



## Webinar Report

*The ILC DAs on the Protection of Persons in the Event of Disasters: A Follow-up of the Thematic Section of Issue No.1*

(15<sup>th</sup> September 2020)

### Overview

On the occasion of the launch of the call for abstracts of Issue No. 3 (2020) of the *Yearbook of International Disaster Law* (YIDL), published by Brill, the Editors, in cooperation with the American Society of International Law Disaster Law Interest Group and the Jean Monnet Project DILAW4EU, organized a series of live webinars. The first was held on Tuesday 15<sup>th</sup> September (14.30-15.45 CEST) and was devoted to “The ILC DAs on the Protection of Persons in the Event of Disasters: A Follow-up of the Thematic Section of Issue No.1”.

### List of Speakers

- Marie Aronsson-Storrier (Reading University)
- David Fisher (IFRC)
- Therese O’Donnell (University of Strathclyde)
- Arnold Pronto (UN Office Legal Affairs)
- Giulio Bartolini (Editor-in-Chief YIDL), as moderator.

### Introduction

**Giulio Bartolini** introduced the webinar, the speakers, and their presentations. This webinar ideally is a follow-up to Issue No. 1 of the YIDL in relation to the Draft Articles on the Protection of Persons in the Event of Disasters (DAs), approved in 2016 and proposed to the UN General Assembly by the International Law Commission (ILC) for being transformed into an international convention. He acknowledged with gratitude the participation to the seminar by Eduardo Valencia-Ospina, formerly Special Rapporteur for the DAs within the ILC.

## First Round

**Arnold Pronto** addressed the sociological and epistemic perspective within the works of the ILC, which involved disaster law specialists, international law academics having a generalist approach and practitioners. He referred to the perennial debate on the distinction between codification and progressive development of international law, which remains undetermined and tenuous. On the one side, the general subject of the protection of persons is characterized by a tremendous amount of hard law sources, such as bilateral treaties, multilateral regional agreements and commercial treaties regulating, inter alia, tariffs and customs. On the other side, soft law instruments, especially those issued by the IFRC, dominate the field of disaster law. Concerning the idea of having a treaty on the basis of the DAs, he underlined that this was the original approach undertaken by the ILC, based on its traditional function to propose legal texts to be adopted in the form of an international convention, even if this has become relatively more rare in recent times. He also traced an analogy with the Convention on the Privileges and Immunities of the UN of 1946. Concerning the DAs, the ILC definitely accepted the idea that there should be an added value to have a hard law text in the field of IDL.

**David Fisher** focused on the operational challenges in international disaster law and how the DAs relate to relief activities. The DAs are in many respects bolder than the existing hard law instruments, especially in relation to the duty to seek assistance under Article 11 and related consent under Article 13. The DAs definitely are ahead, thus more progressive, than other instruments in so far as big disasters with a series of different actors involved are concerned. He observed that the DAs had a massive impact in the academic arena, for instance in terms of programmes and courses. This has bolstered the legitimacy of IDL, irrespective of whether it is considered a special regime of international law. However, he noted that the main audience of the DAs is not composed by lawyers, but rather by practitioners acting in the field. This would have required more explicit and specific language in the text of the DAs, for example in relation to expedited relief, customs clearance, exemption from custom duties and taxes, obtainment of visas and permissions, authorizations for medical personnel, definition of medications, etc. He envisaged a new trend of localization and regionalization in the future developments of IDL. These issues are somehow outside the scope of the DAs. This may represent a challenge in the next years.

**Marie Aronsson-Storrier** addressed the relevance of Article 9, which covers disaster risk reduction (DRR). Such an inclusion in the DAs was controversial during the works of the ILC. The adoption of the Sendai Framework played major role and influence as to the adoption of Article 9, eventually. This said, the approach to DRR in the DAs remains quite limited, especially in relation to the prevention of new risks. Nevertheless, this problem is addressed in the ILC commentary. The definition of disaster itself in the DAs under Article 3(a) is potentially restrictive. This in turn affects the scope of DRR. In the absence of a coherent framework for DRR, her submission is that Article 9 can be used as a gateway into really exploring through international law how international law interrelates with disaster risk reduction, rather than just considering Article 9 as a complete norm in terms of regulatory scope.

**Therese O'Donnell** focused on the role of non-state actors, such as NGOs and the RCRC movement, including their possible function of lawmakers. As a generalist international lawyer, she observed that the DAs reflect the wider debates and the existential anxieties within contemporary public international law with regard to matters of sovereignty, notions of community, understandings of vulnerability, lawmaking and interdisciplinarity. The DAs really set forth a role for non-state actors. They (or the commentary) contain 16 references to NGOs and 2 to civil society. Their role as lawmakers and standard setters is clearly acknowledged therein. It remains to be seen whether the DAs themselves (or the ensuing possible treaty) would stand as

the main reference for States or, for instance, the IDRL Guidelines would keep this function. The different possible scenarios relate to the role of NGOs either as drivers or as implementers of IDL. This is also reflected into the debate with the international humanitarian law community, for instance in relation to the “rights versus needs” eternal debate, use of force, security, responsibility to protect, etc. The DAs certainly recognize the role of humanitarian actors and foster protection and facilitation of their needs. However, concerning the question whether NGOs contributed to the DAs more than the DAs contributed to NGOs, the answer remains unclear. In any case, the process of recognition of the role and “personality” of NGOs into the field of IDL has trespassed the point of no return. In this respect, the ILC should be commended for the clarity and celerity of its works.

## Second Round

After the first round, **Giulio Bartolini** introduced a second round of speakers’ interventions revolving around the following open question:

- *What would be the added value of a treaty in the field of IDL?*

**Arnold Pronto** observed that the provisions in the DAs have a different level of generality/specificity. The drafting challenges for the ILC have been substantial. In this respect, more specific language, as found for instance in the IDRL Guidelines, would have been more suited to practical concerns. The explanation for the adoption of the framework approach in the DAs is the lack of specific expertise in such a dynamic field such as IDL. This is demonstrated in relation to issues such as risk, hazard activities, prevention, and disaster risk reduction. Having said so, it is currently the phase of building consensus of States for the adoption of a convention, which can result to be relatively more difficult in light of the pandemic of COVID-19. In this respect, the rules and principles on international cooperation and assistance would be controversial to transpose in hard law provisions. Furthermore, the ILC had to include NGOs under the scope of the DAs, which remains a politically sensitive item for the delegations of some States. The conclusion remains to wait and see.

**David Fisher** noted that the feeling is that there would be major advantages in having a single treaty to be adopted on the basis of the DAs, also against the actual scenario where numerous resolutions by international/transnational organizations and actors are available. Mostly, the DAs contain a useful vocabulary on how to handle operational situations, however with a high degree of vagueness in relation to various definitions. Moreover, the DAs are really progressive on the regulation of the activities of NGOs. Therefore, the negotiation of a treaty on the basis of the DAs, possibly resulting in an improved text, is to be welcomed.

**Marie Aronsson-Storrier** noted that there would be hesitation for some States to include DRR aspects as binding provisions in a treaty. Certainly, the new treaty will look quite different from the present DAs. In any event, even if no treaty were adopted, the DAs will maintain their importance, for instance in terms of the academic and pedagogic impact they have acquired.

**Therese O’Donnell** stated that the added value to adopt a treaty would be to have an effective, visible, and understandable single text governing the field of the protection of persons in the event of disasters. In particular, she traced a comparison with the Draft Articles on the Responsibility of States for Internationally Wrongful Acts of 2001 (ARSIWA), which can hardly be considered to be ineffective. Therefore, the conclusion is that the DAs will be effective in any case. In this respect, an agnostic approach as to the entry into force of a treaty based on the DAs may be maintained.

## Q&A

**Giulio Bartolini** opened the floor for Q&A.

**Eduardo Valencia-Ospina** expressed his concern about the relation between the DAs and the COVID-19 pandemic, notably about the extent to which they can play a role in this context. With no doubt, the new pandemic falls under the definition of disaster under the DAs and, therefore, such an interaction is in place. It will be interesting to test the application of the DAs against this new development and the developments of international law in general.

Following a question by **Dug Cubie** on the relation between the global, the regional and the national level in the field of disaster law, **Eduardo Valencia-Ospina** stated that this issue falls at present under the scope of Article 18, even if the text does not mention explicitly regional arrangements and organizations. In this respect, the ILC decided that an express reference was unnecessary, as found in the *travaux* of the DAs. He observed that a certain level of generality is inherent in the framework form of the DAs, which nonetheless clearly are the result of thorough and considered discussion.

## Final Wrap-Up

**Giulio Bartolini** introduced the final wrap-up of remarks by the speakers.

**David Fischer** observed that it is not possible to ignore COVID-19 in the context of international disaster law. There is plenty of treaties and instruments for the prevention and response to pandemics, for instance the International Health Regulations. However, the matter of the international assistance in the event of emergencies remains quite unregulated, especially in terms of lack of definitions and topics. Some examples pertain to the possibility to get a visa for relief personnel, allowances to operate around control measures, definition of essential personnel, etc. Concerning the political role of regional organizations in the field of IDL, this is indisputable, in particular as far as disaster governance is concerned.

**Marie Aronsson-Storrier** noted that COVID-19 can be categorized as a multi-fold type of disaster. The DAs will be followed in any case, including for addressing the new pandemic.

**Therese O'Donnel** remarked the importance to keep high the enforcement of the principle of solidarity in the times of COVID-19, where discrimination against vulnerable persons has occurred or may occur. The regional organizations have a crucial role in supporting the fulfillment of an ever-standing obligation to protect.

## Closing Remarks

**Giulio Bartolini** finally described the program and schedule of the next YIDL webinars as well as the structure of the next issue (No. 3) of the YIDL. Thereafter, he closed the meeting.