
18. The protection of vulnerable groups

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1. THE UNEVEN BURDEN OF DISASTERS

Cataclysmic events that bring death and injury, destroying homes and livelihoods, make us all vulnerable. The International Law Commission (ILC) defines ‘disaster’ as ‘a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale environmental damage, thereby seriously disrupting the functioning of society’.¹

The point of this chapter, however, is that natural disasters (like armed conflicts) are not equal in their impact. The very old, the very young, the sick, the wounded, persons with disabilities (PWDs) and, in some circumstances, women, can face particular and acute challenges. Women are typically primary caregivers, with responsibility for children, the elderly and infirm and for household work. They can be especially burdened when there is a breakdown in law and order and in basic support structures. Women can be targets for abuse and harm on the one hand and invisible to registration and relief agencies on the other.

The most deadly natural disaster this century was the earthquake and tsunami that struck in the Indian Ocean in December 2004, killing 230,000 people across 14 countries. Newspaper reports suggest that four times more women than men were killed,² that children accounted for one-third of the fatalities, but that PWDs fared worst. Unable to escape the walls of water, these people were more likely to be killed

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¹ See International Law Commission (ILC), *Draft Articles on the Protection of Persons in the Event of Disasters*, UN Doc. A/CN.4/L.831 (15 May 2014) (ILC Draft Articles), art 3. The International Red Cross and Red Crescent Movement offers a similar definition, distinguishing natural disasters from those involving armed conflicts. See *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (adopted at The 30th International Conference of the International Red Cross and Red Crescent Movement, 26–30 November 2007) Res 4, Annex Introduction, s 2(1).

² J Aglionby, ‘Four Times as Many Women Died in Tsunami’, *The Guardian* (26 March 2005). This aligns with research by E Neumayer and T Plumper, ‘The Gendered Nature of Natural Disasters: The Impact of Catastrophic Events on the Gender Gap in Life Expectancy’ (2007) 97 *Annals of the Association of American Geographers* 551. The study examined disasters over 21 years.

or wounded. They also struggled to access aid in the aftermath of the disaster.³ In the earthquake and tsunami off the Pacific coast of Tohoku that killed more than 15,000 in 2011, older persons were said to account for over 65 per cent of the deaths.⁴ PWDs also suffer disproportionate harm in and when displaced by human conflict. In 2014–15 the United Nations High Commissioner for Refugees (UNHCR) reported over 59 million refugees and persons of concern,⁵ the conflicts in Syria and Iraq producing flows not seen since the 1994 genocide in Rwanda. HelpAge and Handicap International in 2013 found the incidence of disability amongst refugees from Syria was almost twice the global average estimated by the World Health Organization (WHO) in its *Global Health Report*.⁶ Of the Syrian refugees surveyed, researchers found 30 per cent had special needs. One in five was affected by physical, sensory or intellectual impairment; one in seven was affected by chronic disease; and one in 20 suffered from injury, with nearly 80 per cent of those injuries resulting directly from the conflict. Seventy-seven per cent of older refugees surveyed had special needs.⁷ These people shared the same concerns as able-bodied refugees about lack of food and income, access to shelter, basic healthcare and essential household items. However, refugees with disabilities faced extra challenges in obtaining assistance – and the consequences for them not obtaining assistance were disproportionately harsh.

There is now substantial research documenting the impact of conflict and disasters on PWDs.⁸ As well as inflicting physical and psychological injuries that can lead to short- and long-term impairments, disaster events typically involve major disruptions to societal structures and operations. These can seriously affect the ability to respond to persons in need. PWDs are more likely to be left behind during evacuation exercises; they are less likely to benefit from humanitarian assistance or to gain access to needed medical services or assistive technologies. Situational stressors and negative cultural attitudes to disability can produce adverse responses that range from discrimination in the allocation of scarce resources⁹ through to failure to acknowledge the presence of

³ United Nations (UN) Children's Fund (UNICEF), *UNICEF launches \$144.5 million appeal* (6 January 2005) <http://www.unicef.org/media/media_24707.html> accessed 21 September 2015.

⁴ Defined as 60 years or older. See Jiji Press, '70% of Missing Aged 60 and Older' *Japan Times* (8 March 2012) 2. See also *Kyodo News* '90% of Disaster Casualties Drowned' *Japan Times* (21 April 2011) 2.

⁵ See UN High Commissioner for Refugees (UNHCR) *Global Trends 2013: War's Human Cost* (UNHCR, 2014) 36 <<http://unhcr.org/trends2013>> accessed 21 September 2015.

⁶ World Health Organization (WHO) *World Report on Disability* (2011) <<http://www.who.int/disabilities/worldreport/2011/en/>> accessed 21 September 2015.

⁷ See HelpAge and Handicap International, *Hidden Victims of the Syrian Crisis: Disabled, Injured and Older Refugees* (2014) <<https://data.unhcr.org/syrianrefugees/download.php?id=5812>> accessed 21 September 2015.

⁸ See, e.g., JE Lord, 'Disability-Inclusive Disaster Preparedness and Response' (2010) *American Society of International Law Proceedings* 118, 119–20; UN Enable, 'Disability, Natural Disasters and Emergency Situations', available at <<http://www.un.org/disabilities/default.asp?id=1546>>.

⁹ See *ibid.*

these people.¹⁰ The propensity for governments to neglect and ignore vulnerable groups within their societies was confirmed by a UN survey conducted in 2013. This found that PWDs were rarely included in the planning and execution of recovery and reconstruction operations – a fact that has only recently begun to change.¹¹

In this chapter I explore how international law has responded to vulnerability in situations of disaster and emergency. In an account that is necessarily impressionistic given the enormity of the subject matter, I examine the genesis and evolution of legal norms governing the protection of various groups of vulnerable people in disaster situations. These are women, children, PWDs, the elderly and minority groups.

The chapter is organized around two main arguments. The first is that international legal norms in this field are very much work in progress. International law seems to have developed first in response to situations involving human conflict and, to a lesser extent, epidemics – rooted in religious beliefs and traditions encouraging charitable responses to persons in need. Legal norms and practices to govern responses to natural disasters are both more recent and less defined. In many respects the development of international law has been reactive, with landmark ‘protective’ norms created in response to particular events.

My second argument is that in recent years international human rights law (IHRL) has undergone cathartic change in its approach to vulnerability in all its forms and manifestations. That change is best expressed as a move away from charity and from paternalist and medical models of protection towards a rights-based framework for all vulnerable groups – from women and children through PWDs to minority groups. Of the nine human rights conventions,¹² the most significant in this context have been the 1995 Convention on the Rights of the Child¹³ and the Convention on the Rights of Persons with Disabilities (CRPD), concluded in 2006.¹⁴ Article 11 of the CRPD represents the first occasion in which state parties *expressly* assume protection

¹⁰ See M Crock, R McCallum, B Saul and L Smith-Khan, ‘To “Promote, Protect and Ensure”: Overcoming Obstacles to Identifying Disability in Forced Migration’ (2014) 27 JRS 38.

¹¹ Lord (n 8) 119–20. For the change in approach, see, e.g., International Foundation of the Red Cross (IFRC) and United Nations Development Program (UNDP) *Effective Law and Regulation for Disaster Risk Reduction: A Multi-Country Report* (2014); and Sendai Framework for Disaster Risk Reduction, 18 March 2015, UN Doc. A/CONF.224/CRP.1. Both are discussed in Section 4 below.

¹² These instruments include notably: International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) (ICCPR); International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976) (ICESCR); Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) (CERD); Convention on the Elimination of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) (CEDAW); and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) (CAT).

¹³ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) (CRC).

¹⁴ Convention on the Rights of Persons with Disabilities (adopted 30 March 2007, entered into force 3 May 2008) (CRPD).

obligations in the context of natural disasters as well as armed conflicts. This provision requires that states parties:

... take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

It will be my contention that this provision plays an important if not unique role in moving the international community closer to finding a general legal framework for the protection of vulnerable people in disaster situations.

Walter Kälin describes the relationship between human rights and natural disasters as having three dimensions.¹⁵ The first is factual, in so far as disasters affect the enjoyment of human rights. The second is legal, reflecting the obligation of states to protect persons so affected. The third dimension is operational and reflects the role that human rights should play in shaping disaster management and response strategies. In this chapter I focus on the second and third of these dimensions, and I examine man-made as well as natural disasters. Section 2 traces the evolution under international law of protective norms for vulnerable groups in situations of human conflict. The two areas of law examined in this context are international humanitarian law (IHL) and international refugee law (IRL). In each instance I look at the treatment afforded groups of people who have been deemed at law to be vulnerable, highlighting both the achievements and shortcomings of the laws that have evolved. It will be seen that the categories in these two fields do not map exactly with the taxonomy of vulnerability I use in section 3. Here I consider the protections afforded by specific human rights instruments that are most relevant to particular cohorts in situations of natural disasters. I conclude in section 4 by examining initiatives by various United Nations (UN) bodies to strengthen the legal and operational frameworks around the protection of persons affected by cataclysmic events.

2. INTERNATIONAL LEGAL RESPONSES TO VULNERABLE GROUPS IN MAN-MADE DISASTERS

As David Fidler notes, the most obvious point to make about international law and disasters is that historically the connection has been weak.¹⁶ The IFRC has described disaster response as a ‘long neglected facet of international law’.¹⁷ Fidler explains the neglect as a function of the ‘episodic’ and short duration of natural disasters, which typically have not impacted on the ‘systemic coordination of states’ pursuit of their material national interests’.¹⁸ Where countries require short-term assistance to manage

¹⁵ See W Kälin, ‘The Human Rights Dimension of Natural or Human-made Disasters’ (2012) 55 *German Ybk IL* 119, 121.

¹⁶ See DP Fidler, ‘Disaster Relief and Governance after the Indian Ocean Tsunami: What Role for International Law?’ (2005) 6 *MJIL* 458, 459.

¹⁷ See *ibid* and IFRC *World Disasters Report 2000* (2000) 157.

¹⁸ Fidler (n 16) 460–61.

a critical incident, they will typically strive to maintain as much sovereign control as possible – a fact that provides little prospect for the development of rules of international law.¹⁹

In contrast, disasters associated with armed conflict, the spread of disease (epidemics) and cross-border pollution events do affect states' interests in fundamental ways. The product is a rich and diverse body of international law which operates to constrain the way states behave in these instances. The two sources of international law chosen for closer scrutiny in this section have been a natural starting point for the development of legal norms relevant to state responses to natural disasters. Both have evolved in response to vulnerability – and as a measure to redress inequity. Moreover, the first international agencies to attend in situations where large groups of people are displaced are typically the IFRC and/or UNHCR.

2.1 International Humanitarian Law

IHL was one of the first areas of law to identify groups worthy of protection and to articulate the protections that must be afforded in situations of armed conflict. Reflecting a desire to constrain the radical anarchy of war so as to protect those undeserving of injury and harm, IHL established a baseline for protection and respect. Subject to special rules exempting combatants and civilians taking part in hostilities, IHL was the first system of international law to articulate basic rights to life, to respect for a person's physical and mental integrity, and to the enjoyment of the highest attainable standard of health.²⁰

For a long time IHL was regarded as the only form of international law governing armed conflict. There was a strong view that IHL applied in armed conflicts as a *lex specialis* (or special law), overriding human rights law as the *lex generalis*.²¹ The more modern view is that IHL and human rights law co-exist, neither excluding the other.²²

As explored in detail elsewhere,²³ the protective focus of IHL is apparent in its attention to protecting vulnerable civilians and persons 'in a state of weakness which demands special consideration'.²⁴ This includes the 'disabled or infirm', including

¹⁹ Ibid 461.

²⁰ See generally, J-M Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 87 IRRC 175.

²¹ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* ICJ Rep 225 (8 July 1996) 240.

²² See the International Committee of the Red Cross's (ICRC) authoritative statement of customary IHL produced in 2005: J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules* (CUP, 2005) (ICRC Study).

²³ This section of the chapter draws from N Hart, M Crock, R McCallum and B Saul, 'Making Every Life Count: Ensuring Equality and Protection for Persons with Disabilities in Armed Conflicts' (2014) 40 Monash Law Review 148.

²⁴ See JS Pictet (ed), *IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Commentary, ICRC, 1958) 134 (IV Geneva Convention Commentary).

persons wounded in conflict.²⁵ This principle underpins obligations to both refrain from attacks on vulnerable persons and to take positive steps to aid persons in need.²⁶ PWDs should be given priority when evacuating areas under siege (art 17). Prisoners of war who have disabilities are also entitled to ‘special facilities’ in detainment camps. Interestingly, particular mention is made of the blind, singled out for care and ‘rehabilitation’.²⁷

The Convention makes special provision for children, especially those orphaned or separated from their families in times of war. Article 24 enjoins states not to leave such children ‘to their own resources’ and to ‘facilitate the reception of the children in a neutral country for the duration of the conflict’.²⁸

One weakness of the IHL regime is that it tends to be limited to situations where a state is operating within a territory over which a state can be said to exercise control. The Fourth Geneva Convention does establish obligations to protect the sick or wounded that apply to anyone within such territory: to this extent the protective duties are universal and not confined by the nationality or other identity of the persons affected.²⁹ However, where a conflict is raging so fiercely that no state can be said to be in control of a territory, IHL’s protective force is inevitably weakened. Issues can arise about the duties that apply to non-state actors – and to armed conflicts within countries that have no international characteristics.

Having said this, common article 3 of the Geneva Conventions and customary international law binds everyone – states and non-state actors in all situations – to observe certain minimum standards of humane treatment. This phrase was not defined by the drafters of the Geneva Conventions. The intention was to allow the concept to respond to the exigencies of contemporary events and changing mores. It has been accepted nonetheless as embracing certain minimum guarantees. First among these is the absolute prohibition on torture and cruel, inhuman and degrading treatment, including outrages on human dignity. This rule applies to civilians and persons *hors du combat*.³⁰ It is also referenced across the Conventions and their additional protocols in

²⁵ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) (Fourth Geneva Convention). Article 16 directs that such people ‘shall be the object of particular protection and respect’.

²⁶ Ibid. Note that field ambulances and ‘badged’ vehicles conveying the wounded and infirm enjoy the same protections as civilian hospitals (see art 21).

²⁷ See Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) (Third Geneva Convention) art 30.

²⁸ See also the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) (API); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) (APII). As Guy Goodwin-Gill notes, a total of 25 articles in the 1949 Geneva Convention and the 1977 Additional Protocols deal specifically with children: see GS Goodwin-Gill, ‘Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions’ (1995) 3 *International Journal of Children’s Rights* 405, 413.

²⁹ The protections of art 13 ‘cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, [or] nationality’.

³⁰ See ICRC Study (n 22) 315–19.

prohibitions against torture, cruelty and brutal treatment.³¹ In this, IHL provided the foundations for essential elements of modern human rights³² – and for the criminal conduct constituting international war crimes.³³ The prohibitions against torture and cruel and inhuman treatment align closely with fundamental guarantees that apply to displaced persons and persons in detention under customary law. These are ‘rights’ that are particularly relevant in evacuation situations and that apply in both international and non-international conflicts.³⁴ The rights of detainees to food, water, clothing, shelter and medical attention apply to both prisoners of war and civilians who are deemed to pose a threat to security.³⁵ Here again, IHL has served to create a baseline in the treatment of people, whether they be friend or foe.

The other area in which IHL has developed fundamental rules of general import is in the treatment of people who are sick and wounded. These rules, derived from both treaties and customary practice, apply equally in international and non-international conflict. Wounded combatants unable to defend themselves are protected in much the same way as wounded civilians, under rules that prohibit attacks on persons *hors du combat*.³⁶ These people must be treated ‘humanely’,³⁷ a principle that extends to positive acts such as the provision of medical assistance to persons in need.³⁸ These guarantees hold special significance for PWDs who are especially vulnerable in conflict situations.³⁹

As Hart et al. note, there are central features of the IHL regime that limit its effectiveness in emergency situations. The first is that the long established rules are expressed in the language of obligation on the part of states rather than as rights vested in individuals.⁴⁰ The basic IHL instruments neither confer rights on individuals to seek remedies for IHL violations nor establish mechanisms for enforcing the law.⁴¹ The second, obvious, point is that IHL operates exclusively in situations involving armed conflict. What is interesting in

³¹ See also First Geneva Convention, art 12; Second Geneva Convention, art 12; Third Geneva Convention, art 17; Fourth Geneva Convention, art 32; API, art 75(2); APII, art 4(2).

³² Most notably CAT.

³³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) articles 8(2)(a)(ii), 8(2)(a)(iii) and 8(2)(c).

³⁴ See Fourth Geneva Convention, art 49 and Second Additional Protocol, art 17(1) respectively.

³⁵ For prisoners of war, see Third Geneva Convention arts 25–32. For civilians, see Fourth Geneva Convention arts 76, 85, 87, 89–92.

³⁶ See ICRC Study (n 22) 164–70. See also common article 3 of the Geneva Conventions and API, art 41(2).

³⁷ See ICRC Study (n 22) 306–8. See common article 3 of the Geneva Conventions; API, art 75; APII, art 4(1) (concerning non-international conflicts).

³⁸ See ICRC Study (n 22) 307–8.

³⁹ See M Nowak, *Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/63/175 (28 July 2008) paras 37–41.

⁴⁰ See Hart et al. (n 23) 156ff.

⁴¹ See Pictet (n 24) 373. Many attempts to seek domestic redress have failed, with courts reaching the same conclusion. See for example *Distomo*, BGH – III ZR 245/98 (Bundesgerichtshof, 26 June 2003); *Handel v Artukovic*, 601 F Supp 1421 (CD Cal, 31 January 1985) 1425–6 paras 3–4; and *Hamdi v Rumsfeld*, 316 F 3d 450 (4th Cir, 28 June 2003) 468–9 paras 18–19. Retribution, compensation and/or punishment have fallen *ex post facto* to specialist criminal courts or tribunals.

this context is the extent to which over time the ICRC has extended its field operations into the realm of emergency response to disasters that do not necessarily involve armed conflict. The gradual acceptance that IHL should operate alongside human rights law rather than as a *lex specialis* is a further manifestation of the trend towards a harmonized approach to the protective norms of international law.

2.2 International Refugee Law

A similar process of expansion and harmonization has occurred in IRL.⁴² This area represents a second example of international law developing around the obvious need to protect persons rendered vulnerable by human conflict. A refugee, by definition, is a person who finds himself or herself in an emergency situation, being bereft of the protection that should flow from nationality or ‘habitual residence’ of a state. The UN Convention relating to the Status of Refugees (Refugee Convention) and/or its attendant Protocol⁴³ are both widely subscribed and the source of principles reflected in customary international law.⁴⁴ Significantly, refugees (as defined) must not be returned or refouled to a country where they could face ‘persecution’ for one of the five Convention reasons. The non-refoulement principle operates to modify the sovereign rights states otherwise enjoy in their dealings with non-citizens. Articles 3–34 of the Convention operate in theory if not always in practice as an elaborate human rights instrument for persons who meet the definition of refugee.⁴⁵

The non-refoulement rule is qualified by many pre-conditions and exceptions. The Refugee Convention is not particularly progressive in its reference to protections of specific vulnerable groups. For example, children are barely mentioned other than in a context that emphasizes parental rights.⁴⁶ The instrument is inherently limited in so far as it applies only to refugees who, by definition, are international migrants. The Convention does not apply to internally displaced persons (IDPs). Nor is there an independent committee of experts to oversee its operation. The only source of ‘soft law’ occurs in the context of the annual meeting of states parties. Here, the ‘Executive Committee’ of UNHCR (ExCom) issues ‘Conclusions’ on the Convention and oversees the operation of the agency.⁴⁷

⁴² See JC Hathaway, ‘The Evolution of Refugee Status in International Law: 1920–1950’ (1984) 33 ICLQ 348.

⁴³ See Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) (Refugee Convention); Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967). See generally, JC Hathaway and M Foster, *The Law of Refugee Status* (2nd edn, CUP, 2014).

⁴⁴ The Convention is described as the ‘cornerstone of the international protection regime’. See UNHCR ExCom, *Conclusions on Provision of International Protection Including through Complementary Forms of Protection* (No 103 (LVI), 7 October 2005) preamble, para 1.

⁴⁵ See JC Hathaway, *The Rights of Refugees under International Law* (CUP, 2005).

⁴⁶ See arts 4 (right to religious education) and 17(2)(c) (employment rights). Reference to education rights in art 22 makes no reference to age or childhood.

⁴⁷ UNHCR is funded directly by states parties rather than through an appropriation by the UN General Assembly. ExCom Conclusions are collected in UNHCR, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees* (UNHCR, 2009).

Having said this, UNHCR is a UN body established by statute. Bound by international law, it has embraced the newer human rights treaties. UNHCR responded to the creation of the Convention on the Rights of the Child (CRC) with policies and guidelines in the early 1990s.⁴⁸ A series of ExCom Conclusions followed which emphasize the importance of the CRC as a 'normative framework for action to protect and care for children of concern'.⁴⁹ In more recent times, UNHCR⁵⁰ and ExCom⁵¹ have responded to the paradigm shifts demanded by the Convention on the Rights of Persons with Disabilities (CRPD) in its treatment of refugees with disabilities.⁵²

Just as significantly, UNHCR has come to operate increasingly as a front-line relief agency. Although established originally to deal with the cross-border movement of forced migrants, its mandate has been expanded to deal with IDPs. Although predominantly focused on people affected by armed conflict, UNHCR like the IFRC, has been drawn inevitably into the provision of relief to persons affected by natural disasters within their own countries. For example, there has been a disturbing convergence between man-made and natural disasters. Periodic drought, famine and pestilence are often felt most acutely by the displaced.⁵³

Moreover, state parties and UNHCR have come to interpret the terms of the Convention in ways that have extended the protective force of the instrument to vulnerable groups embraced as 'particular social groups'. In some countries persecuted women,

⁴⁸ See UNHCR, *UNHCR Policy on Refugee Children*, EC/SCP/82 (6 August 1993). The CRC (n 13) is acknowledged expressly in para 6. See also UNHCR, *Refugee Children: Guidelines on Protection and Care* (UNHCR, 1994); *Guidelines on International Protection: Child Asylum Claims under Article 1A(2) and 1F of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, UN Doc. HCR/GIP/09/08 (22 December 2009).

⁴⁹ See UNCHR ExCom, *General Conclusion on International Protection* (No 71 (XLIV), 8 October 1993); *Conclusion on Refugee Children and Adolescents* (No 84 (XLVIII), 17 October 1997); *Conclusion on Children at Risk* (No 107 (LVIII), 5 October 2007). See also J Pobjoy, 'A Child Rights Framework for Assessing the Status of Refugee Children' in S Juss and C Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar Publishing, 2013) 91; and M Crock, 'Re-Thinking the Paradigms of Protection: Children as Convention Refugees in Australia' in J McAdam (ed), *Forced Migration, Human Rights and Security* (Hart, 2008) 155.

⁵⁰ See, e.g., UNHCR *Heightened Risk Identification Tool – Second Edition* (2010) <<http://www.refworld.org/docid/4c46c6860.html>> accessed 23 September 2015; UNHCR, *Need to know guidance: working with persons with disabilities in forced displacement* (UNHCR, 2011) <<http://www.unhcr.org/4ec3c81c9.pdf>> accessed 23 September 2015; UNHCR, *Age, Gender and Diversity Policy* (June 2011) <<http://www.unhcr.org/refworld/docid/4def34f6887.html>> accessed 23 September 2015; and UNHCR *Who we help* <<http://www.unhcr.or.id/en/who-we-help>> accessed 23 September 2015. These initiatives are discussed in Crock, McCallum, Saul and Smith-Khan (n 10).

⁵¹ See *Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR* (ExCom Conclusion No. 110 (LXI), 12 October 2010) <<http://www.unhcr.org/4cbeb1a99.html>> accessed 23 September 2015.

⁵² See further below section 3.2.3.

⁵³ See W Kälin, Secretary-General's Representative on the Human Rights of Internally Displaced Persons, 'The Climate Change – Displacement Nexus' (speech, ECOSOC Panel on Disaster Risk Reduction and Preparedness: Addressing the Humanitarian Consequences of Natural Disasters, 16 July 2008) <<http://www.brookings.edu/research/speeches/2008/07/16-climate-change-kalin>> accessed 23 September 2015.

children, PWDs and marginalized groups have all benefitted from a more expansive interpretation of the definition of refugee.⁵⁴ In virtually every instance, the increase in generosity reflects willingness on the part of states to link refugee law with IHRL.

3. BEYOND CHARITY: THE EVOLUTION OF HUMAN RIGHTS LAW

3.1 Protection Frameworks

The most significant move towards the creation of an international legal regime to protect vulnerable persons in emergency situations has occurred in the domain of human rights law.⁵⁵ As many have documented, the modern approach has been to see this body of law increasingly as complementary or subsidiary to other protective norms. The trend is apparent in a tendency to question the status of IHL and refugee law as *lex speciali*, independent in their operation.⁵⁶ The significance of the change is that human rights law starts from the premise that individuals are rights-bearers rather than objects of compassion or charity.⁵⁷ Unlike IHL or IRL, many of the human rights conventions establish oversight bodies, some of which have been empowered by separate protocols to entertain individual complaints.⁵⁸ This section begins with a brief discussion of some of the factors limiting the usefulness of human rights law in emergency situations. Thereafter the laws developed in response to various groups and types of vulnerability are examined in turn.⁵⁹

3.1.1 Derogation clauses

The traditional reluctance of states to overlay disasters with legal norms is apparent in the fact that the most powerful of the core human rights treaties have allowed for

⁵⁴ See TA Aleinikoff, 'Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group"' in E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP, 2003) 310. See also M Foster, *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'* (UNHCR, April 2012). For a comprehensive comparative study of refugee jurisprudence see Hathaway and Foster (n 43).

⁵⁵ E Harper, *International Law and Standards Applicable in Natural Disaster Situations* (International Development Law Organization, 2009) <<http://eird.org/publicaciones/natural-disasters-manual-idlo-2009.pdf>> accessed 24 September 2015.

⁵⁶ See, e.g., J McAdam, *Complementary Protection in International Law* (OUP, 2007); and M Foster *International Refugee Law and Socio-economic Rights: Refuge from Deprivation* (CUP, 2007).

⁵⁷ See, e.g., H Arendt, *The Origins of Totalitarianism* (Harcourt Brace, 1951); and R Mario-Marin, *Human Rights and Migration* (OUP, 2014).

⁵⁸ See J Crawford, 'The UN Human Rights Treaty System: A System in Crisis?' in P Alston and J Crawford (eds) *The Future of United Nations Human Rights Treaty Monitoring* (CUP, 2000); and S Egan, 'Strengthening the United Nations Human Rights Treaty Body System' (2013) 13 HRLR 209.

⁵⁹ See Harper (n 55).

derogations in times of emergency. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) and article 15 of the European Convention on Human Rights (ECHR) both allow for the temporary repeal or suspension of human rights guarantees in extreme cases. The preconditions for such action are strict: a situation must constitute 'a threat to the life of the nation' and must be 'officially proclaimed' and notified internationally. Derogation is permitted only 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with ... other obligations under international law; do not involve discrimination (as defined); and do not affect non-derogable rights'. As Kälin documents,⁶⁰ these restrictions should and do make it rare for states to decree that human rights guarantees do not apply. However, climate change events and huge disasters like the 2004 Boxing Day tsunami can cause situations where derogation is a justifiable. As Kälin notes, there can be disasters where the observance of many human rights may be either impossible or impracticable.⁶¹ Examples are situations where rights may be abrogated: the confiscation of personal property needed for emergency defence or repair work; the conscription of workers to assist in relief efforts; and measures that disadvantage some members of a community in order to ensure the survival of others. Other rights that can be suspended in emergencies are rules governing arrest and detention.⁶²

However, the strength of IHRL is that some rights are inalienable. These are rights from which states are not permitted to derogate, whatever the situation. For example, the ECHR lists the following as 'non-derogable': the right to life; freedom from torture; freedom from slavery; the requirement that punishment be based in law; the double jeopardy rule; and the base prohibition on the death penalty.⁶³ The list of non-derogable rights under the ICCPR and other conventions is even longer.⁶⁴

Before examining the laws developed in response to particular groups of vulnerable persons, it is worth commenting briefly on three categories of foundational rights that can be important in emergency situations.

⁶⁰ W Kälin, 'The Human Rights Dimension of Natural or Human-made Disasters' (n 15) 128–31.

⁶¹ Ibid 129–31. See UN Economic and Social Council, 'Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR', UN Doc. E/CN.4/1984/4 (28 September 1984) Annex, para 39. For examples of earthquake and hurricane events where Chile, Guatemala and Ecuador have suspended the operation of the ICCPR see W Kälin, 'The Human Rights Dimension of Natural or Human-made Disasters' (n 15) 131 fn 46.

⁶² Ibid 130, citing relevant articles of the ICCPR and ECHR and other instruments.

⁶³ See ICCPR, art 15(2); Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 22 November 1984, entered into force 1 November 1998) (Protocol No 7 to the ECHR); Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (adopted 28 April 1983, 1 May 1985) (Protocol No 6 to the ECHR); and Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in all circumstances (adopted 3 May 2002, entered into force 1 July 2003) (Protocol No 13 to the ECHR).

⁶⁴ See W Kälin, 'The Human Rights Dimension of Natural or Human-made Disasters' (n 15) 129 fn 37.

3.1.2 Judicial rights

The first are termed 'judicial' rights as they involve an individual's interaction with the law. The right to equality before and equal protection under the law is enshrined in article 16 of the ICCPR. This is reflected in all major human rights instruments in the fundamental principle of non-discrimination on the bases of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶⁵

3.1.3 Civil and political rights⁶⁶

The right to equality is again the starting point in international and regional instruments that articulate civil and political rights for persons affected by disasters. This is expressed in the prohibition against discrimination.⁶⁷ One further civil right that could be characterized as inalienable is freedom from servitude and other forms of violence and abuse.⁶⁸ There is a range of other rights that can be important in disasters. These include protections against unlawful or arbitrary interference with privacy, family, home or correspondence;⁶⁹ freedom of conscience, thought and expression;⁷⁰ freedom of religion;⁷¹ freedom of assembly;⁷² rights to property;⁷³ and the right to participation in government.⁷⁴

3.1.4 Economic, social and cultural rights⁷⁵

However unusual suspension of the core human right instruments might be in practice, it is worth noting that some human rights instruments contain no derogation clauses. The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a notable example in point. This instrument was drafted alongside the ICCPR. The

⁶⁵ See Harper (n 55) 27.

⁶⁶ For a comprehensive account of the jurisprudence relating to the ICCPR see S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Commentary, Cases and Materials* (OUP, 2004).

⁶⁷ ICCPR, art 2(1); The Universal Declaration of Human Rights, GA Res. 217A (III) (adopted 10 December 1948) (UDHR) art 2; and ICESCR art 2(2). See also regional instruments: American Convention of Human Rights (22 November 1969, entered into force 18 July 1978) (ACHR) art 1(1); African Charter of Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (ACHPR) arts 2 and 19; and ECHR art 14.

⁶⁸ ICCPR, art 8 (including most instances of forced labour); and UDHR, art 4. See also regional instruments: ACHR (*ibid*) art 6; ACHPR (*ibid*) art 5; and ECHR art 4.

⁶⁹ ICCPR, art 17; UDHR, art 12. See also regional instruments: ACHR (n 67) art 11; and ECHR art 8.

⁷⁰ ICCPR, art 19. See also regional instruments: ACHR (n 67) art 13; ACHPR (n 67) arts 8 and 9; and ECHR art 10.

⁷¹ ICCPR, art 18; UDHR, art 18. See also regional instruments: ACHR (n 67) art 12; and ECHR art 9.

⁷² ICCPR, art 21; UDHR, art 20. See also regional instruments: ACHR (n 67) art 15; ACHPR (n 67) art 11; and ECHR, art 11.

⁷³ See, generally, Harper (n 55) chapter 4.

⁷⁴ ICCPR, art 25; UDHR, art 21.

⁷⁵ For a comprehensive account of the jurisprudence relating to the ICESCR, see B Saul, D Kinley and J Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP, 2014).

absence of an equivalent provision to article 4 of the ICCPR has been read as an indication that the convention cannot be suspended in the case of public emergencies. Underscoring the centrality of the right to life, the fact that this instrument applies in full in disaster situations means that base human rights must include rights to food and water; shelter; health and medical services; clothing and sanitation; as well as the right not to be discriminated against on grounds of race, ethnicity, religion, sex or other protected grounds. As the UN Committee on Economic, Social and Cultural Rights (CESCR) has explained, humanitarian assistance must be 'adequate' such that goods and services are: available in sufficient quality and quantity; accessible to all without discrimination; culturally appropriate; and adaptable to the exigencies of a situation.⁷⁶ The ECHR lists the following as 'non-derogable': the right to life; freedom from torture; freedom from slavery; the requirement that punishment be based in law; the double jeopardy rule; and the base prohibition on the death penalty.⁷⁷ The list of non-derogable rights under the ICCPR and other conventions is even longer.⁷⁸

It is in the human rights instruments that focus directly on persons who are most vulnerable in disaster situations that international law is most developed. Considering in turn each of the groups enumerated earlier, it will be seen that the most comprehensive coverage occurs in the most recent instruments: the CRC and the CRPD.

3.2 Human Rights and the Protection of Particular Groups

3.2.1 Women

The main convention and protocol upholding the rights of women was done around the time that the ICCPR and the ICECSR were coming into force.⁷⁹ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) enshrines the prohibition of gender-based discrimination, requiring states parties to incorporate principles of gender equality in their constitution and domestic legislation.⁸⁰ Article 1 defines discrimination as:

⁷⁶ See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The nature of States Parties' obligations (Art 2(1) of the Covenant)*, UN Doc. E/1991/23 (14 December 1990); CESCR, *General Comment No 4: The Right to adequate housing (Art 11(1) of the Covenant)*, UN Doc. E/1992/23 (13 December 1991) para 8; CESCR, *General Comment No 12: The Right to adequate food (Art 11 of the Covenant)*, UN Doc E/C.12/1999/5 (12 May 1999) paras 7–13.

⁷⁷ See Protocol No 7 to the ECHR (n 63); Protocol No 6 to the ECHR (n 63); Protocol No 13 to the ECHR (n 63)

⁷⁸ See ICCPR, art 15(2); Kälin 'The Human Rights Dimension of Natural or Human-made Disasters' (n 15) 129 fn 37.

⁷⁹ See CEDAW (n 12); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000). See also the Convention on the Political Rights of Women (adopted 31 March 1953, entered into force 7 July 1954); Declaration on the Elimination of All Forms of Discrimination against Women (adopted 7 November 1967); Declaration on the Protection of Women and Children in Emergency and Armed Conflict (adopted 14 December 1974); Declaration on the Elimination of Violence Against Women (adopted 20 December 1993).

⁸⁰ CEDAW (n 12) art 2.

[a]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁸¹

This basic protection operates to prohibit harmful traditional practices.⁸²

In emergency situations, widows, single women and women living in poverty can be particularly susceptible to exploitation and abuse. They can be subjected to trafficking, forced marriage and precarious employment as prostitutes or piece-workers (home-based labour), or in street or factory work.⁸³ CEDAW demands that states parties adopt measures to suppress all forms of trafficking, exploitation and prostitution of women.⁸⁴ In this respect the Convention represents the first of a series of international and regional instruments targeting the harmful effects of human trafficking.⁸⁵

The issue of forced marriage is of concern for women in many societies affected by disasters, with unaccompanied or orphaned girls being at particular risk. This vulnerability is recognized in the fact that many of the human rights instruments stipulate that marriage must only take place where both parties consent.⁸⁶ While the various Conventions do not provide a minimum age for marriage, the general approach has been to interpret these instruments as prohibiting the marriage of children aged less than 18 years. In fact, national laws vary in the stipulation of legal age for marriage. The general consensus is that child marriage places young people at risk of abuse, exploitation and adverse health outcomes.⁸⁷

3.2.2 Children

Of all the vulnerable groups discussed in this chapter, children have attracted the most extensive matrix of international legal instruments. The CRC now has three optional

⁸¹ Regional treaties to similar effect include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (13 September 2000, entered into force 25 November 2005) (PACHPRA) art 2 and ACHPR (n 67) art 18.

⁸² Harper (n 55) 73.

⁸³ See, for example, D Otto, 'Remapping Crisis through a Feminist Lens' in S Kouvo and Z Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance* (Hart, 2011) 75.

⁸⁴ CEDAW (n 12) art 6.

⁸⁵ See, in particular, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (adopted 12 December 2000, entered into force 25 December 2003); and Protocol against the Smuggling of Migrants by Land, Sea and Air (adopted 15 December 2000); and supplementing the 2003 Convention against Transnational Organized Crime (adopted 12 December 2000, entered into force 29 September 2003). See generally A Gallagher, *The International Law of Human Trafficking* (CUP, 2010).

⁸⁶ See ICESCR, art 10; ICCPR, art 23; UDHR, art 16; the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (adopted 10 December 1962, entered into force 9 December 1964). See also ACHR (n 67) art 17. The exception is the ECHR, art 12, which protects the right of all persons of age to marry in accordance with national laws.

⁸⁷ Harper (n 55). See generally Chapter 2 of this publication for other rights of particular relevance to women who are protected by the various conventions.

protocols covering: the sale of children, prostitution and pornography; children in armed conflicts; and a regime for hearing individual complaints.⁸⁸ These are supplemented by the traditional human rights treaties, the Hague Convention on inter-country adoption⁸⁹ and the smuggling and trafficking protocols.⁹⁰

The CRC was drafted as a super human rights convention for children, expressly embracing on behalf of the world's children every instrument that could protect and foster respect for children as rights bearers. The most widely subscribed of all UN treaties other than the UN Charter,⁹¹ this convention sets rules that apply to children regardless of citizenship, immigration status or circumstance. Children 'appear in the universal protected group of "children"'⁹² no matter what classifications states may seek to impose on them.

The CRC contains no derogation clause for emergency situations. Rather, it embraces and augments the protective functions of IHL and refugee law and other human rights. Article 38 requires states parties 'to respect and to ensure respect' for IHL applicable in armed conflicts which are relevant to children. States parties must ensure 'protection and care of children who are affected by an armed conflict', and avoid using children as soldiers.⁹³

The centrepiece of this convention is article 3 which provides that the best interests of the child shall be a primary consideration in all actions concerning children.⁹⁴ This

⁸⁸ See Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000, entered into force 18 January 2002); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002); Optional Protocol to the Convention on the Rights of the Child on a communications procedure, GA Res. 66/138 (adopted 19 December 2011, entered into force 14 April 2014).

⁸⁹ See Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (adopted 29 May 1993, entered into force 1 May 1995).

⁹⁰ See above, n 85.

⁹¹ See the current list of the status of ratification, reservations and declarations, available at United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en> accessed 24 September 2015.

⁹² Office of the High Commissioner for Human Rights (OHCHR) *Study of the OHCHR on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration*, UN Doc. A/HRC/15/29, para 4.

⁹³ CRC (n 13) art 38.

⁹⁴ The phrase 'best interests' recurs throughout the CRC (n 13): see arts 9, 18, 20, 21, 37, 40. The provenance of art 3 is found in principle 2 of the Declaration of the Rights of the Child, GA Res. 1386 (XIV) (20 November 1959); in two provisions of the Convention on the Elimination of all Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) arts 5(b) and 16(1)(d)); and in the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (adopted 1990, entered into force 29 November 1999) art IV, as well as the Charter of Fundamental Rights of the European Union [2000] OJ C 364/1, art 24(2). See J Pobjoy, 'The Best Interests of the Child Principle as an Independent Source of Protection' (2015) 64 ICLQ 327, 329. See also UN Committee on the Rights of the Children (UNCRC), *General Comment No 14 (2013): The Rights of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3(1))*, UN Doc. CRC/C/GC/14 (GC14).

provision has been described variously as a right, principle and a rule of procedure.⁹⁵ Best interests should operate as the starting point in any actions involving children, whether this relates to procedures followed or the substantive outcomes effected. The Convention moves beyond the traditional welfare or paternalistic approach to children in the stipulation in article 12 that children must be allowed to participate in any process affecting them.⁹⁶

Issues of first importance for children in disaster and emergency situations begin at birth with the child's right to an identity and nationality in the form of birth registration (article 7(1) of the CRC). Unregistered births equate with statelessness – and the most radical forms of rightlessness.⁹⁷ The CRC ties this together with a child's right to know and be cared for by her or his parents.⁹⁸ Where a family is destroyed or disrupted by disaster, the CRC obliges states to afford children 'special protection and assistance'. Such measures preference family-based solutions through: '... foster placement, "kafala" under Islamic law; adoption, or, if necessary, placement in suitable institutions for the care of children. When considering solutions regard shall be had to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.'⁹⁹

The placement of children in substitute care raises multiple protection issues, most particularly where children are sent across international borders. The CRC contains a number of provisions that spell out the over-arching duty of states to protect children in these situations. Article 19 is of particular significance with its injunction that states parties protect children against all forms of violence, abuse and neglect, negligent treatment, maltreatment or exploitation, including sexual abuse. The article obliges states to establish social programmes as well as structural supports to ensure such protection.¹⁰⁰

⁹⁵ CRC (n 13) art 3(1); UNCRC, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, UN Doc. CRC/C/GC/14 (29 May 2013), paras 1–7.

⁹⁶ See UNCRC, *General Comment No 12: The Right of the Child to Be Heard*, UN Doc. CRC/C/GC/12 (1 July 2009) (GC12) para 74, stating that 'there can be no correct application of article 3 if the components of article 12 are not respected'. See also, GC14 (n 95) paras 43, 53–4.

⁹⁷ See J Bhabha, *Children without a State: A Global Human Rights Challenge* (MIT Press, 2011).

⁹⁸ See CRC (n 13), art 7(1) and art 9.

⁹⁹ CRC (n 13), art 20.

¹⁰⁰ See also CRC (n 13), arts 32–8. See UNCRC, *General Comment No 13 (2011): The right of the child to freedom from all forms of violence*; PS Pinheiro, *World Report on Violence Against Children* (UN Secretary-General's Study on Violence against Children, October 2006) <[http://www.unicef.org/lac/full_text\(1\).pdf](http://www.unicef.org/lac/full_text(1).pdf)> accessed 24 September 2015; and S Har, YH Lee and M Wernham, 'A New Age for Child Protection: General Comment 13: Why it is Important, How it was Constructed and What it Intends' (2011) 35 *Child Abuse and Neglect* 970. For a comprehensive account of art 19 of the CRC see J Cashmore, 'Article 19: The Right to Protection against All Forms of Violence, Abuse and Neglect' in J Tobin and P Alston (eds), *The Convention on the Rights of the Child: Commentary Cases and Materials* (OUP, forthcoming).

Another striking aspect of the CRC is its treatment of child refugees.¹⁰¹ Article 22 obliges states to extend protection to children equally whether they are considered to be Convention refugees (as defined) or are seeking refugee status, and whether unaccompanied or accompanied by parents or other persons. The provision enjoins states to cooperate with the UN and other agencies to protect and assist such children to trace and re-unite with family members (see also articles 9 and 10). In the event that this cannot be achieved, refugee children must be afforded the same protections as permanent residents or citizen children.

Article 22 draws in all of the protective measures contained in the CRC and other human rights instruments. For children seeking asylum, the UNCRC acknowledged in General Comment 12 that it is critical that children seeking protection as refugees be allowed to express their views on all aspects of relevant proceedings.¹⁰² In terms of substantive outcomes, article 6 enshrines the child's right to life survival and development, and article 37(b) enshrines the child's right not to be detained: a matter of pressing concern in more than one country.¹⁰³ The Convention makes provision for children with disabilities in article 23, while issues of health and education receive separate treatment.¹⁰⁴ In emergency situations, the right to health is of critical importance. For children, disruptions will often affect access to schooling, with potentially life-altering consequences for the child's development.

It is beyond the scope of this chapter to explore all of the relevant law in detail. Suffice to note that the protective force of the CRC has been enhanced over the years with protocols on the sale of children, child prostitution and child trafficking, and with separate conventions relevant to inter-country adoptions.¹⁰⁵

3.2.3 Persons with disabilities

The story of how the CRPD came to address the situation of PWDs in emergencies is interesting. The UN General Assembly established the Ad Hoc Committee on a Comprehensive and Integral International Convention Protecting the Rights and Dignity of PWDs in 2002.¹⁰⁶ The Committee was tasked with drafting a comprehensive human rights treaty for PWDs, using existing human rights Conventions as the starting point.¹⁰⁷ The Boxing Day tsunami occurred just before the Committee met for the fifth

¹⁰¹ For a comprehensive account of Article 22 of the CRC see J Pobjoy, 'Article 22: Refugee Children' in J Tobin and P Alston (eds), *The Convention on the Rights of the Child: Commentary Cases and Materials* (OUP, forthcoming).

¹⁰² GC12 (n 96) para 123.

¹⁰³ See, for example, C Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law' (2012) 19(1) *Indiana Journal of Global Legal Studies* 257; and M Crock, 'You Have to be Stronger than Razor Wire: Legal Issues Relating to the Detention of Refugees and Asylum Seekers' (2002) 10 *Australian Journal of Administrative Law* 33.

¹⁰⁴ See arts 24 and 39 (health) and 28–9 (education).

¹⁰⁵ See above n 85.

¹⁰⁶ Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, GA Res. 56/168 (26 February 2002) para 1.

¹⁰⁷ In addition to the instruments discussed throughout this chapter, see the 1991 Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care,

time, prompting the delegation from Costa Rica to propose a separate provision on ‘special situations’ rendering PWDs ‘especially vulnerable’.¹⁰⁸ The result is article 11 of the CRPD. Apart from the CRC, which expressly references IHL and refugee law, the CRPD is the only Convention that explicitly invokes IHL and international human rights law as being applicable in all forms of natural and man-made emergencies. As we have seen, article 11 enjoins states to take ‘all necessary measures to ensure the protection and safety of PWDs in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters’. As well as establishing a framework for monitoring the way PWDs are treated by state parties, the CRPD’s Optional Protocol establishes a regime for the hearing of individual complaints.¹⁰⁹ As I have argued in greater depth elsewhere, the rights protected in the CRPD apply to all persons on the territory of a state party, irrespective of nationality or visa status. In other words, the Convention operates to protect refugees and stateless persons as well as nationals of a state who are affected by disasters.¹¹⁰

The revolution wrought by the CRPD is that it mandates a paradigm shift in the way PWDs are treated. It uses the language of rights, replacing the medical or charity approach that has traditionally viewed these people as objects of pity, or recipients of welfare and passive protection.¹¹¹ The ‘social model’ of disability recognizes that impairments alone do not disable a person. Rather, the inability to function in a society occurs as a result of environment and social attitudes – and a failure to make ‘reasonable accommodation’ for a person’s impairment. This phrase is defined in article 2 as ‘necessary and appropriate modification and adjustments ... to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’. Article 5(3) makes it clear that a failure to make reasonable accommodation for a person with impairments constitutes impermissible discrimination on the basis of disability. The rights-affirming adage ‘nothing about us without us’ finds expression in the participation provision (article 12).¹¹²

GA Res. 46/119 (17 December 1991); the Declaration on the Rights of Mentally Retarded Persons, GA Res. 2856 (XXVI) (20 December 1971); and the Declaration on the Rights of Disabled Persons, GA Res 3447 (XXX) (9 December 1975).

¹⁰⁸ M Schulze, *A Handbook on the Human Rights of Persons With Disabilities: Understanding the UN Convention on the Rights of Persons With Disabilities* (September 2010), 83 <http://iddcconsortium.net/sites/default/files/resources-tools/files/hi_crpdc_manual_sept2009_final.pdf> accessed 24 September 2015.

¹⁰⁹ The Convention provides for the establishment of the Committee on the Rights of *Persons with Disabilities* (CRPD Committee). See R Kayess and P French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8 HRLR 1.

¹¹⁰ See M Crock, C Ernst and R McCallum, ‘Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities’ (2012) 24 IJRL 735, 741.

¹¹¹ On this point, see the comments of L Arbour, *Statement by the UN High Commission for Human Rights, on the Ad Hoc Committee’s adoption of the International Convention on the Rights of persons with disabilities* (5 December 2006) cited in Kayess and French (n 109) 1.

¹¹² On 11 April 2014 the CRPD Committee adopted a comment on this article. See UNCRPD Committee, ‘General Comment No 1 – Article 12: Equal Recognition before the Law’ UN Doc. CRPD/C/GC/1 (19 May 2014).

Article 11 recognizes that in emergency situations, minor impairments can become major impediments to participation. Differential treatment may be necessary to ensure universal enjoyment of rights. The CRPD Committee has issued statements exhorting state parties to make accommodation for PWDs in both man-made and natural disaster situations. For example, in 2013, it exhorted all players in the conflict in Syria to give assistance to PWDs; to stop targeting civilians; and to allow the various humanitarian actors to give assistance without being hindered.¹¹³

Research undertaken by the University of Sydney suggests that the CRPD is beginning to make a difference for PWDs who are displaced by human conflict or natural disasters.¹¹⁴ One way in which this is occurring is in the way PWDs are being identified and counted. As the 'Washington Group' have operationalized through their research tool,¹¹⁵ the CRPD demands that states look beyond any obvious impairments that a person might have (such as blindness or physical impairment) to ask about what a person can and cannot do without assistance.¹¹⁶

In addition to the basic principle of non-discrimination acknowledged in article 4, the CRPD enshrines all of the major economic, social and political rights.¹¹⁷ As Harper notes, for persons with disability, the issues of greatest significance in emergency situations will often relate to the provision of health care;¹¹⁸ protection from exploitation and abuse;¹¹⁹ and the recognition of the person's right to dignity and respect – most particularly in acknowledging the rights to autonomy and self-sufficiency.¹²⁰ The basic rights to respect and to participate underpin moves to encourage a more inclusive approach to disaster risk prevention and to the planning for emergency events, including rescue missions and rehabilitation post-disaster.

3.2.4 Older persons

Another group that are worthy for consideration in the context of disasters and emergencies are the elderly. As Handicap International and HelpAge have highlighted, older persons often find themselves affected by the infirmities of age or with

¹¹³ Office of the United Nations High Commissioner for Human Rights, *Persons with disabilities: 'forgotten victims' of Syria's conflict – UN committee* (Press Release, 17 September 2013) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13736&LangID=E>> accessed 24 September 2015. The CRPD Committee is the monitoring body for CRPD.

¹¹⁴ See Crock, McCallum, Saul and Smith-Khan (n 10).

¹¹⁵ Washington Group on Disability Statistics, *Washington Group: Extended Question Set on Functioning* (WG ES-F) Version 9, November 2011) <http://www.cdc.gov/nchs/data/washington_group/WG_Extended_Question_Set_on_Functioning.pdf> accessed 24 September 2015.

¹¹⁶ See Crock, McCallum, Saul and Smith-Khan (n 10).

¹¹⁷ See, e.g., arts 18 (liberty of movement and nationality), 2 (Freedom of expression and opinion, and access to information), 22 (respect for privacy), 23 (respect for home and the family), 24 (non-discrimination in education), 28 (living standards), 27 (non-discrimination in employment), and the participation articles in arts 29 (political and public life) and 30 (cultural life, recreation, leisure and sport).

¹¹⁸ See art 25.

¹¹⁹ See arts 15–16.

¹²⁰ See arts 19 and 26. See also Harper (n 55) 87.

disabilities that make them particularly vulnerable.¹²¹ Although there have been significant advocacy efforts made to secure a human rights convention for these people, the law in this field remains particularly under-developed. In 2011, the Secretary General made a report to the UN General Assembly as a follow-up to the Second World Report on Aging.¹²² Acknowledging that older persons are not a homogenous group, the Secretary General nevertheless identified four main challenges facing older persons. These are discrimination; poverty; violence and abuse; and the failure to provide measures or services specific to the needs of older persons. In emergency situations, disadvantage can be compounded by other grounds of discrimination such as sex, ethnicity, disability and socio-economic status. As matters stand, older persons have the full range of human rights instruments at their disposal. Of these the most important may be the CRPD, although the protection issues specific to older persons are central to efforts being made to draft a tenth human rights Convention to protect these people.¹²³

3.2.5 Minority groups

Other than the Refugee Convention which is often all about persecuted minorities, the international human rights instrument most relevant to minority groups affected by disasters is one of the earlier Conventions. The International Convention on the Elimination of all Forms of Racial Discrimination (CERD) prohibits discrimination on the basis of race, colour, descent or national or ethnic origin. Discrimination is defined as any distinction, restriction or preference. As Harper explains, this convention is important in an emergency context because of the propensity to exclude or overlook minority groups. A reluctance on the part of marginalized people to reach out for help is also an issue.¹²⁴ CERD established an oversight committee that operates to oversee state practice relative to the Convention. However, no protocol has been concluded to facilitate the hearing and adjudication of complaints brought by individuals.

¹²¹ See HelpAge and Handicap International (n 7).

¹²² *Follow-up to the Second World Assembly on Ageing*, UN Doc. A/66/173 (Report of the UN Secretary-General, 22 July 2011).

¹²³ See UN Department of Economic and Social Affairs (DESA), Open-ended Working Group on Ageing for the purposes of strengthening the protection of the human rights of older persons, established by the General Assembly by resolution 65/182 (21 December 2010). See, *Towards a comprehensive and integral international legal instrument to promote and protect the rights and dignity of older persons*, GA Res. 67/139 (13 February 2013); and *Follow-up to the Second World Assembly on Ageing*, GA Res. 65/182 (4 February 2011). See generally <<http://social.un.org/ageing-working-group/>> accessed 24 September 2015.

¹²⁴ See Harper (n 55) 94–100.

4. CONCLUSION: STRENGTHENING LEGAL FRAMEWORKS FOR PROTECTING THE VULNERABLE IN SITUATIONS OF DISASTER

While the development of IHRL demonstrates a degree of progress in global attitudes, the lived experience of vulnerable persons in disasters depends ultimately on the protective measures taken by states, institutions and individuals. At the end of the day the Human Rights Treaty bodies have little coercive power: their (non-binding) recommendations can have little impact unless states deign to respond. The critical significance of securing the international commitment of states to prepare for and to cooperate in the management of disasters is a driving force behind UN initiatives.

In 2005 the UN Secretary General argued that natural disasters were becoming ‘an increasingly serious obstacle to the achievement of the Millennium Development Goals’.¹²⁵ This realization is behind the more recent Sustainable Development Goals.¹²⁶ While international law recognizes that states have the primary responsibility to render assistance,¹²⁷ there is increasing support for the view that states also have an obligation to seek (and not to refuse) assistance when an event is beyond the capacity of the state.¹²⁸

As Fidler documents,¹²⁹ there remains a ‘yawning gap’ at the heart of international law in the frameworks for dealing with disasters of supra-national proportions. The International Law Commission has begun the task of formulating some legal rules. Interestingly, the early drafts produced related in large measure to rules around state cooperation in disasters. The rights of vulnerable persons were not prominent on the agenda.¹³⁰ For its part, the IFRC Movement adopted the Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance (IDRL Guidelines) in November 2007. These were endorsed by the UN General Assembly in 2008 in resolutions that encouraged states to adopt them.¹³¹ Again, this

¹²⁵ See *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005 (Report of the UN Secretary-General, 21 March 2005) para 203.

¹²⁶ *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res. 70/1 (25 September 2015) (SDGs).

¹²⁷ See GA Res. 46/182 of 19 December 1991; International Law Commission (ILC), *Draft Articles on the Protection of Persons in the Event of Disasters*, UN Doc. A/CN.4/L.831 (15 May 2014) (ILC Draft Articles) art 12.

¹²⁸ See the discussion by W Kälin, ‘The Human Rights Dimension of Natural or Human-made Disasters’ (n 15) 143–5.

¹²⁹ See Fidler (n 16) 465.

¹³⁰ See ILC, *Draft Articles on the Protection of Persons in the Event of Disasters: Texts and titles of Draft Articles 6, 7, 8 and 9 provisionally adopted by the Drafting Committee on 6, 7 and 8 July 2010*, UN Doc A/CN.4/L.776 (14 July 2010).

¹³¹ See Strengthening emergency relief, rehabilitation, reconstruction and prevention in the aftermath of the Indian Ocean tsunami disaster, GA Res. 63/137 (3 March 2009); Strengthening of the coordination of emergency humanitarian assistance of the United Nations, GA Res. 63/139 (5 March 2009); International cooperation on humanitarian assistance in the field of natural disasters, from relief to development, GA Res. 63/141 (10 March 2009). See also IFRC, *About*

document focuses on co-operation, relief operations and building resilience in communities prone to disaster.

International meetings called in response to disasters in Japan have had a similar focus on risk reduction and planning for disasters.¹³² The change that is apparent in these latest initiatives is that attention is being paid to the needs of specific groups. For example, while the Millennium Goals made no mention of PWDs, the Sustainable Development Goals are being drafted in a much more inclusive process and with a more inclusive focus. Goal seven is to ‘Empower *inclusive*, productive and resilient cities’ (emphasis added).¹³³ Resilience is defined as:

the ability of a system, community or society exposed to hazards to resist, absorb, accommodate to and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions.¹³⁴

The need for stronger legal frameworks was stressed by the IFRC and the UN Development Program (UNDP) in their multi-country report released in June 2014.¹³⁵ The report states:

Greater inclusion of women and the most vulnerable in Disaster Risk Reduction (DRR) planning and implementation is an important measure to prevent them from being disproportionately affected by disasters. While several country examples mandate the formal participation of women and vulnerable groups by law, in most cases, these legal provisions are merely aspirational statements. It is recommended, therefore, to mandate by law specific mechanisms that facilitate the representation of women and vulnerable groups in both national and local Disaster Risk Management institutions and processes. Since the study was not able to gather sufficient data on the implementation of legal provisions for the inclusion of women and vulnerable groups, this is an area that would lend itself to further in-depth research on legal provisions and practice concerning their involvement in DRR needs assessments, planning, implementation and institutions.¹³⁶

These issues were central to the decision to make disaster preparedness a focus of the June 2015 Conference of States Parties of the CRPD.¹³⁷

the Disaster Law Programme <<https://www.ifrc.org/en/what-we-do/disaster-law/about-idrl/>> accessed 24 September 2015.

¹³² See the Sendai Framework for Disaster Risk Reduction (2015–2030), UN Doc. A/CONF.224/CRP.1 (adopted 18 March 2015) (the Sendai Framework). This document follows on from the Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters, UN Doc. A/CONF.206/6 (adopted 22 January 2005).

¹³³ SDGs (n 126) goal 7.

¹³⁴ UN Office for Disaster Risk Reduction (UNISDR), *2009 UNISDR Terminology on Disaster Risk Reduction*, (May 2009) <http://www.unisdr.org/files/7817_UNISDRTerminologyEnglish.pdf> accessed 24 September 2015.

¹³⁵ IFRC and UNDP, *Effective Law and Regulation for Disaster Risk Reduction: A Multi-Country Report* (2014).

¹³⁶ *Ibid* 86, recommendation 6.

¹³⁷ See Report of the eighth session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, UN Doc. CRPD/CSP/2015/5 (13 July 2015). See also

The many initiatives to bring states together reflect a general understanding that the legal frameworks discussed in this chapter are at best uneven in the protection they afford to vulnerable persons in emergency situations. While efforts have been made to re-invent IHL, refugee law and aspects of human rights law, the increasing prevalence and severity of disasters underscore the need for a more comprehensive and inclusive response.

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