Disasters may lead to migration and displacement.<sup>55</sup> Mitigating the consequences of natural disasters and adapting to the threats has a

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54 For a discussion of the work of the International Law Commission in this area, see Part IV.G.

55 Walter Kälin *Guiding Principles on Internal Displacement: Annotations* (The American Society of International Law and The Brookings Institution-University of Bern, Studies in Transnational Legal Policy No 38, Washington, 2008) identifies "the need for an appropriate normative framework for the internally displaced" (at xii); and finds that "it is often difficult in practice to determine which norms apply [to each situation]" (at 7). See also Jane McAdam *Climate Change, Forced Migration, and International Law* (Oxford University Press, Oxford, 2012) at 256; and François Gemme "Environmental Changes and Migration Flows. Normative Frameworks and Policy Responses" (Doctoral thesis, Université de Liège, 2011).



broader contextual setting that requires common constitutional elements and constructs to specify the elements of a "first principles" approach.<sup>56</sup> Realising those elements gives effect to them.

The term "constitutional" as used here conveys new meaning. For the purposes of this article, constitutional unification refers to unifying the essential elements that govern the dynamic normative nexus (the nexus between climate-disaster-water-displacement, and so on). The idea is that shared process elements govern the legal principles, rules and standards that reside at the normative nexus. Taken together, the elements reconcile with state law, but they need to extend beyond state law to govern global commons' problems. Cançado Trindade reinforces this argument for a new *jus gentium*, as a new "law of peoples".<sup>57</sup>

Normative congruity has other challenges besides those mentioned. Technically, national jurisdictions do not extend beyond borders. They do not have extraterritorial authority over a global "law of peoples". Technically, international law emerged as a law between nations. States still have a prominent position. Public international law was not designed to govern global commons problems, like climate change, which knows no borders and expands well beyond the public sphere.

A further challenge that comes to the fore when trying to attain congruity in the legal order is that the existing legal deficit is not necessarily driven by a survivalist gap or by the absence of legal norms. It comes to the fore when the global community is unable or seemingly incapable of governing harm that seeps across borders; or when a state may have diminished capacity to respond; or when there is an issue of inter-generational equity.

All these challenges stem from a certain type of normative failure. This article distinguishes between what I term "systemic" and "systematic" normative failure. As to systemic failure, the proposed approach assumes it is possible to diversify systemic risk, say with institutional restructuring or relational transformation, or by an automaticity of shared responsibility (the disaster is solved of its own accord). Systematic risk arises when there are intrinsic "non-diversifiable" normative failures (existing legal processes do not solve the problem or they have been incapable of doing so). A systematic failure will almost always include a systemic failure.

If the diagnosis is systematic, then risk is not diversifiable and a new doctrine or reformulated legal theory could be the only viable way forward. The need for such a process-oriented solution sends what is seemingly a static social, economic or cultural problem back to the policy and

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56 Jenny R Hernandez and Anne D Johnson "A Call to Respond: The International Community's Obligation to Mitigate the Impact of Natural Disasters" (2011) 25 Emory Intl Law Review 1087 at 1092 identify the problem as a "lack of a unified international framework". See also the "Nansen" response in Norwegian Refugee Council "The Nansen Conference: Climate Change and Displacement in the 21st Century" (Norway, June 2011).

57 Antônio Augusto Cançado Trindade "International Law for Humankind: Towards a New *Jus Gentium*" (2005) 316 Recueil des Cours 9 at 252–317.

legislative arenas; but they too stagnate in the absence of doctrine. Developing a legal process that governs the global commons makes a degree of sense with respect to governing global commons problems. Climate change extends beyond borders; legal processes should probably do the same. In brief, there could be some justification in giving systematic cohesion to a kaleidoscopic plurality of legal norms that formulate an orderly legal response to disasters.

### ***G Constitutionalism: Method and Structure***

For precision, process unification would benefit from economic or statistical modelling of legal norms in the form of a networked model as opposed to a narrow institutional or "structural adjustment" solution. If one knows the parameters of disaster preparedness and intervention, then there could be a better distribution, evaluation and monitoring of actions between co-ordinating bodies and agencies. To legitimise these actions or standards of performance, they need to link to legal rules and principles.

The confines of this article do not provide space to present econometric models. Instead, the article describes how normative "constitutionalism" could evolve to improve resistance and resilience to disasters. Rather than following common discourse by arguing that law does not play a fundamental unifying role and does not govern disasters effectively, the next part focuses on how international law could or ought to play a fundamental unifying role.

Constitutionalising the elements of a unified legal process should guide a "first principles" framework approach. Reaching consensus on a common language would make it much easier to incorporate resilience planning and response mechanisms into national legal systems. In turn, a co-ordinated approach ought to lead to some sort of cohesive and coherent way to meet the needs of local communities in the event of disasters. The analysis that follows uses the climate-disaster nexus as a vehicle for further explanation.

The next part introduces the transcendental first principles of international climate law. These principles are of a *lex specialis* variety but they have far broader implications. The subsequent part shows how these first principles relate to disaster law. A synthesis of the preliminary findings follows thereafter. Neither climate law nor disaster law are self-contained bodies of law. Both are dynamic subsets of a broader legal system.

### ***III "FIRST PRINCIPLES" UNIFYING INTERNATIONAL CLIMATE LAW***

International law provides some insights into tackling the problem of how to govern a normative nexus;<sup>58</sup> but governing co-ordinated legal responses to disasters associated with anthropogenic

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58 See for example *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Merits)* [2005] ICJ Rep 168 at [216]. The International Court of Justice addressed the concept of a normative nexus with respect to the relationship between international humanitarian law and international human rights law.

climate change presents a relatively new challenge.<sup>59</sup> Individual legal norms interact within the legal system and give rise to collective normative implications, such as those found at the climate-disaster nexus. While these interactions require an account of national circumstances, the ramifications are deeper and broader (harm emanating from one state may injure people in others). Governing this extraterritorial challenge also highlights the importance of both market- and non-market-based mechanisms under the UNFCCC, which is consistent with a "first principles" approach.

The analysis starts by assessing the existing first principles of international climate law. It then adopts a similar approach to analyse disaster law. Collectively, legal principles, rules and standards at the climate-disaster nexus should form a type of unified constitution; or, in other words, a type of consolidated order.<sup>60</sup>

A kaleidoscopic frame is analogous. All legal norms interact but they are not all visible at the same time. Legal norms may take on different roles depending on a particular time and space. They unify insofar that they do not fall out of the frame.

Building on this idea of law as integrated systems, international climate law comprises a broad body of law constituted, inter alia, by the UNFCCC, decisions of the UNFCCC Conference of the Parties and environmental law. International climate law resides at a nexus between other special regimes and it interconnects to international law. Given its near universal support, it makes sense to turn to the UNFCCC to scrutinise the existing normative first principles governing climate change that shall guide the states parties "[i]n their actions to achieve the objective of the Convention and to implement its provisions".<sup>61</sup> The analysis is not limited to that of UNFCCC art 3 principles; but such an analysis forms a sort of baseline scenario that results in a type of "five in one" model. As shown below, it is possible to derive five transcendent *lex specialis* or first principles from art 3 of the UNFCCC. The article labels these principles equity, solidarity, precaution, sustainable development and "good neighbourliness". The sections below provide a brief overview of each of the five first principles that could form a "five in one" scenario. The important aspect to grasp is the process of legal interpretation rather than argue about the provisional holding labels given to the first principles, which would be subject to negotiation anyhow.

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59 See generally Intergovernmental Panel on Climate Change *Climate Change 2007*, above n 19. See also Intergovernmental Panel on Climate Change *Climate Change: The IPCC Scientific Assessment: The First Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge (UK), 1990).

60 In short, a legal principle answers the question "why", a legal rule answers the question "what" and a standard answers the question "how".

61 UNFCCC, above n 23, art 3.

## A *Equity*

Under examination, textual, contextual and supplementary means of treaty interpretation may concur that art 3(1) of the UNFCCC provides for a baseline legal principle of equity.<sup>62</sup> If this is the case, then legal equity is the basic, transcendental or fundamental principle governing art 3(1). In other words, legal equity is a "first principle", and other principles, rules and standards will inform legal equity and derive from legal equity.

According to the proposed model, every norm (principle, rule, standard, and so on) has an objective and subjective element. An objective element reflects a type of material guarantee. A subjective element reflects behavioural effect or realisation of the guarantee.

Article 3(1)'s provision for objective equity provides that the parties have a responsibility to protect the climate system "for the benefit of present and future generations".<sup>63</sup> The construction provides for a specific application of an obligation to protect that comprises intra- and inter-generational equity in the climate context and should not be confused with textual norms that govern mass atrocity crimes like genocide, war crimes, crimes against humanity and ethnic cleansing. While there is a general recognition of the role of the affected state to protect and assist victims of disasters,<sup>64</sup> art 3(1) of the UNFCCC flags protective action in "accordance with [the Parties'] common but differentiated responsibilities and respective capabilities".

"Common but differentiated responsibilities" is an important "sub-principle" or "auxiliary principle".<sup>65</sup> The UNFCCC delimits an equitable legal burden on the basis of "respective capabilities". There is no explicit or implicit direction within this construction that those who historically contributed the most to climate change during the industrial revolution have a more

62 See Thorp, above n 25, at 20. UNFCCC, above n 23, art 3(1) stipulates:

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

63 The "responsibility to protect" has special meaning in international law: see for example Monica Serrano "The Responsibility to Protect and its Critics: Explaining the Consensus" (2011) 3 *Global Resp Protect* 425. See also Craig Allan and Thérèse O'Donnell "A Call to Alms?: Natural Disasters, R2P, Duties of Cooperation and Uncharted Consequences" (2012) 17 *J Conflict & Sec L* 337 at 339:

Ultimately, natural disasters *per se* would be excluded from R2P's purview in 2009 by both the UN Secretary General in his Report *Implementing the Responsibility to Protect* and by the ILC.

See generally Tahmika Ruth Jackson "Bullets for Beans: Humanitarian Intervention and the Responsibility to Protect in Natural Disasters" (2010) 59 *Naval L Rev* 1.

64 *Strengthening of the coordination of humanitarian emergency assistance of the United Nations* GA Res 46/182, A/RES/46/182 (1991) annex at [4].

65 UNFCCC, above n 23, art 4(1).

pressing burden to provide assistance in the event of a natural disaster. That decision needs to be found elsewhere. Its development, if ever it is to happen in international climate law, is one of policy orientation that will be informed by decisions of the UNFCCC Conference of the Parties. A more viable mechanism could be to bind common disaster response processes and minimum standards but facilitate a progressive scale-up as national capabilities advance in accordance with defined targets.

Subjective, or behavioural, rights may also derive from equity. Rights to information, participation and access to justice are illustrative. These auxiliary principles may traditionally be thought of as a type of procedural equity, but they are not limited to procedure. They also comprise substantive elements that provide a framework by which to specify tailored rules at the climate-disaster nexus. Principles 18 and 19 of the Rio Declaration on Environment and Development reflect these norms with respect to disaster law.<sup>66</sup>

Recognised as auxiliary principles, these norms provide the rationale for developing coherent transparency rules within the post-2015 climate and disaster risk reduction agreements. First principles and auxiliary principles should give rise to a common language in different negotiating arenas. Their transposition into other principles, rules or standards triggers the need for the convergence of fundamental norms (first principles and possibly auxiliary principles) and the complementarity of consequential norms. By way of example, the evolution of monitoring, reporting and verification rules under the UNFCCC provide a strong basis for an equitable accounting framework that is applicable to all. A similar framework approach for effective reporting could be reinforced for disaster law and development. In this fashion, equity facilitates a process applicable to all. Solidarity accommodates provision for special circumstances.

### ***B Solidarity***

Solidarity is proposed as the second "first principle" of international climate law.<sup>67</sup> The process of legal interpretation that unfolds mirrors the process applied to interpreting art 3(1) of the UNFCCC. An interpretation of UNFCCC's art 3(2) text, context, object and purpose, and supplementary interpretation (assessment of preparatory treaty work), suggests a fundamental

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<sup>66</sup> *Rio Declaration on Environment and Development* A/CONF151/26 (1992). Principle 18 provides:

States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.

Principle 19 provides:

States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

<sup>67</sup> See Thorp, above n 25, at 23.

principle of fairness, but its construction differs from that of art 3(1).<sup>68</sup> First, fairness may supplement a deficit. In terms of climate change, the parties to the UNFCCC should give full consideration to the special and differentiated treatment of developing and, in particular, the most vulnerable developing states parties. Secondly, solidarity extends to all parties suffering a disproportionate or abnormal burden under the UNFCCC.

As with equity, a series of commitments unfold from a "first principles" approach. There is an unequivocal obligation on the states parties to the UNFCCC to give full consideration to the implementation of response measures to countries with areas prone to natural disasters.<sup>69</sup> These actions extend to funding, insurance and technology transfer. The negotiating parties hence have a pre-existing framework from which to negotiate other norms.

In brief, equity establishes the threshold for material and fulfilment fairness, and solidarity facilitates the specification of a range of commitments that accommodate diverse "respective capabilities". Bounded flexibility thereby facilitates normative processes to deal with a variety of circumstances in accordance with certain limits.

### ***C Precaution***

Article 3(3) of the UNFCCC provides for a fundamental first principle of precaution.<sup>70</sup> The object and purpose of art 3(3) is "to anticipate, prevent or minimize the causes of climate change

68 UNFCCC, above n 23, art 3(2):

The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.

69 Article 4(8)(d) stipulates:

In the implementation of the commitments in this Article, the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures, especially on:

...

Countries with areas prone to natural disasters.

70 Article 3(3) stipulates:

The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation,

and mitigate its adverse effects". The objective is to be prudent in protecting the climate and managing uncertainties. Prudence demands foresight, due diligence and safeguards. The states parties thereto should "take precautionary measures", for example, employ risk management to achieve the stated objective.

The ubiquitous governing value of art 3(3) is precaution. As with preceding legal principles of climate change, derivative or "sub-level" principles thereof also exist. In terms of the precautionary principle applicable to international climate law, the first sub-level construct is that the parties should take precautionary measures to "anticipate, prevent or minimize the causes of climate change".<sup>71</sup> The second is that the parties should take precautionary measures to "mitigate" the adverse effects of climate change.<sup>72</sup> Mitigation includes cutting greenhouse gas emissions. Adaptation includes learning to live with global warming. Adaptation and mitigation are equally relevant to disaster law.

Article 3(3) clearly mentions "precautionary measures" but there may still be a degree of academic debate about whether a precautionary principle exists at all.<sup>73</sup> The precautionary principle remains relevant to international climate law because the UNFCCC makes it explicit. Treaty interpretation from a textual application, in context, according to the UNFCCC's object and purpose, and by supplementary means, all point to a precautionary principle.<sup>74</sup>

### ***D Sustainable Development***

In its textual interpretation, the transcendental, fundamental or first order interpretation of art 3(4) of the UNFCCC provides for a fourth first principle, that of sustainable development.<sup>75</sup> Article 3(4)'s express provision of sustainable development as a legal norm of climate law establishes a *lex*

and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.

71 Article 3(3).

72 For an analysis, see Thorp, above n 25, at 25. For a general discussion, see Hernandez and Johnson, above n 56.

73 For a general overview of the precautionary principle, see Arie Trouwborst *Evolution and Status of the Precautionary Principle in International Law* (Kluwer Law International, The Hague, 2002); and Terrence Iverson and Charles Perrings "Precaution and Proportionality in the Management of Global Environmental Change" (2012) 22 *Global Environmental Change* 161.

74 Thorp, above n 25, at 25.

75 UNFCCC, above n 23, art 3(4):

The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.

*specialis* norm in the area of climate law.<sup>76</sup> The precise commitment, and effectiveness of that commitment, depends on the parties' interpretation and application of the underlying derivative products of sustainable development, which include but are not limited to auxiliary principles.

Appropriateness and integration may be underlining auxiliary principles. Disaster response should be appropriate to the circumstances and should be integrated at the local level. A further more detailed analysis not presented here may demonstrate that appropriateness has a special relation with non-arbitrary measures.

Another important finding is that the early parts of this analysis placed developing nationally appropriate mitigation action measures (NAMAs) within the context of sustainable development. The implications are broad. For instance, potential mitigation measures should extend beyond quantifiable targets. By extension, there is a need not only to develop common financial accounting rules but also to establish common qualitative rules, and "present and future economic value-based accounting" models in areas such as renewable energy. Fundamental changes in consumer and producer production are needed while respecting local communities and social justice. These issues point yet again to the need for a systematic model rather than relying inappropriately on systemic carbon offsets. As to integration, the integration of NAMAs at a local level should be enabled by technology, finance, capacity building and so on. Sustainable development thereby also provides an important gateway to reaching consistency between post-2015 climate, disaster reduction and development agreements.

### ***E Good Neighbourliness***

A detailed analysis of art 3(5) of the UNFCCC unfolds in a similar fashion to the preceding analysis. The analysis applies recognised rules of treaty interpretation. Interpretation of the text, context, object and purpose (and an assessment of the preparatory work) all correspond with a fifth transcendental "first principle".

The first principle provided for by virtue of art 3(5) of the UNFCCC, which is for the benefit of society as a whole, has the provisional label of "good neighbourliness".<sup>77</sup> In its interpretative construct, art 3(5) may provide for the auxiliary principles of co-operation and "no harm". At a broader level, there is a need to strengthen co-operation between all countries, large and small, and to promote co-operation with international organisations, civil society and academic research

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<sup>76</sup> Thorp, above n 25, at 26.

<sup>77</sup> At 28. Article 3(5) of the UNFCCC, above n 23, stipulates:

The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.



institutes. Consequential rules for "no harm" may have a closer link to regulating pollution, loss and damage and establishing standards to reverse the trend of deteriorating eco-systems.

At another tier again, art 3(5) provides for important economic principles and a framework for negotiating their consequential norms. Speeding up the pace of new economic development requires opening up trade and directing investment into the green economy, renewable energy projects, biology, environmental protection and conservation, new-energy forms for new types of rail and vehicle transport, and "eco-civilised" services. Improving effective investment in these areas is pivotal to realising the economic-wide dimensions of all first principles.

### ***F UNFCCC Decisions of the Conference of the Parties***

If there is merit in governing climate-related disasters, then decisions of the UNFCCC Conference of the Parties should perhaps elaborate fundamental first principles and embellish the body of international law that resides at the climate-disaster nexus. The Bali Action Plan, adopted by the Conference of the Parties in 2007, expressly recognises the need within adaptation for strategies for disaster risk reduction and risk management.<sup>78</sup> The Cancun Adaptation Framework, adopted by the Conference of the Parties in 2010, invites parties to enhance adaptation through strengthening disaster risk reduction strategies.<sup>79</sup> Rio+20's outcome document, *The future we want*, re-emphasises a commitment to the overarching framework; it specifically mentions that framing the green economy includes, inter alia, improving resilience and disaster preparedness.<sup>80</sup>

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78 UNFCCC Conference of the Parties *Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007* FCCC/CP/2007/6 (2008) at [21]; and UNFCCC Conference of the Parties *Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007 – Addendum – Part Two: Action taken by the Conference of the Parties at its thirteenth session* FCCC/CP/2007/6/Add.1 (2008) at 3 ("Bali Action Plan" Decision 1/CP.13).

79 See generally UNFCCC Conference of the Parties *Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010 – Addendum – Part two: Action taken by the Conference of the Parties at its sixteenth session* FCCC/CP/2010/7/Add1 (2011) at 2 ("The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention" Decision 1/CP.16; UNFCCC Conference of the Parties *Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its sixth session, held in Cancun from 29 November to 10 December 2010 – Addendum – Part Two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its sixth session* FCCC/KP/CMP/2010/12/Add1 (2011) at 3 ("The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session" Decision 1/CMP.6) and at 5 ("The Cancun Agreements: Land use, land-use change and forestry" Decision 2/CMP.6).

80 *The future we want* GA Res 66/288, A/RES/66/288 (2012) at [4], [11], [135], [186]–[189] and [280].

## ***G Key Findings***

Going forward, it would be worthwhile to assess how the fundamental first principles, auxiliary principles and consequential legal rules of international climate law interact with, and apply to, disaster law. The direction proposed here is fully consistent with decisions of the UNFCCC Conference of the Parties, which has repeatedly agreed that UNFCCC principles should guide the negotiations.<sup>81</sup> Given this context, the next part of the article assesses how the first principles that underpin the UNFCCC relate to disaster law. It examines contemporary endeavours to govern disasters. It explores several dynamic interactions between the first principles of climate law and disaster law. It sets up a window for normative contextualisation of the climate-disaster nexus and it reviews the work of a number of authorities to date.

## ***IV DEVELOPING A UNIFIED AND UNIVERSAL APPROACH TO GOVERN THE NORMATIVE CLIMATE-DISASTER NEXUS***

### ***A Insurance Principles and Contemporary Endeavours to Govern Disasters***

Reaching consensus on a universal and uniform process by which to prevent disaster, and protect persons in the event of disasters, is a long-established concern of governments hoping to unite in a universal effort of good will to combat physical and moral sufferings of humanity. Responding to this concern in 1921, Giovanni Ciraiolo, a member of the Italian Senate and President of the Italian Red Cross Society, sought support for a global insurance mechanism that would guarantee international assistance to victims of disasters.<sup>82</sup> The "Inter-governmental co-operation on insurance principles" formed the basis of Senator Ciraiolo's proposal.<sup>83</sup>

Almost a century later, the European Union adopted a Green Paper on insurance in the context of natural and man-made disasters.<sup>84</sup> The European Union's Green Paper raises the idea of a disaster insurance pool in a similar way to Ciraiolo's studies.<sup>85</sup> Interestingly, much of the discussion centres

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81 UNFCCC Conference of the Parties *Report of the Conference of the Parties on its eighteenth session, held in Doha from 26 November to 8 December 2012 – Addendum – Part two: Action taken by the Conference of the Parties at its eighteenth session* FCCC/CP/2012/8/Add1 (2013) at 3 ("Agreed outcome pursuant to the Bali Action Plan" Decision 1/CP.18) and at 19 ("Advancing the Durban Platform" Decision 2/CP.18, which acknowledges "that the work of the Ad Hoc Working Group on the Durban Platform for Enhanced Action shall be guided by the principles of the Convention").

82 *Mutual Insurance of Nations against Public Calamities [notes]* (1922) 3 League of Nations Official Journal 727 at 727.

83 *Annexes [notes]* (1923) 4 League of Nations Official Journal 1361 at 1433.

84 European Commission *Green Paper on the insurance of natural and man-made disasters* COM(2013) 213 final (2013).

85 At 9.

on standards rather than process. Of note, however, is that there does not appear to be any significant evidence at this stage to support the view that harmonising insurance standards at a regional level will naturally lead to the protection of persons in the event of disasters. Care will need to be taken to ensure that any potential intervention does not impinge on integration at the local level; but even before advancing to that stage, it is advisable to develop a unified and universal approach.

The arguments put forward in this paper may substantiate further research on unifying a "first principles" approach to disaster insurance. There are a number of other reasons though as to why a Pan-European wide approach to harmonising insurance regulations or standards across diverse markets is probably not the most appropriate immediate solution. In the absence of consensus on fundamental first principles and an appreciation of how to mobilise them, reverse logic (arguing from consequential standards to the normative cause) could undermine human security. It could jeopardise the position of those member states with well-structured insurance markets and a wealth of expertise in responding to unpredictable events. Harmonising ad hoc regional standards in the absence of due international process is unlikely to reflect overarching international auxiliary norms that account for special circumstances and varying vulnerabilities that are faced by different communities. In the absence of acknowledging an international consensus on first principles and consequential commitments, local markets may still require a certain degree of flexibility to develop and deliver tailored local insurance products. At the same time, equitable efficiency and competition should trigger benefits to filter from more mature insurance markets through to those less fortunate.

Certain aspects of the International Law Commission's work on this subject, discussed later, also have normative underpinnings in Ciraolo's proposals.<sup>86</sup> For Ciraolo, co-ordinating inter-governmental organisations was essential to give effect to the principles of solidarity and mutual assistance, notions that many in the common law may have found "ideologically repugnant" at the time.<sup>87</sup> Yet, it was not so much the notion of solidarity that was repugnant but the proposed manner by which states could forfeit sovereignty. An additional problem was that being duty-bound to fund universal relief efforts could still lead to a stilted and overburdened bureaucratic process. John Hutchinson recalls the differences between civil and common law perspectives:<sup>88</sup>

Chamberlain made Britain's reservations plain when the League council approved the composition of the preparatory commission on 11 December [1924]. In particular, he contrasted "some countries [where] it was the custom to rely on subventions from the State in times of disaster ... [with] other countries –

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86 *Mutual Insurance of Nations against Public Calamities [notes]*, above n 82, annex 2 at 728. See *Annexes [notes]* (1922) 3 League of Nations Official Journal 1212: Leon Bourgeois suggested a similar plan in 1920 at 1217; the scheme proposed by the Italian Red Cross and supporting articles may be found at 1218–1220.

87 John F Hutchinson "Disasters and the International Order. II: The International Relief Union" (2001) 23 *International History Review* 253 at 253–254.

88 At 255.

among them Great Britain – [where] reliance was placed on funds voluntarily subscribed for purposes of relief."

Notwithstanding these differences, in 1927, the Assembly of the League of Nations unanimously approved an international convention and statute that would establish an International Relief Union.<sup>89</sup> The Convention entered into force in 1932 and it eventually attracted 29 states parties.<sup>90</sup> Despite these early successes, the International Relief Union quickly fell into desuetude and was eventually abandoned altogether.

A number of factors influenced its demise. According to the IFRC:<sup>91</sup>

... the IRU [International Relief Union] was never able to effectively carry out its mission, due mainly to the crippling lack of funds incident to its inability to command regular contributions from member states. It intervened in two disasters and sponsored some scientific studies, but with the crumbling of the League of Nations and withdrawal of support of the Red Cross in the late 1930s, the IRU effectively died. Its official existence lingered for many years, only ending with the transfer of its research promotion responsibilities to UNESCO in 1967.

Reviewing the evolution of the International Relief Union, its demise and potential resurrection, is expedient for the reasons identified earlier: comparable work towards an evolving international disaster law is underway today. The European Union's efforts have been mentioned. The International Law Commission is engaged in a relevant drafting exercise. An examination of more than ten years of preparatory work that led to the International Relief Union statutes was, therefore, an appropriate input to this article.<sup>92</sup> Before assessing the International Law Commission's work, a brief historical review of relevant baseline or first principles, which also frame current discussions, follows because some of the issues that intervened earlier may still be relevant and appropriate today.

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89 Convention establishing an International Relief Union 135 LNTS 247 (opened for signature 12 July 1927, entered into force 27 December 1932) [IRU Convention]. United Nations Educational, Scientific and Cultural Organization [UNESCO] *Transfer to UNESCO of Certain Responsibilities and Assets of the International Relief Union* UNESCO/15C/19 (1968). The latter document relates to the circumstances that led to the transfer of certain responsibilities and assets of the International Relief Union to UNESCO.

90 IRU Convention Status, available at <<http://treaties.un.org>>. Czechoslovakia, Cuba, Egypt, France, Greece, Hungary, India, Iraq, Luxembourg, Myanmar, New Zealand, Romania and the United Kingdom of Great Britain and Northern Ireland had withdrawn from the IRU Convention by 1973.

91 IFRC *Law and Legal Issues in International Disaster Response: A Desk Study* (Geneva, 2007) at 27 [International Disaster Response].

92 The author is grateful for the support of the United Nations Office at Geneva in providing access to the League of Nations Archives Reading Room at the United Nations Office at Geneva Library.

## ***B Dynamic Interactions between Climate and Disaster Principles***

Senator Ciraolo's proposal of 1922 is similar to the one proposed herein: it provides for *first principles* and consequential rules to anticipate and respond to disasters.<sup>93</sup> On 23 June 1923, Ciraolo forwarded a revised proposal to the Secretary-General of the League of Nations supported by a "Draft Statute or Fundamental Covenant".<sup>94</sup> The Draft Statute made provision for an "International Federation for Mutual Assistance in the Relief of Peoples Overtaken by Disaster" and it set out a framework for anticipating and responding to disasters.<sup>95</sup>

The global community, as it was then, recognised the importance of Ciraolo's proposal, the object of which was to "render assistance with the greatest dispatch and certainty to peoples suffering from disaster".<sup>96</sup> With the Council of the League adopting its resolution to move forward on 1 September 1922,<sup>97</sup> Ciraolo's proposal triggered an extensive consultation process. Amongst other endeavours, the inquiry reviewed potential schemes and international legal response mechanisms. In 1923, a detailed study consolidated these inputs.

A year later, in 1924, the League of Nations discussed how to go about creating the new Federation. The consultation process and study reinforced the normative framework and influenced the Federation's aims. The Federation was to provide "mutual assistance to ensure assistance by all members in the misfortune of any single one".<sup>98</sup> Institutionally and operationally, the League of Nations reinforced a "wider recognition of the Red Cross in times of peace".<sup>99</sup>

A normative framework underpinned operational directions. The 1923 Draft Statute already reflected a number of important principles. In effect, negotiating parties derived consequential rules from baseline first principles. The principles of neutrality and solidarity were core. Neutrality aimed

93 See *Mutual Insurance of Nations against Public Calamities [notes]*, above n 82.

94 *International Federation for Mutual Assistance in the Relief of Peoples Overtaken by Disaster [notes]* (1924) 5 League of Nations Official Journal 769 at 769; and *II. Revised Proposal of Senator Ciraolo, forwarded to the Secretary General of the League of Nations on June 23rd, 1923, Draft Statute or Fundamental Covenant* at 770 [Draft Statute 1923].

95 Draft Statute 1923, above n 94, art I.

96 *Annexes [notes]*, above n 86, at 1432. Three problems were also identified (at 1434): (1) the role of the Red Cross organisations; (2) the provision of funds; and (3) the role of the League. See also Ciraolo's earlier explanation of his proposed scheme: *Second Meeting (Private) [notes]* (1922) 3 League of Nations Official Journal 1163 at 1163.

97 *Annexes [notes]*, above n 86, at 1432.

98 Draft Statute 1923, above n 94, art III. For more on contemporary insurance-related issues, see Daniel-Stefan Paraschiv "Insurance against Losses from Natural Disasters" (2011) 3 Contemp Readings L & Soc Just 224.

99 *I. Circular Letter from the Secretary-General to Members of the League, December 8th, 1923*, above n 94, at 769.

to "unit[e] mankind for the mutual insurance of civilised nations".<sup>100</sup> The aims of the Federation reflected solidarity in the provision of mutual assistance "by all members in the misfortune of any single one".<sup>101</sup> The framework strengthened preparedness to respond and protect – in due consideration of the "adequate and appropriate relief for peoples collectively overtaken by disasters which, in view of the suddenness of the danger and the magnitude of the need, they cannot confront unaided" – and when the state itself does not have the capacity.<sup>102</sup> Such considerations included: "physical conditions which govern the life of a community as a result of upheavals due to natural forces"; "hygienic conditions ... as a result of dangerous epidemics"; "social conditions ... that could cut off the minimum supplies indispensable for normal existence"; "consequences of war"; and the "threatened exhaustion of the race".<sup>103</sup>

The original proposal clearly went far beyond natural disasters to include virtually all disasters. The scheme proved problematic and unwieldy but these dilemmas were not irresolvable. A distinction was to be made between natural disasters and other types of disasters. A far more politically sensitive question concerned funding.

State funding was based on annual contributions. All states were to contribute ten per cent of the contributions paid by them as members of the League of Nations at the time of making their annual contributions to the League of Nations.<sup>104</sup> Contributions to the "International Relief Fund" were not, however, limited to states. Institutions and the private sector were to supplement the International Relief Fund on a voluntary basis according to what I perceive as a certain concept of "bound flexibility" and various framework approaches.<sup>105</sup> The gradual introduction of multifarious ad hoc framework approaches would raise other issues, the most serious being the undermining of a unified approach applicable to all.

Within three months, the "International Federation for Mutual Assistance in the Relief of Peoples Overtaken by Disaster" was rebranded the "International Relief Union" and the listing of specific disasters was removed to allow for greater flexibility in ascertaining priorities on a "needs"

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100 Draft Statute 1923, above n 94, art II.

101 Article III.

102 Article III.

103 Article III.

104 Article XIII:

States which are not Members of the League of Nations, and which therefore pay no annual contribution to it, but which are Members of the Federation, shall pay into the International Relief Fund the same percentage contribution as they would have paid if, being Members of the League of Nations, they had paid to the League an annual contribution proportionate to their political, demographic, economic and financial position.

105 Article XV.

basis. A resolution of the fifth Assembly of the League of Nations on 26 September 1924 appointed and tasked a preparatory committee to "investigat[e] concrete proposals for the creation of an IRU against calamities".<sup>106</sup> The Preparatory Committee was "instructed to draw up concrete proposals regarding Senator Ciralo's scheme for the creation of an organisation of international solidarity between peoples against the calamities which may befall them".<sup>107</sup> Solidarity was a cornerstone first principle of the Convention and Statute Establishing an International Relief Union (IRU Convention).<sup>108</sup> Solidarity provided the springboard for unification, but its auxiliary principles that provided for special circumstances led to contentious and seemingly irresolvable debate.

As mentioned, the IRU Convention fell into desuetude (13 of the 29 ratifying parties or definitive acceding parties notified their withdrawal by 1973). An interesting question is whether the International Relief Union's touted "failure" reflected systemic or systematic failure. If systemic, then more structural reforms and institutional building could have provided a solution. From the analysis undertaken to date, it seems that the problem was far more deep-seated. The solution may have been doctrinal rather than only institutional.

This preliminary finding does not mean it is impossible to resurrect a unified disaster law to protect persons in the event of disasters. Another point being made in this article is that the IRU Convention itself incorporates important foundations of a unified law. Modern international climate law reflects many of the norms provided for by virtue of the IRU Convention. Others are being raised again in international fora.

Besides the norms mentioned earlier, the preamble to the IRU Convention incorporates three ideals envisaged by the League of Nations that were "considered to meet with the approval of all States". First is "the promotion of "international co-operation ... by the prescription of ... just ... relations between nations", which derives from the "good neighbour" principle. Second is that "endeavours to take steps in matters of international concern for the prevention and control of disease" reflects a precautionary principle. Third is that the parties:

... agree to encourage and promote the establishment and co-operation of duly authorised voluntary national Red Cross organisations having as purposes the improvement of health, the prevention of disease and the mitigation of suffering throughout the world [principles of precaution, sustainable development, appropriateness and integration].

Having demonstrated a dynamic connection between disaster norms through the IRU Convention and climate norms through the UNFCCC, the next point at issue is whether to use these normative frameworks as building blocks for modern reforms; and, if so, in what manner could such

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106 *First Meeting (Public) [notes]* (1925) 6 League of Nations Official Journal 1304 at 1304.

107 *International Relief Union [notes]* (1926) 7 League of Nations Official Journal 723 at 723.

108 IRU Convention, above n 89.

a proposal unfold. Answering this question requires a more detailed look at other relevant bodies of law, in particular those legal systems residing at the climate-disaster nexus. In addition to assisting negotiators, the findings of such an inquiry may also advance the work of the International Law Commission in bringing together the appropriate building blocks for unification. The article proceeds by trying to unfurl these issues.

### ***C Towards Normative Contextualisation at the Climate-Disaster Nexus***

Interestingly, the IRU Convention never defines the term "disaster". The IRU Convention refers to *force majeure*, which evolved from the notion of "calamity". Writing on the history of the International Relief Union, Peter Macalister-Smith suggested that the term "disaster" was originally to be considered in a "wide sense, including any serious disturbance of the life of a community resulting from natural forces, epidemics and the consequences of war".<sup>109</sup> Negotiators eventually reached a compromise. Responses to natural disasters were to exclude armed conflict. At that point, negotiators considered disasters in terms of "situations of calamity due to *force majeure*".<sup>110</sup> The term calamity, originally contextualised within a comprehensive legal framework by which to respond to a disaster, eventually extended to new commitments: disaster response, resilience to hazards, and so on. In 2007, the International Law Commission referred to the UNISDR of 2004 and observed that:<sup>111</sup>

The incidence of a "disaster" is a function of the risk process, namely the degree of exposure of people, infrastructure and economic activity to a "hazard", such as an earthquake or hurricane, as well as the vulnerability of those exposed to the hazard.

The first principles of equity (universal mutual assistance subject to respective capabilities) and solidarity (co-ordinating relief efforts for the vulnerable and reducing abnormal burdens for others) remained intact, not because someone had been inscrutably and unfathomably blamed for climate change or a disaster, but because these were fundamental principles of humanity.

The IRU Convention reflected these principles in two main objects:<sup>112</sup>

(1) In the event of any disaster due to *force majeure*, the exceptional gravity of which exceeds the limits of the powers and resources of the stricken people, to furnish to the suffering population first aid and to assemble for this purpose funds, resources and assistance of all kinds;

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109 MacAlister-Smith, above n 1, at 148.

110 At 148.

111 International Law Commission *Protection of persons in the event of Disasters: Memorandum by the Secretariat A/CN.4/590* (2007) at [1] [*Protection of Persons in the Event of Disasters*].

112 IRU Convention, above n 89, art 2.



(2) In the event of any public disaster, to co-ordinate as occasion offers the efforts made by relief organisations, and, in a general way, to encourage the study of preventive measures against disasters and to induce all peoples to render mutual international assistance.

The International Relief Union would co-ordinate disaster response when a state had exhausted its capability to respond.<sup>113</sup>

Contemporary research supports the International Relief Union's conclusion that strengthening well co-ordinated collective action is essential to disaster response and building resilience. According to Astier Almedom:<sup>114</sup>

One of the most important findings of resilience research to date is that individual, community, and national resilience can be enhanced by creating the conditions for people and their institutions to collectively act to prevent or mitigate disasters.

The ramifications are important. Ad hoc direct grants and state aid could otherwise distort markets and result in allocative inefficiencies. Some types of distributive fairness may not be seen as being fair at all.

The principles of neutrality, equity and solidarity resonated throughout the Convention instead and manifested in a series of insurance-related directives. The IRU Convention elaborated on other principles, such as, impartiality and non-discrimination: "The IRU shall operate for the benefit of all stricken peoples, whatever their nationality or their race, and irrespective of any social, political or religious distinction".<sup>115</sup> To uphold the principle of sovereignty, inter alia, certain limits were placed on the International Relief Union's interventions subject to consent.<sup>116</sup>

From an operational perspective, the IRU Convention envisaged an international civil force and independent institutional structure. While independent, the institution would associate in free co-operation with other important bodies. The Red Cross Societies were always pivotal.<sup>117</sup>

In terms of sustainability, the issue of funding inevitably reappeared. By the time the IRU Convention was adopted, the International Relief Union's Executive Committee was to decide on the constructs of a special share regime, which was an innovative and forward-looking scheme for

113 Astier M Almedom "Profiling Resilience: Capturing Complex Realities in One World" (2011) 35 Fletcher Forum of World Affairs 145 at 146.

114 At 150.

115 IRU Convention, above n 89, art 3.

116 Article 3 limits the International Relief Union's interventions to the territories of the high contracting parties, and also links to, and ought to be read in conjunction with, art 4, which provides that "action by the IRU in any country is subject to the consent of the Government thereof".

117 Articles 5 and 6.

its time.<sup>118</sup> Voluntary grants and private bequests would still play a vital role.<sup>119</sup> Regrettably, this cohesive vision never materialised for long. The idea of a "law of peoples" and global civil force remained primitive and embryonically *in situ*. Undoubtedly, many philanthropic foundations wanted to do their own thing: render a public service but secure independent recognition and credit for their accomplishments. States were preoccupied with issues of sovereignty.

More recently, the IFRC has relaunched several proposals to try to unify the international legal and policy framework for disaster law. These proposals merit attention and are discussed below. Before discussing the IFRC's efforts to unify parts of the operational framework for disaster law, the article introduces the overarching framework approach used by Jean Pictet to unify international humanitarian law. The process proposed herein to govern normative systems in the global commons is similar.

### ***D The Unification of International Humanitarian Law***

Pictet's studies on the development of unifying principles and consequential norms are similar to the current analysis. They differ insofar as they eventually informed a universal system of international humanitarian law and were not directly applicable to climate or disaster law. Nevertheless, the challenges of developing a humanitarian law of the global commons were similar, and the process by which to attain consensus may be relevant.

Although Pictet never documented the process on which his studies were founded, there is some evidence that his approach followed a certain "first principles" line of reasoning. Pictet emphasised the importance of ensuring minimum safeguards and the humanity of all people in times of peace and war. He placed:<sup>120</sup>

... the principle of inviolability at the head of the list: the individual has a right to the respect of his life, integrity, both physical and moral, and of the attributes inseparable from his personality.

Similarly, for Pictet, unified legal systems require a special type of interconnection. As suggested by this article, special regimes interconnect with international law: they interconnect with other special regimes; and they interconnect within the interior of their own systems.

To achieve universality of the validity and effect of the legal norm within the interior of international humanitarian law, Pictet made a distinction between substantive principles and derived principles (principles deduced by legal philosophy and jurisprudence from derived principles). For

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118 Article 9.

119 Article 11.

120 Jean Pictet *Development and Principles of International Humanitarian Law: Course given in July 1982 at the University of Strasbourg as Part of the Courses Organized by the International Institute of Human Rights* (Martinus Nijhoff Publishers, Leiden, 1985) at 63.

instance, Pictet showed how the "no harm" principle and a unified series of normative consequences, such as non-discrimination and protecting civilians, doctors and chaplains, derive from the principle of good neighbourliness.<sup>121</sup> Pictet added: "Together with the essential principles of humanity, the Geneva Conventions contain secondary provisions and highly detailed procedures for application."<sup>122</sup>

This article proposes a similar process to govern pluralistic legal norms that traverse the global commons. It explains and demonstrates part of the proposed legal process as it could apply to protect persons in the event of climate-related disasters. Developing highly detailed procedures for application are equally important to governing climate-related disasters but they should feed into an overarching unified process.

### ***E IFRC and the Unification of International Disaster Law***

As will be seen later, there is a certain type of interconnection in want of specification that occurs between first principles at the normative nexus. Fundamental principles proclaimed by the 20th International Conference of the Red Cross in Vienna 1965 guide the influential IFRC.<sup>123</sup> These principles are also relevant to governing the normative climate-disaster nexus.

By way of background, the 25th International Conference of the Red Cross adopted the revised text contained in the Statutes of the International Red Cross and Red Crescent Movement in Geneva in 1986.<sup>124</sup> The fundamental first principles reflected in that text are all found in the International Relief Union's preparatory work. These first principles include the principles of humanity, impartiality, neutrality, independence, voluntary service, unity and universality.<sup>125</sup>

At the application level, an expansive body of international treaties, resolutions and codes of conduct govern international disaster response.<sup>126</sup> This mass of overlapping international legal instruments was once collectively referred to as "international disaster response laws, rules and

121 At 12.

122 At 90.

123 See International Committee of the Red Cross *The Fundamental Principles of the Red Cross and Red Crescent* (International Committee of the Red Cross, Geneva, 1996).

124 International Committee of the Red Cross "The Fundamental Principles of the International Red Cross and Red Crescent Movement" (31 October 1986) <[www.icrc.org](http://www.icrc.org)>.

125 See for example Horst Fischer "International disaster response law treaties: trends, patterns, and lacunae" in *International Disaster Response Laws, Principles and Practice: Reflections, Prospects, and Challenges* (IFRC, Geneva, 2003) 24; and Michael Hoffman "What is the scope of international disaster response law?" in *International Disaster Response Laws, Principles and Practice: Reflections, Prospects, and Challenges* (IFRC, Geneva, 2003) 13.

126 See generally Jovica Patrnogic and Boško Jakovljević *Protection of Human Beings in Disaster Situations: A Proposal for Guiding Principles* (Villa Nobel, San Remo, 1989).

principles", or "IDRL". The IFRC's Disaster Law Programme subsequently broadened its focus on reducing human vulnerability to cover legal issues related to disaster risk reduction and recovery.

To achieve cohesion and order at the local level, the IFRC points to the need for states to abide by a defined set of guidelines.<sup>127</sup> The IFRC's Guidelines also recognise the importance of non-state actors. The Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance are illustrative: they were adopted at the 30th International Conference of the Red Cross and Red Crescent, held from 26 to 30 November 2007.<sup>128</sup>

The international community has not always embraced unified guidelines. However, in the aftermath of a series of natural disasters (the Indian Ocean tsunami included), the United Nations General Assembly adopted resolutions encouraging states to take the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance into account as appropriate.<sup>129</sup> By 2010, the United Nations was encouraging member states to "strengthen operational and legal frameworks for international disaster relief, taking into account the Guidelines, as appropriate".<sup>130</sup> The United Nations General Assembly reinforced this message again in 2011 and 2012.<sup>131</sup>

In 2013, the IFRC, the United Nations and the Inter-Parliamentary Union published a Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (with commentary).<sup>132</sup> In brief, it is designed as a reference tool for developing legislation and procedures for managing potential future international disaster assistance at a domestic level. The Model Act covers issues such as initiation and termination of international disaster assistance, co-

127 IFRC *International Disaster Response*, above n 91, at 13.

128 IFRC "Introduction to the Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance" (2011) <www.ifrc.org>. See also Charles W Gould "The Right to Housing Recovery after Natural Disasters" (2009) 22 Harv Hum Rts J 169.

129 *Strengthening emergency relief, rehabilitation, reconstruction and prevention in the aftermath of the Indian Ocean tsunami disaster* GA Res 63/137, A/RES/63/137 (2008) at [6]; *Strengthening of the coordination of emergency humanitarian assistance of the United Nations* GA Res 63/139, A/RES/63/139 (2008) at [8]; and *International cooperation on humanitarian assistance in the field of natural disasters, from relief to development* GA Res 63/141, A/RES/63/141 (2008) at [5].

130 *International cooperation on humanitarian assistance in the field of natural disasters, from relief to development* GA Res 64/251, A/RES/64/251 (2010) at [7].

131 *International cooperation on humanitarian assistance in the field of natural disasters, from relief to development* GA Res 65/264, A/RES/65/264 (2011) at [7]; and *International cooperation on humanitarian assistance in the field of natural disasters, from relief to development* GA Res 66/227, A/RES/66/227 (2012) at [7].

132 IFRC, United Nations Office for the Coordination of Humanitarian Affairs and Inter-Parliamentary Union *Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (Geneva, 2013).

ordination and preparedness, general responsibilities of assisting actors, legal facilities as well as logistics and transit.

### ***F The UNISDR and the Hyogo Framework for Action***

Before proceeding to develop a unified process specification at the climate-disaster nexus for protecting persons in the event of disasters, there is a need to identify with the context of the UNISDR and the "Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters" (Hyogo Framework for Action). Both the UNISDR and the Hyogo Framework are important instruments that influence the normative climate-disaster nexus. This section brings those two mechanisms into the frame.

By declaring 1990 as the start of the International Decade for Natural Disaster Reduction, the United Nations signalled that it would play a prominent role in fostering co-operation in disaster risk reduction.<sup>133</sup> A breakthrough General Assembly Resolution 46/182 of 19 December 1991 launched the United Nations' process for co-ordinating responses to natural disasters.<sup>134</sup> The annex to Resolution 46/182, largely informed by the IFRC, contains 42 guiding principles for strengthening the United Nations' co-ordination of emergency humanitarian assistance in the event of natural disasters. In alignment with the IFRC's direction, "[h]umanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality".<sup>135</sup> Resolution 46/182 also specifically recognises the principles of sovereignty; territorial integrity; obligations of states to "take care of the victims of natural disasters and other emergencies occurring on its territory"; "international cooperation" where an affected country does not have the necessary response capacity; state co-operation with international organisations; disaster prevention and preparedness; long-term development; and sustainable development.<sup>136</sup> Special attention is given to prevention, preparedness, standby capacity (including contingency funds), co-ordination, co-operation and leadership.<sup>137</sup>

United Nations General Assembly Resolutions 63/141 and 64/251 make special mention of regime specific first principles insofar as they "recognise the importance of the principles of neutrality, humanity, impartiality and independence for the provision of humanitarian assistance".<sup>138</sup> In responding to disasters, Resolution 64/251 encourages all member states, in accordance with Resolution 46/182, to fully "respect the humanitarian principles of humanity, neutrality, impartiality

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<sup>133</sup> *International decade for natural disaster reduction* GA Res 42/169, A/RES/42/169 (1987) at [3].

<sup>134</sup> GA Res 46/182, above n 64, at [1].

<sup>135</sup> Annex at [2].

<sup>136</sup> Annex at [4]–[11].

<sup>137</sup> Annex at [13]–[39].

<sup>138</sup> GA Res 63/141, above n 129, preamble at [2]; and GA Res 64/251, above n 130, preamble at [2].

and independence, and their obligations under international law, including international humanitarian law".<sup>139</sup>

UNISDR is the secretariat of the International Strategy for Disaster Reduction. One of the secretariat's main tasks is to ensure implementation of the International Strategy for Disaster Reduction.<sup>140</sup> UNISDR's core functions include applying disaster risk reduction to climate change adaptation and strengthening the international system for disaster risk reduction.

UNISDR has been active since its creation in December 1999. In 2004, the secretariat supported the establishment of the inter-agency Working Group on Climate Change and Disaster Risk Reduction. During the first Global Platform for Disaster Risk Reduction of June 2007, the Working Group agreed on three priority areas: gathering and sharing good practices in climate risk-reduction; providing policy guidance to UNFCCC processes on the post-2012 climate change regime; and developing methods for reducing the carbon footprint disaster risk reduction activities.

In 2005, 168 governments gave impetus to global work on disaster risk reduction by adopting the voluntary Hyogo Framework for Action at the second World Conference on Disaster Reduction.<sup>141</sup> The Hyogo Framework for Action promotes the International Strategy for Disaster Reduction and provides for another set of agreed principles and priorities for action. The Hyogo Framework aims to reduce the loss of life as well as disaster inflicted social, economic and environmental losses caused to communities. For implementation, the Hyogo Framework identifies strategic goals that incorporate principles of integration, development and the systematic incorporation of risk reduction approaches into the implementation of emergency preparedness, response and recovery programmes; and it links them to priority actions. The Hyogo Framework allocates primary responsibility to governments, but it also involves civil society, individuals, private enterprises, non-governmental organisations and local communities. As governments make further progress on implementing the Hyogo Framework and managing climate change, there is a need for normative guidance that meshes into cohesive national development plans.

Recognition of the links between international disaster response and sustainable development is also growing. In 2009, the United Nations General Assembly noted discussions on an international strategy for disaster reduction under the umbrella of sustainable development.<sup>142</sup> In 2010, the United Nations requested relevant organs and bodies of the United Nations system and other relevant international organisations to give effect to the Hyogo Framework for Action in responding

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139 GA Res 64/251, above n 130, at [14].

140 *International Decade for National Disaster Reduction: successor arrangements* GA Res 54/219, A/RES/54/219 (1999) at [3].

141 *International Strategy for Disaster Reduction* GA Res 60/195, A/RES/60/195 (2005) at [2].

142 *International Strategy for Disaster Reduction* GA Res 64/200, A/RES/64/200 (2009) at [3], [8] and [25].

to the devastating effects of the Haiti earthquake.<sup>143</sup> As the United Nations Secretary-General's Special Representative for Disaster Risk Reduction and Implementation of the Hyogo Framework for Action, and head of the Secretariat of the UNISDR, Margareta Wahlström expressed the view in 2009 that "if left unattended, disaster risk will steadily grow, and thereby set up conditions for massive destruction of decades of development gains".<sup>144</sup>

Global assessment reports have been produced.<sup>145</sup> As part of a 2011 user review, the Hyogo Framework for Action Mid-Term Review suggested that the "international community should develop a more coherent and integrated approach to support HFA implementation".<sup>146</sup> The United Nations General Assembly was also beginning to acknowledge the normative climate-disaster nexus:<sup>147</sup>

... global climate change, among other factors, contributes to the increase in intensity and frequency of natural disasters, which amplify natural disaster risk, and in this regard encourages Member States, as well as relevant regional and international organizations, in accordance with their specific mandates, to support adaptation to the adverse effects of climate change and to strengthen disaster risk reduction and early warning systems in order to minimize the humanitarian consequences of natural disasters, including through the provision of technology and support for capacity-building in developing countries.

Contextualising climate, disaster and development norms takes the process a step forward. This paper suggests a more coherent and integrated approach to all three domains. By way of example, climate change issues should be more cohesively integrated into a post-2015 process for governing climate change, disaster risk reduction (Hyogo Framework for Action 2) and the post-2015 development agenda.<sup>148</sup> Advancing the Hyogo Framework for Action 2 and the post-2015

143 *Humanitarian assistance, emergency relief, rehabilitation, recovery and reconstruction in response to the humanitarian emergency in Haiti, including the devastating effects of the earthquake* GA Res 65/135, A/RES/65/135 (2010) at [14].

144 Wahlström, above n 29, at 154.

145 See for example UNISDR *2009 Global Assessment Report on Disaster Risk Reduction: Risk and poverty in a changing climate – Invest today for a safer tomorrow* (Geneva, 2009); and UNISDR *Revealing Risk, Redefining Development*, above n 35.

146 UNISDR *Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters – Mid-Term Review 2010–2011* (Geneva, 2011) at 70.

147 GA Res 65/264, above n 131, at [6]. See also GA Res 66/227, above n 131, at [6].

148 *International Strategy for Disaster Reduction* GA Res 67/209, A/RES/67/209 (2013) at [12]:

*Requests* the secretariat of the International Strategy for Disaster Reduction to serve as the secretariat of the Conference, to facilitate the development of a post-2015 framework for disaster risk reduction and to coordinate the preparatory activities in consultation with all relevant stakeholders.

development agenda provides an opportunity to integrate appropriate disaster risk reduction and development processes rather than artificially split dynamic legal processes into spurious self-contained regimes. Adapting to the adverse effects of climate change and reducing greenhouse gases is vital to advances in disaster law and development. Rather than being left to the vagueness of "informal law", reaching consensus on consequential norms (principles, rules and standards) that trigger concrete programmes and integrate national disaster risk management frameworks with development action plans could benefit individuals and society as a whole.

The International Law Commission is also in the process of working through how to protect persons in the event of disasters. An overview of its work follows together with a series of supporting recommendations.

### ***G The International Law Commission***

In 2007, the United Nations General Assembly noted the International Law Commission's inclusion of the topic "Protection of persons in the event of disasters" in its workplan.<sup>149</sup> While the International Law Commission seemed to acknowledge the need for a "law of the global commons" to govern legal issues in the global commons, it recognised early on that it did not have the mandate to develop an integrated "law of peoples", *jus gentium* or new global human order per se as that would have serious policy consequences. While recognising:<sup>150</sup>

... [that] certain legal rights and duties ... may be accepted as such in a legal instrument emerging from the Commission ... there were also moral rights and duties to be recommended *de lege ferenda*.

In effect, the International Law Commission conceded not to confine its work to a more restrictive *lex lata* framework. Its efforts were to extend beyond codification to consider legitimising moral values. By design, this will still have serious policy implications for the rule of law.

As Ronald Cass observes, the rule of law enables people to have a sort of settled expectation that crises would otherwise disrupt and it promotes "principled predictability". According to Cass, there is a need for:<sup>151</sup>

... a set of precepts about how our system of law and government should be structured so that individuals can know the ground rules, can anticipate the way laws will work, and have confidence that

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See also *Sustainable Development: International Strategy for Disaster Reduction – Report of the Second Committee A/67/437/Add.3* (2012).

149 *Report of the International Law Commission on the work of its fifty-ninth session GA Res 62/66, A/RES/62/66* (2007) at [7].

150 International Law Commission *Report of the International Law Commission on the work of its sixtieth session A/63/10* (2008) at [251].

151 Ronald A Cass "The Rule of Law in Time of Crisis" (2008) 51 *Howard LJ* 653 at 654.



laws will apply the same way to everyone, regardless of their personal circumstances and regardless of the identity of the person applying the law.

The International Law Commission's 2007 report ventures some way towards thinking about "principled predictability", but not entirely. The Commission seemed to recognise the role of "humanity; neutrality; impartiality; non-discrimination; cooperation; sovereignty and non-intervention; and prevention, mitigation and preparedness" as "first principles" early on, but it did not proceed by developing a unified or universal process by which to give effect to these principles.<sup>152</sup> The International Law Commission's working group proceeded in its usual manner by drafting proposed articles first, which may of course still be beneficial to "constitutionalising" an eventual "first principles" process applicable to all; but it is not a "first principles" approach.

Upholding sovereignty and non-intervention are central to reports of the International Law Commission's drafting committee on draft articles for the conduct of international disaster relief activities. According to the International Law Commission's early report of 2007, disaster relief by assisting actors can only be carried out "with the consent of the affected country and in principle on the basis of an appeal by the affected country", and the receiving state "has the primary responsibility for the protection of persons on its territory or subject to its jurisdiction or control during a disaster".<sup>153</sup>

By 2011, the International Law Commission's drafting committee had moved away from a unified principle-based framework and provisionally adopted a series of draft articles.<sup>154</sup> Additional

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152 International Law Commission *Protection of Persons in the Event of Disasters*, above n 111, at [3].

153 At [20] and [23].

154 At its 61st session, the Commission, at its 3029th meeting, on 31 July 2009, took note of Draft Articles 1 to 5, as provisionally adopted by the drafting committee: see International Law Commission *Protection of persons in the event of disasters: Texts of draft articles 1, 2, 3, 4 and 5 as provisionally adopted by the Drafting Committee A/CN.4/L.758* (2009). The Commission, at its 3067th meeting, on 20 July 2010, took note of Draft Articles 6 to 9, as provisionally adopted by the drafting committee: see International Law Commission *Protection of persons in the event of disasters: Text and titles of draft articles 6, 7, 8 and 9 provisionally adopted by the Drafting Committee on 6, 7 and 8 July 2010 A/CN.4/L.776* (2010). See also International Law Commission *Protection of persons in the event of disasters: Text of the draft articles on the Protection of persons in the event of disasters provisionally adopted at that date by the commission A/66/10 and Add1* (2011). The Commission adopted the report of the drafting committee on Draft Articles 10 and 11 at its 3116th meeting, on 2 August 2011: International Law Commission *Report of the International Law Commission on the work of its sixty-third session A/66/10* (2011) at [273] [*Sixty-Third Session Report*]. The Commission, at its 3180th meeting, on 16 July 2013, referred Draft Article 5 ter, which extends the general duty to co-operate to the pre-disaster phase, and Draft Article 16, which relates to responsibilities and accountability mechanisms and institutional arrangements, to the drafting committee: International Law Commission *Report of the International Law Commission on the work of its sixty-fifth session A/68/10* (2013) at [58].

draft articles are under discussion.<sup>155</sup> Understanding how these articles may fit in context with climate law and development law is uncertain.

Although there may be a connection between recent weather-related disasters and climate, the International Law Commission's drafting committee does not appear to have examined these issues at the time of writing. As stated earlier, it is not necessary to prove scientific attribution between natural disasters, like flooding, and climate, in order to advance a normative process. In certain circumstances, the duty to protect local citizens should be a strong enough rationale to protect local citizens and ensure that appropriate funding pools are in place for flood victims even if they reside in developed countries. If the public sector forfeits its mandate due to scepticism, a penchant for over investment in international development and under investment in local development, or other reasons, then private sector insurance companies may come to the fore and canvass for detailed scrutiny.

To relate the work of the International Law Commission's drafting committee to this article, the following commentary on the draft articles initiates an examination that may help to govern climate-related disasters.<sup>156</sup> The commentary sets out an agenda for reflection by relevant stakeholders. It is designed to feed into an overall "first principles" approach to protect persons in the event of disasters.

### 1 Scope

The draft articles "apply to the protection of persons in the event of disasters".<sup>157</sup> The purpose of these draft articles is "to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights".<sup>158</sup> By virtue of this construction, the International Law Commission's work on instruments for prevention, preparation, protection and recovery is seemingly limited and the scope could perhaps be too narrow in terms of the commitments that ensue. It may be useful to consider the normative interactions that link ex ante decisions (what happens before a disaster) with ex post decisions (actions taken after a disaster). The implications extend beyond co-operation and could include measures to adapt and mitigate disasters.

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155 See generally International Law Commission *Fifth report on the protection of persons in the event of disasters* A/CN.4/652 (2012) [*Fifth Report*].

156 This article has been updated using the following report: International Law Commission *Report of the International Law Commission on the work of its sixty-fourth session* A/67/10 (2012) [*Sixty-Fourth Session Report*].

157 At 91, Draft Article 1, Scope (provisionally adopted by the Commission).

158 At 91, Draft Article 2, Purpose (provisionally adopted by the Commission).

## 2 *Defining disaster*

According to the draft articles, "disaster" means a:<sup>159</sup>

... calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

The provision considers three specific criteria: "widespread loss of life, great human suffering and distress, or large-scale material or environmental damage". In 2009, the Special Rapporteur underscored that "some actual loss is required, as opposed to the mere threat of harm".<sup>160</sup> Due to complexity, there is no distinction between natural and human-made events.<sup>161</sup> In addition, "the inquiry into a calamity's root cause is immaterial. ... The disruption itself ... gives rise to protection".<sup>162</sup>

## 3 *Relationship with international humanitarian law*

The draft articles do not apply "to situations to which the rules of international humanitarian law are applicable".<sup>163</sup> In its 2010 report, the International Law Commission's drafting committee "widely agreed" that the draft articles should not cover situations of armed conflict.<sup>164</sup> Prima facie, this makes sense. However, as discussed in some detail above, international law is not static. Many natural disasters occur along with armed conflicts, a point which was raised in delimiting the definition of disaster in the first place. All provisions relate to improving international co-operation, but certain parameters may require greater clarity in order to structure an effective operational response at the national level.

## 4 *Duty to co-operate*

Draft Article 5, Duty to cooperate, provides:<sup>165</sup>

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159 At 91, Draft Article 3, Definition of disaster, (provisionally adopted by the Commission).

160 International Law Commission *Second report on the protection of persons in the event of disasters* A/CN.4/615 (2009) at [47].

161 At [48].

162 At [49].

163 International Law Commission *Sixty-Fourth Session Report*, above n 156, at 91, Draft Article 4, Relationship with international humanitarian law (provisionally adopted by the Commission).

164 International Law Commission *Third report on the protection of persons in the event of disasters* A/CN.4/629 (2010) [*Third Report*] at [11].

165 International Law Commission *Sixty-Fourth Session Report*, above n 156, at 91, Draft Article 5, Duty to cooperate (provisionally adopted by the Commission).

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

Draft Article 5 bis provides:<sup>166</sup>

For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources.

The International Law Commission's fourth report confirms that the duty to co-operate is incumbent not only on third-party states but also on affected states, and it complements human rights obligations.<sup>167</sup> The principle of "cooperation is a foundational premise of the international legal order".<sup>168</sup> It is "repeatedly recognized" and a "*conditio sine qua non* to successful relief actions".<sup>169</sup>

A provision for "unilateral cooperation", such as art 5 bis, changes the object of a duty to co-operate in some unfortunate ways. Confusing "result-based" commitments to provide scientific, technical and logistical support with an overarching obligation of conduct, such as the duty to co-operate, is best avoided. Providing assistance in the absence of any conduit for receiving assistance may require further reflection.<sup>170</sup> In addition, there is scope to regard the list as illustrative rather than all-inclusive.

## 5 *Humanitarian principles in disaster response*

Draft Article 6 provides:<sup>171</sup>

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

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166 At 85, Draft Article 5 bis, Forms of cooperation (provisionally adopted by the drafting committee on 30 July 2012).

167 International Law Commission *Fourth report on the protection of persons in the event of disasters* A/CN.4/643 (2011) at [36]; International Law Commission *Fourth report on the protection of persons in the event of disasters: Corrigendum* A/CN.4/643/Corr1 (2011).

168 International Law Commission *Protection of Persons in the Event of Disasters*, above n 111, at [17].

169 At [18]. See also [19] and [20].

170 International Law Commission *Fifth Report*, above n 155, at [117]–[119].

171 International Law Commission *Sixty-Fourth Session Report*, above n 156, at 91, Draft Article 6, Humanitarian principles in disaster response (provisionally adopted by the Commission).

Human dignity is a transcendental norm within which three auxiliary principles form a core and come into play in disaster relief.<sup>172</sup> First is the principle of humanity: "Human suffering must be addressed wherever it is found".<sup>173</sup> Second, neutrality specifies a type of secular apolitical non-discriminatory norm: "Hence, actions taken in response to disasters are neither partisan or political acts nor substitutes for them".<sup>174</sup> Third, impartiality incorporates non-discrimination.<sup>175</sup>

By 2010, the International Law Commission identified non-discrimination, proportionality and "impartiality proper" as derivatives of the substantive principle of impartiality. Non-discrimination reflects an objective test of equality between all human beings and that there ought to be no adverse distinctions on the grounds of age, gender or race. Proportionality establishes a relationship between response and necessity: "response activities must be proportionate to the needs in scope and in duration".<sup>176</sup> "Impartiality proper" implies that substantive distinctions are based on need and not some other subjective criteria, such as, contribution to climate change or a pending disaster.

Further work is required to interpret "taking into account the needs of the particularly vulnerable" as found in by Draft Article 6. Which groups are vulnerable?<sup>177</sup> How will needs assessments be conducted and by whom? Again, the UNFCCC's approach may provide useful guidance. The development of constituencies for indigenous peoples, women and gender, and so on, is another potential example as to where work in this area could develop.<sup>178</sup>

## 6 *Human dignity and human rights*

Draft Article 7 stipulates that "[i]n responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person".<sup>179</sup> Draft Article 8 provides that persons "affected by disasters are

172 International Law Commission *Third Report*, above n 164, at [17].

173 At [48].

174 At [28].

175 IFRC "Impartiality" <[www.ifrc.org](http://www.ifrc.org)>.

176 International Law Commission *Third Report*, above n 164, at [35].

177 See generally John Handmer, Elsie Loh and Wei Choong "Using Law to Reduce Vulnerability to Natural Disasters" (2007) 14 *Geo J on Poverty L & Poly* 13.

178 For further discussion and examples, see Payal K Shah "Assisting and Empowering Women Facing Natural Disasters: Drawing from Security Council Resolution 1325" (2006) 15 *Colum J Gender & L* 711.

179 International Law Commission *Sixty-Fourth Session Report*, above n 156, at 91, Draft Article 7, Human dignity (provisionally adopted by the Commission). See generally Stuart Ford "Is the Failure to Respond Appropriately to a Natural Disaster a Crime against Humanity – The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis" (2010) 38 *Denv J Intl L & Poly* 227.

entitled to respect for their human rights."<sup>180</sup> Both of these provisions may benefit from further commentary concerning guidance on consequential norms, such as those that reside at the climate-disaster nexus, rights to drinkable water and other prerequisites for human dignity.

### 7 *Role of the affected state*

Draft Article 9 provides for the role of the affected state. Draft Article 9(1) states that "[t]he affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory".<sup>181</sup> As mentioned, this duty is not to be confused with the interpretation of "responsibility to protect" in international law.<sup>182</sup> Draft Article 9(2) stipulates that in upholding the principle of sovereignty, the "affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance".<sup>183</sup>

### 8 *Duty of the affected state to seek assistance*

Draft Article 10 provides for the duty of the affected state to seek assistance to the "extent that a disaster exceeds its national response capacity".<sup>184</sup> Many delegations have welcomed this provision as a legal rather than political or moral obligation.<sup>185</sup> The duty to seek assistance generally stems from a state's obligation to protect human dignity, human security and fundamental human rights. When distress meets the criteria of an overwhelming disaster, then a state ought to send a distress signal and seek assistance from the international community. Whether or not the international community is able to respond in a co-ordinated fashion also involves the principles of prevention (ex ante measures), mitigation and preparedness.

Clarity as to what happens when an affected state is not willing to accept assistance would be beneficial. Other aspects also require precision. When is a state's local capacity "overwhelmed"? Should this be an obligation of result or conduct? Should the article express the duty in mandatory or hortatory terms? While states are predominant, how should affected states seek assistance "as

180 International Law Commission *Sixty-Fourth Session Report*, above n 156, at 91, Draft Article 8, Human rights (provisionally adopted by the Commission). See generally David Fisher "Legal Implementation of Human Rights Obligations to Prevent Displacement Due to Natural Disasters" (2010) 41 *Stud Transnatl Legal Poly* 551.

181 International Law Commission *Sixty-Fourth Session Report*, above n 156, at 91, Draft Article 9(1), Role of the affected State (provisionally adopted by the Commission).

182 See generally Tyra Ruth Saecho "Natural Disasters and the Responsibility to Protect: From Chaos to Clarity" (2007) 32 *Brook J Intl L* 663.

183 International Law Commission *Sixty-Fourth Session Report*, above n 156, at 92, Draft Article 9(2), Role of the affected State (provisionally adopted by the Commission).

184 At 92, Draft Article 10, Duty of the affected State to seek assistance (provisionally adopted by the Commission).

185 International Law Commission *Fifth Report*, above n 155, at [24].

appropriate" "from among" the "relevant" actors, such as other states, inter-governmental organisations and non-governmental organisations?

### 9 *Consent of the affected state to external assistance*

Draft Article 11 also concerns the inter-relationships between sovereignty and consent. Sovereignty is upheld insofar that "[t]he provision of external assistance requires the consent of the affected State".<sup>186</sup> However, "[c]onsent to external assistance shall not be withheld arbitrarily".<sup>187</sup> Further, "when an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known".<sup>188</sup>

To a certain extent, Draft Article 11 reflects the idea that the affected state is not the only decision-maker. It is not to withhold consent arbitrarily. Arbitrariness in consideration of the proposed "first principles" of climate law presented before would be counter-productive to sustainable development. Examination of non-arbitrariness at climate-disaster nexus could be beneficial.

A state is also to make its decisions known. How should it do this? Who does it notify? What is the role of the affected people? For example, if the state is not willing to seek assistance, can people at risk or those affected by disaster request assistance? What happens when there is no functioning government? Further study is required.

### 10 *Right to offer assistance*

In 2011, the Special Rapporteur suggested Draft Article 12: "In responding to disasters, States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations shall have the right to offer assistance to the affected State".<sup>189</sup> A new sentence was then added: "Relevant non-governmental organizations may also offer assistance to the affected State". Thus, Draft Article 12 read as follows in 2012: "In responding to disasters, States, the United Nations, and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer

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186 International Law Commission *Sixty-Fourth Session Report*, above n 156, at 92, Draft Article 11(1), Consent of the affected State to external assistance (provisionally adopted by the Commission).

187 At 92, Draft Article 11(2), Consent of the affected State to external assistance (provisionally adopted by the Commission).

188 At 92, Draft Article 11(3), Consent of the affected State to external assistance (provisionally adopted by the Commission).

189 International Law Commission *Sixty-Third Session Report*, above n 154, at [277], n 1. The text of the draft articles provisionally adopted so far by the Commission are found at 254–255.

assistance to the affected State".<sup>190</sup> Again, clarity is required as to which non-governmental organisations are relevant and which are not relevant. Without some clarification as to the nature of an offer, some parties may view the provision as self-evident.

If Draft article 12 is to do more than state the obvious, then perhaps the dynamics raised by issues relating to shared responsibility require further scrutiny. Another link to inter- and intra-generational equity is whether the global community has a duty to offer assistance in a co-ordinated and effective way. This type of normative derivation would differ from whether support is appropriate, non-arbitrary and integrated at local levels.

### *11 External assistance*

Draft Articles 13–15 could facilitate establishing a framework of terms and conditions for external assistance. All three provisions require implementing mechanisms. Interestingly, they all incorporate mandatory obligations in some regard. Draft Article 13 provides:<sup>191</sup>

The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

Of note, is that in many disaster situations, a state may not have a full or comprehensive appreciation of the type of assistance it requires. Notwithstanding, care will need to be taken to ensure that overly laborious third party needs assessment are not imposed on the affected State. Such provisions could give far too much weight to the rights of third parties rather than the needs of local communities. The request of the affected state for support should still remain paramount.

Certain norms in this area could perhaps find a better position by derivation from a type of precautionary principle. There may be a sound policy argument for ex ante external assistance to undertake precautionary action against potential harm from flooding or blizzards even if a link between science and climate change is not 100 per cent certain. Besides facilitating an external assistance framework from which states can derive cohesive rules, there is also a need for legal standards, performance measures and codes of conduct ex ante and ex post disaster.

Draft Article 14 states:<sup>192</sup>

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<sup>190</sup> International Law Commission *Sixty-Fourth Session Report*, above n 156, at 85, Draft Article 12, Offers of assistance (provisionally adopted by the drafting committee on 30 July 2012).

<sup>191</sup> At 85, Draft Article 13, Conditions on the provision of external assistance (provisionally adopted by the drafting committee on 30 July 2012).

<sup>192</sup> At 85–86, Draft Article 14, Facilitation of external assistance (provisionally adopted by the drafting committee on 30 July 2012).



- (1) The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:
  - (a) Civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and
  - (b) Goods and equipment, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof;
- (2) The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

It has been noted that Draft Article 14 makes no distinction between civilian and military personnel. That issue may be rectified. International civil forces play pivotal roles in disaster relief and need support, but there may still be a requirement for better co-ordination between civilian and military relief personnel.

Draft Article 15 provides:<sup>193</sup>

The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actors wishing to terminate shall provide appropriate notification.

In terms of integration at the local level, these provisions are yet to reconcile with a uniform and universal approach. An ad hoc approach could jeopardise operationalizing the draft articles by default. Coherence with the work of other actors could be sensible. I mentioned the IFRC's Guidelines before as an example. Besides the need for a unifying framework, it could be beneficial to discuss how these provisions would lead to specific commitments.

## ***V WAY FORWARD: STUDY AND STRENGTHEN THE DYNAMIC NORMATIVE NEXUS***

### ***A On Developing a Unified and Universal Approach***

At present, the International Law Commission's draft articles are somewhat disperse. They are a work in progress. A cohesive framework of normative principles that would help national authorities draft consequential norms is missing. Specifying fundamental principles at the dynamic climate-disaster nexus (such as sovereignty, humanity, equity, solidarity, neutrality, impartiality, precaution (prevention, adaptation, mitigation and preparedness), sustainable development and good neighbourliness, which includes "no harm" and co-operation), could help anchor consequential rules. In a general sense, principles that are already part of customary international law could be

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<sup>193</sup> At 86, Draft Article 15, Termination of external assistance (provisionally adopted by the Draft Committee on 30 July 2012).

considered within a preamble. Those that have a special context in terms of disaster law could perhaps be better placed in the body of the draft articles.

In the absence of a unified process, or the failure to recognise one, ad hoc approaches could increase confusion in the midst of a major disaster. A unified normative process could help to resolve these types of uncertainties. An equitable basis could, for instance, help to unbundle a duty to protect. An umbrella construction could consider the conditionality of protecting present and future generations of humankind in the event of disasters, on the basis of equity and in accordance with "common but differentiated responsibilities and respective capabilities".

With respect to Draft Article 15, as well as several other draft articles, links to sustainable development could improve. As it stands, provisions for termination are rather abrupt. Reconstruction and sustainability require development. A staged transition may merit attention.

Work is in progress and clarifications are required if states are to understand the extent of their obligations. Starting with the UNFCCC's first principles provides a useful baseline for analysis and application across other regimes that reside at the climate-disaster nexus. Leveraging the UNFCCC's underlying commitments – such as those relating to information-sharing, participation, access to justice, joint planning and implementation, funding, insurance and technology transfer – into the domains of disaster law and development could stem from adopting a "first principles" approach, provided analysis and negotiation proceed in a methodical fashion. In brief, a dynamic strengthening of these types of commitments in the domains of climate law, disaster law and development could initiate a cohesive and worthwhile universal process for unifying interdependent legal norms. In turn, embracing a unified process *applicable to all* could trigger an outcome with legal force by 2015.

### ***B Using "First Principles" as a Unifying Force***

Fundamental first principles of disaster law interact with fundamental first principles of international climate law at a type of normative nexus. The principle of equity concerns impartiality, neutrality, consent and notification. The principle of solidarity incorporates distributive fairness but is not isolated to distributive fairness. It concerns "impartiality proper", priority needs, capacity to respond and mutual insurance. The principles of prevention, adaptation, mitigation and recovery reflect derivations of the precautionary principle. The principle of sustainable development comprises other important norms. Appropriateness (non-arbitrariness) and integration merit further research in a disaster context. The good neighbour principle reflects in the duty to co-operate, "no harm" and other auxiliary norms at the economic level, such as non-discrimination.

Normative principles interact at the intersections between different regimes. They have a dynamic function, but theories of dynamic governance are often lacking. There is, therefore, a potential deficit which gives rise to an opportunity to govern the normative nexus more effectively. Governing the climate-disaster nexus provides one example. Provided intersecting fundamental first principles are coherent, consequential rules are also likely to have a basis for coherence too. In this

way, a process *applicable to all* may be considered as realising a type of kaleidoscopic theory of constitutional normativity.

### ***C Scenario Extension: Climate-Disaster-Water Nexus***

With an appreciation of the basic precepts of the proposed process/model/theory, it is now possible to extend the proposed approach to govern issues of greater complexity. The simplified scenario could extend to other domains of disaster risk reduction and response. Water governance should come into the frame.<sup>194</sup> The other important thing to do is to move from first principles to interconnected consequential rules. The examples that follow focus on small island states and Oceania (due to the fact this article is based on a paper presented at the 20th Annual Conference of the Australian and New Zealand Society of International Law). The issues are not, however, isolated to Oceania.

Within the South Pacific, the Hyogo Framework for Action, the Pacific Regional Disaster Reduction and Disaster Management Framework for Action: 2005–2015 (referred to as the Madang Framework)<sup>195</sup> and, amongst others, the Pacific Framework for Action on Climate Change and their associated action plans<sup>196</sup> would benefit from a more cohesive approach. All Pacific Island countries are parties to the UNFCCC. Yet, they are at various stages of development when it comes to managing risk and responding to natural disasters at the climate-water-disaster nexus.

Like many Pacific Island countries, Tonga, for example, is susceptible to heavy rainfall and flooding in low-lying areas. Five major tropical cyclones and related storm surges have ravaged the country since the 1960s.<sup>197</sup> Given the intensity and frequency of these disasters, Tonga has linked

194 World Health Organization and Water Engineering Development Centre "WHO technical notes on drinking-water, sanitation and hygiene in emergencies" (2011) <www.who.int>.

195 Secretariat of the Pacific Community *An Investment for Sustainable Development in the Pacific Island Countries: Disaster Risk Reduction and Disaster Management – A Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disaster* (SOPAC Miscellaneous Report 613, Noumea, 2005). The document, referred to as the "Madang Framework for Action", was endorsed by the 36th Pacific Islands Forum held in Papua New Guinea in October 2005: Pacific Islands Forum Secretariat "Forum Communiqué" PIFS (05)12 at [24].

196 South Pacific Regional Environment Programme *Pacific Islands Framework for Action on Climate Change 2006–2015* (Apia, 2005) was endorsed by Pacific leaders at the 36th Pacific Islands Forum held in 2005: Pacific Islands Forum Secretariat, above n 195, at [26]. Pacific leaders reconfirmed this commitment at the 40th Pacific Island Forum meeting in Cairns in 2009 by adopting the "Pacific Leaders' Call for Action on Climate Change": Pacific Islands Forum Secretariat "Forum Communiqué" PIFS (09)12 at [4] and annex A. See also Secretariat of the Pacific Community, UNISDR and South Pacific Regional Environment Programme *Roadmap towards an Integrated Regional Strategy for Disaster Risk Management and Climate Change in the Pacific by 2015* (Secretariat of the Pacific Community, Noumea, 2013).

197 UNISDR and United Nations Development Programme *Disaster Risk Reduction and Climate Change Adaptation in the Pacific. An Institutional and Policy Analysis* (Suva, 2012) at 43.

certain aspects of its disaster response plans with its plans for governing the adverse effects of climate change. Tonga has developed an integrated Disaster Risk Management and Climate Change plan linked to the reduction of greenhouse gas emissions.<sup>198</sup>

Situated in the "ring of fire", Vanuatu is one of the world's disaster hotspots. In citing a World Bank report, the Australian government notes:<sup>199</sup>

Almost 81% of its landmass and 76% of its population is vulnerable to two or more hazards including volcanic eruptions, cyclones, earthquakes, droughts, tsunamis, storm surge, coastal and river flooding and landslides.

Vanuatu has developed programmes to respond to water disasters. The government is in the process of developing an integrated climate/water/disaster management plan for the capital, Port Vila. Vanuatu has also prepared a number of strategic plans and underpinned them with supporting actions.<sup>200</sup>

The Caribbean region faces similar threats. Likewise, there is an increasing cognisance of the need to integrate normative frameworks for climate change, disaster response and water governance. The Caribbean Development Bank has played an active role in a series of projects, including responding to erosion. Like the Pacific, the Caribbean has adopted a regional framework for climate change, under the auspices of the Caribbean Community Climate Change Centre.<sup>201</sup>

In terms of developing a water governance framework, it is possible to derive part of this framework from the climate-disaster nexus. Evidently, water law also has specific tailored principles and consequential norms to consider. The proposed integrated process should facilitate local implementation.

Frameworks for water governance within the Pacific and the Caribbean, and even elsewhere, could be underpinned by giving effect to an integrated body of fundamental first principles, which include, inter alia, equity (stakeholder participation), solidarity (collective village action in times of disaster), precaution (climate change adaptation and mitigation plans), sustainable development (the

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198 At 25.

199 Global Facility for Disaster Reduction and Recovery *Disaster Risk Management Programs for Priority Countries* (UNISDR and The World Bank, 2009) at 81 as cited in Australian Agency for International Development *Integration in practice: Integrating disaster risk reduction, climate change and environmental considerations in AusAID programs* (Commonwealth of Australia, Canberra, 2010) at 19.

200 See Secretariat of the Pacific Regional Environment Programme and United Nations Development Programme *Mainstreaming Climate Change Adaptation in the Pacific: A Practical Guide* (Apia, 2013) at 39 and 50. See also National Advisory Committee on Climate Change *National Adaptation Programme for Action (NAPA) - Republic of Vanuatu* (Port Vila, 2007).

201 Caribbean Community Climate Change Centre *Climate Change and the Caribbean: A Regional Framework for Achieving Development Resilient to Climate Change (2009–2015)* (2009).

integration principle) and good neighbourliness (co-operation). Australia and New Zealand are already facing more frequent extreme weather events and natural disasters: earthquakes, heat waves, droughts, floods and receding glaciers. These events put stress on water services and associated infrastructure, including waste. Similarly, it may be possible to leverage an integrated normative framework at the climate-disaster law nexus for the purpose of water governance. A series of consequential rules should improve cohesion.

### ***D On Deriving Consequential Rules from "First Principles"***

Implementing Giovanni Ciraolo's not-so-new model, which favours complementing prevention and building local capacity to reduce disaster risk with a co-ordinated international relief effort, continues to challenge the global community. Private and public sector disaster response actions are often disjointed. The international community is void of a cohesive framework process.

Designing new institutional structures is important, but without reaching an unwavering consensus on a clearly articulated universal normative process, international dialogue is likely to continue to falter. International legal instruments will remain disoriented. Worse still, the consequences emanating from disasters will perpetuate the destruction of infrastructure, environmental damage and even human plight.

These issues are concerns for society as a whole. The international community engages whether a water-related disaster takes place in the Indian Ocean, the Pacific, in Russia or in the United States. To govern the dynamic normative nexus, a principled framework approach and unified process ought to give due consideration to the interconnections between relevant underlying processes.<sup>202</sup>

Existing approaches to address the specialist domains of climate and disaster as self-contained bodies of law or as discrete fragmented rules is one way, but there is much to be said for a different way. Unified principles should inform consequential rules. A more cohesive policy framework could emerge at the climate-disaster-water nexus. Institutionally, a well co-ordinated mobile international civil force would be invaluable. Notwithstanding, coherence will not occur in the field as long as each actor has its own distinct body of rules, standards and performance measures that operates in isolation from the global order. In the absence of a uniform and universal approach, catastrophe may intensify human disaster.

### ***E On "Constitutionalising" a Concomitant "Law of Peoples"***

Reaching agreement on overriding first principles and their consequential norms ought to act as a promising platform for meaningful co-operation and a new *jus gentium*. A unified and universal

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<sup>202</sup> The work of the UNFCCC Conference of Parties, the International Relief Union, the IFRC, the UNISDR and the International Law Commission, amongst others, could be better connected at the climate-disaster nexus.

"law of peoples" could facilitate governing the adverse effects of climate change that seep into the global commons. International law is already based on fundamental first principles, such as good neighbourliness, co-operation and "no harm". These norms reflect in a special, more tailored meaning in the climate regime and they cross over into disaster law and development. A *jus gentium* (a new global human order) could unify these principles and their consequential norms. It should facilitate a universal constitutional approach to protect persons pre-disaster and in the event of disasters. Rather than formulate static self-contained responses, the global community could benefit from legitimising and realising outcomes with legal force that derive from governing norms that interact at dynamic normative nexuses.

### ***F From Self-Contained Regimes to Kaleidoscopic Normativity***

The article has conveyed several proposals in terms of applying a reformulated kaleidoscopic "law of peoples" to the climate-disaster nexus. Five stand out. First, responding to weather-related disasters, like water-related disaster, and ensuring successful implementation of the UNFCCC are important aims, but not necessarily stand-alone aims. Specialist domains overlap. Negotiators should seek to build a cohesive policy framework that reflects the dynamism of the global normative order. Secondly, to govern the normative nexus between relevant special regimes, any new framework ought to give due consideration to existing interconnections (the work of the UNFCCC Conference of the Parties, the International Relief Union, the IFRC, the UNISDR and the International Law Commission, amongst others). Thirdly, there is an opportunity to reformulate Ciraolo's plan for an integrated and workable public-private sector mechanism that incorporates fundamental first principles at selected normative nexuses. Fourthly, a cohesive process, as opposed to various framework approaches, could focus on agreeing to a set of overriding ethical values, articulating them as legal principles and realising them through consequential norms. Fifthly, there is an argument for a paradigm shift from a cost-benefit North-South accounting-based reasoning to a "protection of humanity" value-based reasoning. Governing a kaleidoscopic normative process ought to act as a promising platform for giving meaning and purpose to a new *jus gentium* that will serve the global commons and protect present and future generations of humankind.

### ***G Conclusions***

Disasters have always existed, but there is growing impetus for the international community to develop a coherent and legitimate response to them. There are several reasons why a reformulated normative process may have greater chances of success nowadays. Improved reporting methods alert people to the increasing frequency and intensity of "natural" disasters. Decision-makers have a better understanding about the impacts of climate change. There is momentum to manage disaster risk, co-ordinate global value chains and be better prepared to respond to social and economic upheaval and national security threats. Insurance and financial instruments are more developed. Methods for loss assessment have improved. IT systems make disasters globally transparent within moments of their occurrence. Technology facilitates rapid response teams, reconstruction and prompt compensation.

Another lesson from the International Relief Union is that a more unified international civil force that brings together all actors need not be state driven; but it does require some sort of normative process-centric framework of fundamental first principles and consequential norms. As international law increasingly reaches out beyond states to take heed of a reformulated "law of peoples", old issues that seemed submerged last century are beginning to re-emerge on the global stage. The global community should learn from this historical context. It should build on it and adapt it to the realities of modern day society, a society where both states and non-state actors play a pivotal role and where people in both developing and developed countries may suffer from natural disasters.

To sum up, I have introduced a "first principles" approach, contextualised the first principles of international climate law and proposed how to mobilise them to protect people in the event of disasters. The proposed process/model/theory is new but it builds on the work of others (such as Ciraolo and Pictet). The resulting framework for a cohesive approach and structured dialogue could feed into negotiating post-2015 climate, disaster risk reduction and development agreements.

Climate, disaster risk reduction and development have been the main vehicle for illustration. The proposed process/model/theory has other uses. It outlines the contours of a new type of "constitutionalism" as a "law of the global commons" and is, therefore, of relevance to governing complex dynamic norms. Insofar as I defined and situated the global commons problem within the context of governing a *jus gentium*, the proposed unified legal process should be applicable to all people. The proposed "first principles" process/model/theory, which is founded on a complex network model, is flexible enough to govern other pluralistic normative nexuses residing within the global commons, but easy enough to be implemented.

From a practical perspective, I have demonstrated how a unified normative kaleidoscopic theory could provide an effective way to govern prevention, preparation, protection and recovery in the event of climate-related disasters. I have argued that climate justice should serve the interests of all actors at all levels – local, national, regional and international – but this will only work if the justice system realises a legitimate process, one with legal force. All physics of global justice ultimately arises from the dynamics of legitimising normative interactions. Normative interactions are often said to be "fragmented" due to the complexity of the phenomena that arise in trying to calculate them in order to govern them. But normative interaction is really "undefined". This phenomenon of kaleidoscopic normativity arises because the separation angle between the fractals of human dignity, human rights and human security that bound the legal system is reduced to zero, resulting in an undefined number of norms. Rather than continuing to try to model "infinity", the article proposes developing and giving effect to a "first principles" process/model/theory.