Introduction

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Humanitarian assistance occurs when local or regional crises prompt international action to alleviate human suffering. In contrast to development aid, humanitarian aid is defined by its short-term focus and the immediacy of intervention. Given its crisis management character, humanitarian assistance presents a pressing challenge for international law because the provision of assistance operates under circumstances which depart from common state-centric understandings of how international politics and international law usually work.[1]

To be sure, in the context of humanitarian emergencies processes of inter-state negotiation and consensus-building are dramatically limited by the urgency of the need to assist populations vulnerable to the consequences of natural disaster or armed conflict.[2] *Humanitarian Action: Global, Regional and Domestic Legal Responses* directly responds to this pressing challenge by providing the first in-depth exploration of legal problems posed by contemporary humanitarian practice. Through two points of departure – one which explores the law and politics of humanitarian action, and the second which explores normative frameworks – this book provides legal professionals, scholars and policy-makers with a unique multidisciplinary resource that will help inform the theory and practice of humanitarian assistance. However, before embarking on a legal and political analysis of humanitarian assistance, this introductory chapter will set the stage for the following chapters. It will do this by presenting legal and political approaches through which humanitarian assistance can be

[1] These common understandings often focus on inter-state bargaining to resolve shared problems with a transnational character.

[2] Although international humanitarian assistance started within the realm of international conflicts, due to the decline in international conflicts and the increase of local conflicts after the end of the cold war, today the majority of humanitarian aid goes to people affected by local conflicts and natural disasters.

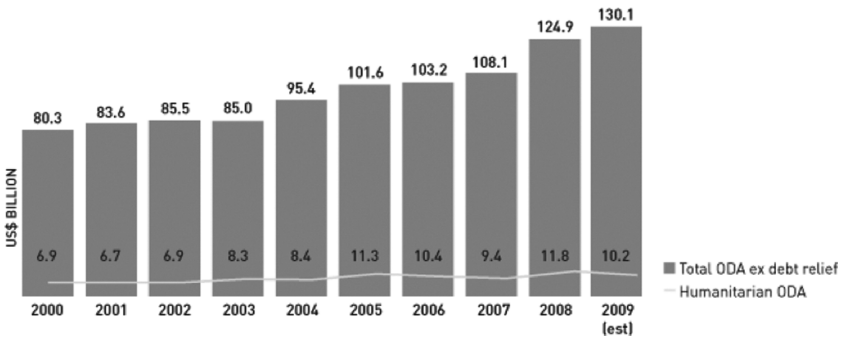

Figure 1: Humanitarian aid: share of official development assistance (ODA), 2000–2009.

approached to guide the reader through the complex issues raised by the contributors to this book.

The field of humanitarian aid continues to experience an unprecedented expansion. In 2010, donors provided approximately 127 billion US dollars for humanitarian and developmental activities in dozens of countries around the world, which is about 90 billion more than in 1960 and 66 billion more than in 1980 (see Figure 1).[3]

Furthermore, states and the International Federation of the Red Cross are by far no longer the main actors in the field as non-governmental organisations (NGOs) have increasingly assumed a key role in large areas of humanitarian aid. Indeed, this expansion has also found resonance within the halls of academia with a growing number of Masters programmes being offered in the field, and practitioners and scholars coming together to establish the International Humanitarian Studies Association to facilitate the development of further research and dialogue in the burgeoning field of humanitarian aid. In addition, the second World Conference on Humanitarian Studies was held in 2011 in Boston and attracted more than 300 participants, both scholars and practitioners, from all over the world. Equal numbers were attracted to the third World Conference in Istanbul, autumn 2013.

[3] The prices are USD in 2009 exchange rates, accessed 18 December 2011, http://webnet.oecd.org/dcdgraphs/ODAhistory/.

Nevertheless, despite a rapidly growing interest in humanitarian studies, the field is marked by a considerable degree of interdisciplinary fragmentation. Unlike many other fields of study, which emerged as sub-fields within a single discipline such as democratisation studies and comparative politics, most of the legal and political analyses in the area of humanitarian studies are dispersed over a broad range of disciplinary journals including *International Politics*, *Law and Development, Disasters*. Only recently the edited volume *International Law and Humanitarian Assistance* (2011), compiled by Heintze and Zwitter, shed first light on international and European legal regulations and the myriad legal intricacies confronted by humanitarian actors. Given the limited scope of Heintze's and Zwitter's volume, the editors felt the need to extend this perspective by combining legal and political analysis. Its goal has been to deepen our understanding of this complex and growing humanitarian policy area and to contribute to shaping the emergent field of humanitarian studies.

Humanitarian Action: Global, Regional and Domestic Legal Responses contributes to the nascent area of humanitarian studies by providing a coherent framework for understanding recent developments in international law and politics relevant to the conduct of humanitarian aid. It is unique in its approach as it is on the one hand a timely follow-up to Heintze's and Zwitter's earlier volume, while on the other hand it takes a broader perspective on the development of the regulatory frameworks of humanitarianism that are relevant to a broad range of debates concerning legal policy, international relations and philosophy. Indeed, it includes contributions on multiculturalism, humanitarian diplomacy, human security and the responsibility to protect. The interaction between these perspectives on humanitarian studies is particularly fruitful as it explains how local problems lead to the emergence of new international norms, as well as how international political and legal norms influence domestic and regional disaster response.

The causes and consequences of global, regional and local approaches to humanitarian action and the mutual influence they have upon each other became more tangible and visible since the end of the cold war. To be sure, this mutual influence is increasingly visible in the complex legal and political frameworks at various levels of analysis – local, regional and global – which makes humanitarian studies one of the most intricate fields of international law and international relations. Local problems such as man-made, natural and complex emergencies are met with a variety of responses by policy-makers and scholars. Approaches such as

human security, 'Responsibility to Protect' and human rights have been elevated on the agenda of humanitarian action. At the same time, the international community tries to mitigate these developments by endorsing unifying frameworks such as the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), a focal point for all disaster management, the European Union's humanitarian response centre, or by creating a framework of state obligations concerning the delivery of aid, as seen in the work of the International Law Commission. Regional organisations also play their own part in assuming humanitarian obligations, as with the Association of East Asian Nations (ASEAN) in the case of Myanmar (Chapter 15), or by facilitating domestic implementation such as in Indonesia (Chapter 14). Thereby, the focus on humanitarian assistance serves as a marvellous test case for the constitutionalisation/fragmentation debate in international law, which – as will be demonstrated in the next section – nicely captures the tension within regulatory frameworks governing humanitarian action. It is through a reflection on the constitutionalisation/fragmentation debate that the overall aim of this book will be achieved: to give the reader an understanding of the workings of this intricate field of interaction between local, regional and global norms, enabling the reader to trace possible developments in the future of humanitarianism.

1. Constitutionalisation or fragmentation of humanitarian norms?

The International Law Commission (ILC)'s work concerning the duty to protect persons affected by natural disasters is but one of the new steps towards international norms governing local disasters and humanitarian aid. According to its work, a state has the duty to accept the bona fide offer of aid by another state if it is not able to provide for the people on its territory. This approach, which is particularly visible in laws governing humanitarian aid, humanitarian law, or human rights, for example, shifts the criteria of applicability of the law from conditions among states to conditions within states. To some degree (at least from a bird's eye perspective on state obligations) these norms supersede and/or replace national legislation to the extent that national laws do not comply with international norms. Such legal frameworks attach their applicability to criteria within the usually sovereign sphere of states and attach international legal obligations to them.

This book offers practical, legal, political and philosophical insight into a highly controversial topic, which from a theoretical perspective can be

best approached from the debate between constitutionalisation and fragmentation of international law. While far from being a new debate, it helps us to understand the consequences of the increasing complexity of international law of humanitarian action, its codification by the ILC, and regional special arrangements for the field.

The question of the unity of international law is as old as the question of what constitutes modern international law. As early as the end of the nineteenth[4] and the early twentieth century, authors raised the question of whether an international constitutional law, or world law, would or could exist.[5] The Viennese school of international law, particularly Verdross,[6] picked up this question and argued for the unity of the international legal order based on certain principles and structures such as Kelsen's Grundnorm *pacta sunt servanda*.[7]

Ever since, the interest of legal scholars in question has not declined but rather gained new interest via the question of fragmentation, or diversification, of international law. Simma, for example, sees two realms of debate concerning fragmentation, one regarding the increasing number of international judicial organs along with the International Court of Justice (ICJ), the other concerning the substance of law itself.[8] In its session in 2000, the ILC also raised questions about the consequences of fragmentation in international law. Hafner, a member of the ILC who wrote the report concerning this question, sees several factors that contribute to fragmentation:

- The proliferation of international regulations;
- Increasing political fragmentation (juxtaposed with growing regional and global interdependence in such areas as economics, the environment, energy, resources, health, and the proliferation of weapons of mass destruction);
- The regionalisation of international law due to a rise in the number of regional fora engaged in the formulation of international regulations;

[4] Franz von Holtzendorff, *Handbuch des Völkerrechts* (Berlin, C. Habel, 1887), e.g. the title of vol. II ('Die völkerrechtliche Verfassung und Grundordnung der auswärtigen Staatsbeiehungen') and elsewhere.

[5] See also: Raymond L. Bridgman, *The First Book of World Law: A Compilation of the International Conventions to Which the Principal Nations Are Signatory, with a Survey of Their Significance* (Ginn and Company Publishers, 1911), www.archive.org/details/firstbookworldl01foungoog.

[6] Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Wien: J. Springer, 1926).

[7] Hans Kelsen, *Reine Rechtslehre* (Wien: Deuticke, 2nd ed., 1960), 221 et seq.

[8] Bruno Simma, 'Fragmentation in a Positive Light', *Michigan Journal of International Law* 25 (2003–2004): 845–847.

- The emancipation of individuals from states; and
- The specialisation of international regulations.[9]

According to Hafner, fragmentation poses both a risk to international law through the loss of credibility and reliability due to sectionalism and regionalism, as well as a possible benefit of tailored laws to regional specificities and thematic requirements. This approach allows us to better match institutions and legal frameworks with the necessities of given disputes or issue areas.[10]

At the same time de Wet argues for an 'intensification of the shift of power and control over decision-making away from the nation State towards international actors' in which 'there is a co-existence of national, regional and sectoral (functional) constitutional orders that complement one another in order to constitute an embryonic international constitutional order'.[11]

In humanitarian action both issues converge. Regional legal arrangements, respect for local norms, and a variety of international norms applicable to a given crisis (for example human rights, international humanitarian law, refugee law, decisions of the Security Council and/or the General Assembly) need to be dealt with by practitioners. Furthermore, this area of issues opens the door to rather new political arguments that are deployed with increasing frequency, such as the concept of sovereignty as responsibility, the responsibility to protect, human security, and several others. This indicates cross-fertilisation between different norms and standards on various levels of analysis, for example the human rights obligation of states other than the one directly concerned towards its citizens. Whereas it is not the intention of the book to confirm or dispute either of the conceptions, the constitutionalisation/fragmentation debate is nevertheless useful to give flesh to the bones of the global–local interaction in the field of humanitarianism which the chapters tackle. In the concluding chapter, the following elements of the debate will be taken as focal points of analysis:

- Shift of decision-making power away from the national order,
- Complementarity of national, regional and international (sectoral – i.e. humanitarian) normative orders,

[9] Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law', *Michigan Journal of International Law* 25 (2003–2004): 849–850.
[10] Ibid., 859.
[11] Erika De Wet, 'The International Constitutional Order', *ICLQ* 55 (2006): 75.

- Proliferation of international norms of humanitarian action to lower levels of normative orders,
- Political fragmentation of sectors of international law and cross-fertilisation of sectoral norms with the humanitarian sector,
- De-internationalisation (regionalisation/localisation) of institutions and norms concerning humanitarian action,
- Emancipation of the individual as subject of international law in the field of humanitarian action,
- Specialisation of international/regional/local regulations on humanitarian action and crises.

2. Structure of the book

In order to shed light on the global/local interaction that is a defining feature of this field, this book will focus on two major areas of relevance for the humanitarian system: Part I deals with the laws about, and politics of, contemporary challenges to humanitarian action and will provide the basis for further inquiry into global–regional–local interaction; herein, authors introduce the challenge of global responses to local crisis, critically revisit common approaches, and explore new paradigms of international law and politics that try to breach the global/local divide in legal policy-making. It deals with the norms and practices that have emerged at the international level and keeps in mind the question of the appropriateness of a top-down approach to local problems. This part discusses norms that have emerged and are currently emerging at the global level, such as sovereignty, Security Council obligations to humanitarian action, and the duty to protect people affected by disasters. In addition it focuses on international norms regarding the individual divided into needs-based versus rights-based perspectives, and raises the pertinent question of the place of the individual human being in all these international developments.

Part II focuses on the interaction between international, regional and national conduct and calls for attention to regional and cultural specificities that need to be taken into account in these kinds of interactions. It puts emphasis on the interaction between international and regional responses to local problems, and raises the question of how these norms interact. It furthermore explores how local crises give rise to new legal and political approaches concerning humanitarian aid. Case studies include the roles, strategies and changing approaches of the international community in the Colombian conflict, the Haiti earthquake and the

cyclone in Myanmar. Thus Part I provides the legal and philosophical ground for Part II, which investigates local/global interaction from legal and political perspectives in the form of case studies; these include European Union anti-corruption mechanisms for humanitarian funding (Chapter 11), national compliance with international norms (Chapters 12, 14), international humanitarian organisations as local peace-builders (Chapter 17), humanitarian aid coordination in Haiti (Chapter 18), Responsibility to Protect (R2P) and humanitarian diplomacy in Myanmar (Chapter 15).

Together both parts provide for a view of the intricate bottom-up and top-down interaction of norms that gives rise to a high degree of complexity within the international system of humanitarian action. Eventually, the conclusion will come back to the focal points of analysis for fragmentation and constitutionalisation mentioned above.

PART I

Law and politics of humanitarian action