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Adverse Human Agency and Disasters: A Role for International Criminal Law?

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University of Basel Law Research Paper

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1 Introduction

International criminal law is among the youngest, and yet most visible, branches of public international law. For the better or the worse, the institutions of international criminal justice – most prominently the International Criminal Court (ICC) – today attract significant attention in discussions around what should or could be done in the wake of serious harm resulting from adverse human agency. Yet, including when it comes to disasters, people often disagree what exactly should be considered relevant for international criminal law. This chapter aims at clarifying the relevance, potential and limitations of international criminal law in relation to preventing, mitigating and responding to disasters.

International criminal law can only be relevant in relation to a disaster if the effects or aspects of the disaster are the result of adverse human agency. Someone needs to have negatively influenced the ordinary course of events, or at least attempted to do so, and he or she must have done so with the necessary mental elements required for a finding of a specific crime.¹ We will consider a range of examples that show how adverse human agency can intervene at various moments in the lifecycle of a disaster. Because of the complexities of many disasters, stereotype ideas about what constitutes an international crime or a simplistic dichotomy between ‘natural’ and ‘human-made’ disasters can mislead legal assessments and can have negative consequences for the relevance of international law as a tool to prevent, mitigate and address disasters.

¹ The Rome Statute usually requires ‘knowledge and intent’ while some of the *mens rea* requirements under customary international law are arguably slightly different for a number of crimes. For an overview, see Sarah Finnin, ‘Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis’ [2012] 61 *International & Comparative Law Quarterly* 325.

For the purpose of this chapter, the term disaster is used to refer to ‘a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society’.² The International Law Commission (ILC) as well as the editors of this volume suggest that armed conflicts are to be covered by the definition of a disaster.³ If armed conflicts are included in the notion of disasters, the part of international criminal law dealing with war crimes will be relevant to ‘disaster law’. The use of the term ‘disaster’ in every-day language would seem to support, or at least not exclude, the inclusion of armed conflicts in the definition of a disaster. Such an approach also makes sense if we assume that it is the *impacts* on human life, health and the environment that provide the key parameters in defining what constitutes a disaster and not the type of causes. However, the incorporation of armed conflicts comes at a disadvantage of increasing complexity. In addition to other applicable legal norms, armed conflicts are governed by a highly specialized body of law (international humanitarian law [IHL]) and this chapter can only point at some of the relevant war crimes provisions. Yet, I opt for including armed conflicts in the scope of the disaster definition for the purpose of outlining the relevance of international criminal law in relation to disasters as comprehensively as possible.

Some will take issue with the broad approach to disasters because the definition suggested by the ILC is not limited to situations ‘attributable to the forces of nature’ as some others have defined disasters.⁴ However, if we were only to include disasters with ‘natural’ causes in the definition of the term, there is a risk that we do not fully appreciate the various points at which

² International Law Commission, *Draft Articles on the Protection of Persons in the Event of Disasters* A/65/10 and A/CN.4/L.831, (6 August 2010 and 15 May 2014) art 3.

³ On the inclusion of armed conflicts in the above-cited Draft Articles, see *Seventh Report on the Protection of Persons in the Event of Disasters (Eduardo Valencia-Ospina)* A/CN.4/668 (including Corr.1 and Add.1), (27 February 2014) para 8. [also add X-ref to introductory chapter?]

⁴ Robert Stallings, ‘Disaster, Crisis, Collective Stress, and Mass Deprivation’ in Ronald W. Perry and Enrico Quarantelli (eds), *What Is a Disaster? New Answers to Old Questions* (Xlibris 2005) 263. Stallings describes disasters as a situation ‘attributed to the forces of nature, regardless of what other causal factors may seem to be involved’.

adverse human agency can exacerbate a disaster and its consequences. Hence, I avoid a definition of a disaster limited to what we commonly believe to be ‘natural disasters’ – precisely because of the risk that simplistic categorizations could mislead legal assessments.

Of course, even if the term disaster is used to encompass situations caused or exacerbated at least in part by human conduct, this does –by far – not mean that international criminal law will be relevant for all disasters. It must be stressed at the outset that abuses must meet very specific legal criteria before even the lowest standard of evidence to invoke international criminal law can be met (e.g. the standard to find that there are reasonable grounds to believe that crimes might have been committed). It can be very challenging or impossible to demonstrate that these criteria are met in any particular situation.

2 The Scope and Sources of International Criminal Law

Understandings of the term ‘international criminal law’ vary⁵: Two features characterize all international crimes:

First, for all international crimes, international law foresees mechanisms for international cooperation and enforcement in the repression of certain conduct. Second, to constitute an international crime, international law must either directly establish criminal liability at the international level or require states to criminalize conduct in domestic criminal law. The three most well-known groups of international crimes – genocide, crimes against humanity and war crimes – are examples of crimes that are criminalized at the international level itself.⁶ Some authors limit their use of the term ‘international criminal law’ to the body of law dealing with these crimes only.⁷ Other international crimes deal with conduct that is not directly criminalized by general international law, but conduct that states must, by virtue of international law, criminalize in their domestic legal systems. Some authors refer to these crimes as ‘transnational’

⁵ This section is based on Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Cambridge Studies in International and Comparative Law, Cambridge University Press 2015).

⁶ Yoram Dinstein, ‘International Criminal Law’ [1985] 20 *Israel Law Review* 206, 221.

⁷ For instance, Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005) chapter 1.

or ‘treaty-based’.⁸ The perpetrator does not incur penal responsibility directly under international law, but indirectly under national criminal laws which the state must adopt by virtue of state obligations under international law to criminalize the conduct.

International criminal law is not limited to those crimes over which the ICC has jurisdiction. The Rome Statute is a useful starting point to understand the elements of international crimes but it is crucial to stress that states only choose to entrust the ICC with jurisdiction over a limited number of crimes.⁹

It should also be noted that there is an important debate whether collective non-state actors, such as corporations or armed groups, can be the authors of international crimes even though most international tribunals at least currently limit jurisdiction to natural persons.¹⁰ We do not need to rule out the possibility that the statutes of existing tribunals could be modified in order to allow them to exercise jurisdiction over non-natural persons, nor should it be forgotten that domestic tribunals may in some circumstances already be competent to prosecute persons other than individuals for international crimes.

To summarize, international criminal law acknowledges that the enforcement of the prohibition of criminalized conduct is not left exclusively to the state. This idea can be of relevance in at least some disasters:

Many extremely serious calamities of the past century were disasters created, manipulated or exacerbated by government officials, members of armed groups and other human actors. They were not simply the result of unfortunate circumstances, such as bad weather, a general lack of resources or well-meant but misguided economic policies.

⁸ Neil Boister, ‘Transnational Criminal Law?’ [2003] 14 *European Journal of International Law* 953.

⁹ See Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998 (entered into force 1 July 2002) arts 10 and 22(3).

¹⁰ Andrew Clapham, ‘Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups’ [2008] 6 *Journal of International Criminal Justice*, 902.

3 Natural disaster, international crime or both?

International criminal law relies on the bedrock principle of personal guilt. A crime, no matter which one, requires a prohibited act or omission with a guilty mind. If a disaster has an entirely non-human origin, no person can be held to account for its occurrence. Yet, where a disaster has multiple causes or where a disaster has been exacerbated by adverse human agency, it is worth exploring whether international criminal law could capture aspects of the catastrophe. Consider the following examples.

The approx. 400,000 deaths during the Ethiopian famine of 1982-1985 are commonly ascribed to climatic causes. Yet, senior Ethiopian government officials publicly admitted that they used starvation as a method to squash the secessionist movement.¹¹ Did these government officials commit international crimes? Was the famine due to a drought, to criminal policies, or a mixture of both?

The question can be raised even in relation to disasters for which it is uncontroversial that their causes were of a non-human origin. Cyclone Nargis of 2008 is such an example and is useful to illustrate the state of the literature on disaster law and its potential relationship with international criminal law. Nargis was ‘one of the deadliest storms in recorded history. It blew away 700,000 homes in the [Irrawaddy delta in Burma/Myanmar]. It killed three-fourths of the livestock, sank half the fishing fleet and salted a million acres of rice paddies with its seawater surges.’¹² The UN estimate that approx. 140,000 people died and many more were affected in their livelihoods and health.¹³ Cyclones are meteorological phenomena that can (at least until now) not be triggered or avoided by human beings. Hence, government officials can surely not be blamed for having caused the cyclone.

¹¹ Alex De Waal, *Famine Crimes: Politics, and the Disaster Relief Industry in Africa* (International African Institute 1997) 177, quoting then Ethiopian Foreign Minister Tibebe Bekele. Discussed in David Marcus, ‘Famine Crimes in International Law’ [2003] 97 *American Journal of International Law*, 245.

¹² ‘A Year after Storm, Subtle Changes in Myanmar’ *New York Times* (29 April 2009).

¹³ UN Office for Disaster Risk Reduction and EM-DAT: The OFDA/CRED International Disaster Database, ‘Cyclone Data and Statistics’ <<http://www.preventionweb.net/english/hazards/statistics/?hid=58>> accessed 27 June 2015.

Yet, the fact that the development of a hurricane cannot be prevented or mitigated, other aspects of the disaster potentially can: The government of Burma/Myanmar was accused of an ‘utter failure ... to act appropriately and in a timely manner’, which, according to critics resulted in a much more destructive humanitarian catastrophe than if the government had taken appropriate steps to respond.¹⁴ In the weeks following the cyclone, the government restricted relief efforts despite the fact that the country was faced with extreme humanitarian needs. High numbers of aid workers did not receive visas and ships laden with supplies could not enter Burmese waters.¹⁵ To make matters worse, the government prematurely declared an end to the relief phase and ‘then began evicting displaced persons who were sheltering in monasteries, schools, and other public buildings and ordered them to return to their homes or military-controlled camps’.¹⁶ In any event, the response by the government did definitely not correspond with the international principles and the best practices that the International Federation of Red Cross and Red Crescent Societies as well as the ILC have tried or are trying to codify,¹⁷ particularly, of course, the duty to seek assistance and the duty not to arbitrarily withhold consent to external assistance.¹⁸

¹⁴ See, for instance, Burma Center Prague, ‘Cyclone Nargis’ <<http://www.burma-center.org/en/burma/history/cyclone-nargis/>> accessed 27 June 2015.

¹⁵ Eric Stover and Patrick Vinck, ‘Cyclone Nargis and the Politics of Relief and Reconstruction Aid in Burma (Myanmar)’ [2008] 300 *Journal of the American Medical Association* 729, 730.

¹⁶ *Ibid.*

¹⁷ Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance (IDRL Guidelines) and International Law Commission, *Draft Articles on the Protection of Persons in the Event of Disasters* A/65/10 and A/CN.4/L.831, (6 August 2010 and 15 May 2014). For an overview, see Angelica Fanaki, ‘Recent Developments in International Disaster Response Laws: ILC’s Work and IDRL Rules in Disaster Relief’ [2013] 18 *Tilburg Law Review* 86.

¹⁸ For a discussion, see in particular Sandesh Sivakumaran, ‘Arbitrary Withholding of Consent to Humanitarian Assistance in Situations of Disaster’ [2015] 64 *International & Comparative Law Quarterly* 501, breaking down the ‘arbitrary withholding standard’ into substantive and procedural elements. Amelia Telec, ‘Challenges to State Sovereignty in the Provision of International Natural Disaster Relief’ in David D. Caron, Michael J. Kelly and

Cyclone Nargis sparked an intense debate about whether members of the ruling junta in Burma/Myanmar might be guilty of crimes against humanity. We will consider these arguments further below. Suffice it to say here that the inability to avoid the cause of a disaster must be distinguished from the question whether government officials committed crimes by obstructing relief and/or by failing to assist the population in meeting their humanitarian needs.

Similarly, the need to distinguish the cause of a disaster from the extent to which a disaster with a ‘non-human origin’ creates a humanitarian catastrophe can also be illustrated with earthquakes. We cannot prevent natural earthquakes but much can be done to mitigate their effects by identifying hazards, building safer structures or by providing education on earthquake safety. ‘Earthquakes don’t kill people, buildings do’, seismologists say after practically every earthquake. The quality of buildings and infrastructure can, of course, be influenced by human conduct – both positively or negatively. Two researchers calculated ‘that 83% of all deaths from building collapse in earthquakes over the past 30 years occurred in countries that are anomalously corrupt’.¹⁹ While the researchers unsurprisingly found a relationship between the general level of poverty and deaths, they showed that poverty is not the only explanatory factor: The vast majority of deaths between 1995 and 2010, when corruption values can be compared directly with earthquake fatalities, occurred in poor countries that are more corrupt than one might expect from their per capita income.²⁰ Here too, human conduct can exacerbate the effects of a disaster with a non-human origin. We will return to the criminal law aspects of this relationship in section 5.3.

What about humanitarian emergencies in the context of armed conflicts? Are refugee flows, for instance, ‘natural’ consequences of armed conflicts, international crimes, none or both of the two? Conflict-related displacement has long been treated as if it was exclusively and always a secondary consequence of the conflict. Recently, however, the awareness has grown both in the

Anastasia Telesetsky (eds), *The International Law of Disaster Relief* (Cambridge University Press 2014) 283. For disasters in which IHL is applicable, see also Joakim Dungel, ‘Humanitarian Assistance in Internal Armed Conflicts: Respecting Sovereignty, Neutrality and Legitimacy: Practical Proposals to Practical Problems’ *Journal of Humanitarian Assistance* <<http://sites.tufts.edu/jha/archives/838>>.

¹⁹ Nicholas Ambraseys and Roger Bilham, ‘Corruption Kills’ [2011] 469 *Nature* 153, 153.

²⁰ *Ibid.*

literature as well as in international criminal tribunals or truth commissions that displacement and other socio-economic deprivations are sometimes inflicted with the intent to force people to leave.²¹

Empirical evidence questioning the natural occurrence of disasters and their impacts is not new. Most prominently, Nobel Prize winner Amartya Sen showed that famines are not simply a result of a lack of food supply.²² Rather, understanding famines requires an analysis of a range of social processes that determine the opportunities of people to cope with a difficult situation. By only considering climatic conditions or absolute food supplies, we fail to understand how ‘famines have occurred even when the supply of food was not significantly lower than during previous years (without famines), or that famine-stricken areas have sometimes exported food’.²³ Given that Sen’s work draws attention to the role of adverse human agency in relation to the creation of a disaster and its impacts, these findings would seem to deserve attention from those interested in disaster law, including those working on international criminal law. As argued elsewhere in much more detail, international criminal lawyers have tended to assume that international criminal law is about certain ‘typical’ abuses – most often, abuses that relate to what human rights lawyers refer to as civil and political rights abuses, to the exclusion of economic, social and cultural rights abuses.²⁴ In particular, there are two assumptions about international criminal law that should be avoided in order to fully appreciate the relevance of international criminal law in relation to disasters, which are discussed next.

²¹ For an overview and a discussion of existing case-law: Federico Andreu-Guzman, ‘Criminal Justice and Forced Displacement: International and National Perspectives’ in Roger Duthie (ed), *Transitional Justice and Displacement* (Social Science Research Council 2012). See also Schmid (n 5), 94-110 and below, section 5.1.2.

²² Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Clarendon Press; Oxford University Press 1981).

²³ Sylvia Nasar, ‘Economist Wins Nobel Prize for Work on Famines and Poverty’ *New York Times* (15 October 1998).

²⁴ Schmid (n 5), chapters 1 and 2.

4 Challenging Traditional Assumptions on the Relationship between Disasters and Human Agency

4.1 The type of violence covered by international criminal law

The first assumption relates to the idea that international criminal law ‘only’ protects physical integrity related to abuses of civil and political rights. This assumption must be qualified by two important considerations:

First, physical integrity can be harmed in many ways.²⁵ For instance, it is uncontroversial that starving protected persons or hindering their access to life-saving medical aid in an armed conflict, for instance, could amount to the war crime of murder/wilful killing if the perpetrator meant to cause death or must have been aware that death would occur in the ordinary course of events.²⁶ Causing death is possible by way of depriving victims of food, water, shelter or other essential socio-economic items, e.g. if a government deliberately restricts the delivery of disaster relief or if it excludes certain groups from accessing, for instance, alternative water sources or temporary shelter. Hart and Honoré, writing on causation, explain: ‘The notion of causing death is not of course confined to crude cases where the actor initiates changes in the victim’s body by introducing some foreign element; it also extends to cases where the actor shortens the victim’s life by depriving him of something needed by his organism for survival.’²⁷ Similarly, Bassiouni clarifies that state practice views murder as including the creation of life-endangering conditions that will in the ordinary course of events result in death.²⁸ If evidence is available so that intent to cause death can be inferred from the facts, the elements of murder/wilful killing may have been

²⁵ Together with Aoife Nolan, I make a similar argument in Evelyne Schmid and Aoife Nolan, ‘‘Do No Harm?’’: Exploring the Scope of Economic and Social Rights in Transitional Justice’ [2014] 8 International Journal of Transitional Justice 362.

²⁶ E.g. Rome Statute (n 9), art 8, para 2(a)(i) and art 8, para 2(c)(i); Geneva Conventions arts 3 and 50/51/130/147.

²⁷ Herbert Hart and Tony Honoré, *Causation in the Law* (2nd edn, Clarendon 1985) 240.

²⁸ M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (2 edn, Kluwer Law International 1999) 301-302.

met, e.g. because people in the wake of a disaster are deliberately prevented from accessing available essential support.

Second, international criminal law does not only protect physical integrity, but also certain types of property and other economic legal interests. The criminalization of a range of international crimes is capable of protecting people's access and enjoyment of some of their economic rights and underlying economic interests.²⁹ To give just a few examples, the crime against humanity of persecution, for instance, protects against discriminatory deprivation of fundamental rights,³⁰ and such deprivations could include the intentional blocking of relief,³¹ forced evictions or the obstruction of access to shelter.³² Similar arguments are possible for other international crimes. Particularly in the context of armed conflicts, civilian property incurs legal protection and its destruction can under certain circumstances constitute a war crime.³³ This is relevant in relation to disasters in which IHL is applicable and the effects of a disaster are, for instance, caused or exacerbated by serious deprivations of people's property, e.g. because the loss of shelter and the ensuing humanitarian needs are attributable to the unlawful destruction of protected property. Hence, international criminal law allows for the inclusion of at least some considerations in relation to people's right to an adequate standard of living and such socio-

²⁹ Schmid (n 5). Evelyne Schmid, 'Distinguishing Types of 'Economic Abuses': A Three-Dimensional Model' [2015] 26 Criminal Law Forum 225, 238-243.

³⁰ Defined, for instance, in Rome Statute (n 9), art 7(1)(h) and 7(2)(g). On persecution and socio-economic rights, see, for instance, Salim Nakhjavani, 'Violations of Social and Economic Rights and International Crimes' in Sébastien Jodoin and Marie-Claire Cordonier Segger (eds), *Sustainable Development, International Criminal Justice, and Treaty Implementation* (Cambridge University Press 2013).

³¹ Christa Rottensteiner, 'The Denial of Humanitarian Assistance as a Crime under International Law' [1999] 81 International Review of the Red Cross 555.

³² See also section 5.1.4.

³³ Relevant provisions include e.g. Rome Statute (n 9), art 8(2)(a)(iv), 8(2)(b)(ii, iv, v, ix or xvi), 8(2)(e)(iv or v). See also Evelyne Schmid, 'War Crimes Related to Violations of Economic, Social and Cultural Rights' [2011] 71 Heidelberg Journal of International Law 523.

economic aspects of people's well-being are key in relation to disaster risk reduction, resilience as well as in terms of disaster mitigation and recovery.

4.2 International criminal law and disasters with causes attributable to the forces of nature

The second assumption concerns the idea that a disaster with a purely non-human origin cannot be relevant for international criminal law. Yet, as illustrated above with the examples of Cyclone Nargis or the relationship between earthquakes and their impact show that such is not always the case. Adverse human agency can enter the scene at later stages of the process in which the effects of a disaster unfold.

This conclusion is supported by the conceptual thinking developed around the concept of the 'Responsibility to Protect' (R2P). This concept centres on the idea of 'responsible sovereignty' and the protection of every state towards its own population and the assistance of other states in ensuring such protection.³⁴ R2P emphasizes that states, individually and collectively and within the confines of the UN Charter, should take a wide range of positive diplomatic, humanitarian and political measures to prevent risks and, if necessary, protect people. From the beginnings, there was a debate whether the R2P concept includes or should include disasters, including disasters with an exclusively non-human origin. At first, this was affirmed.³⁵ The position changed after 2005 and the General Assembly, the Security Council and the UN Secretary-General favoured a more restricted version of R2P.³⁶ From then onwards, R2P became strongly related to international criminal law because the wording of the relevant resolutions clarifies that populations should be protected from 'genocide, war crimes, ethnic cleansing and

³⁴ *World Summit Outcome* GA Res. 60/1, (24 October 2005) paras 138-139. [x-ref to another chapter within the same volume?]

³⁵ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre 2001) 33.

³⁶ *World Summit Outcome* (n 34), paras 138-139. *S/Res/1674* (28 April 2006) para 4; *Implementing the Responsibility to Protect, Report of the Secretary-General A/63/677*, (12 January 2009) para 10(b).

crimes against humanity’.³⁷ As Gromilova and Jägers explain, ‘[s]ince then, it has been denied that R2P applies to environmental crises’.³⁸ Importantly, however, they immediately and aptly qualify this statement by adding that ‘when a State deliberately causes serious injury to its civilian population by inaction this might invoke R2P’.³⁹ When the former French Foreign Minister Kouchner argued in favour of a military intervention to bypass the Burmese government’s refusal to accept humanitarian relief in the wake of Cyclone Nargis,⁴⁰ he suggested that the ruling junta in Myanmar could be guilty of crimes against humanity and Burma was a R2P case requiring military action. While there is reason to believe that Kouchner was correct in his legal assessment about the existence of crimes against humanity following Nargis, there are equally strong reasons to argue that he was wrong to ask for a military intervention. Unfortunately, the debate in 2008 failed to clearly distinguish these two separate considerations.⁴¹ That Burma was probably not a good case to use military intervention does not necessarily mean that no crimes against humanity were committed. Although he strongly disagreed with Kouchner, Gareth Evans admitted that it is possible to conceive that a response of a government in a situation of disaster is ‘so deliberately malicious, or recklessly indifferent to loss of life, that it itself [constitutes] a crime against humanity’. According to Evans, enough relief was finally allowed into Burma so that the argument subsided.⁴² Nevertheless, academics continued to argue

³⁷ World Summit Outcome (n 34), paras 138-139. *S/Res/1674* (28 April 2006) para 4.

³⁸ Mariya Gromilova and Nicola Maryon Catharine Paula Jägers, ‘Climate Change Induced Displacement and International Law’ in Jonathan Verschuuren (ed), *Research Handbook on Climate Change Adaptation Law* (Edward Elgar 2013) 98.

³⁹ *Ibid*, 98-99. Roberta Cohen, ‘The Burma Cyclone and the Responsibility to Protect’ [2009] 1 *Global Responsibility to Protect* 253.

⁴⁰ Bernard Kouchner, ‘Birmanie: Morale de l’extrême urgence’ *Le Monde* (19 May 2008).

⁴¹ A notable exception is Cohen (n 39).

⁴² Gareth Evans, ‘The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All’ [2009] 20 *Irish Studies in International Affairs* 7, 11. Similarly, see Rebecca J. Barber, ‘The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study’ [2009] 14 *Journal of Conflict and Security Law* 3.

that aspects of the response to Nargis could be qualified as international crimes and we will consider their arguments below in the section on crimes against humanity.

The above examples illustrate that a disaster is rarely a single event with a single cause and a single effect. A binary distinction between ‘natural’ and ‘man-made’ disasters is thus too simplistic. Rather, it is possible that the prevention, the cause or the impact of a disaster are adversely influenced by human agency. The following graphic overview illustrates various possible entry-points for human agency.

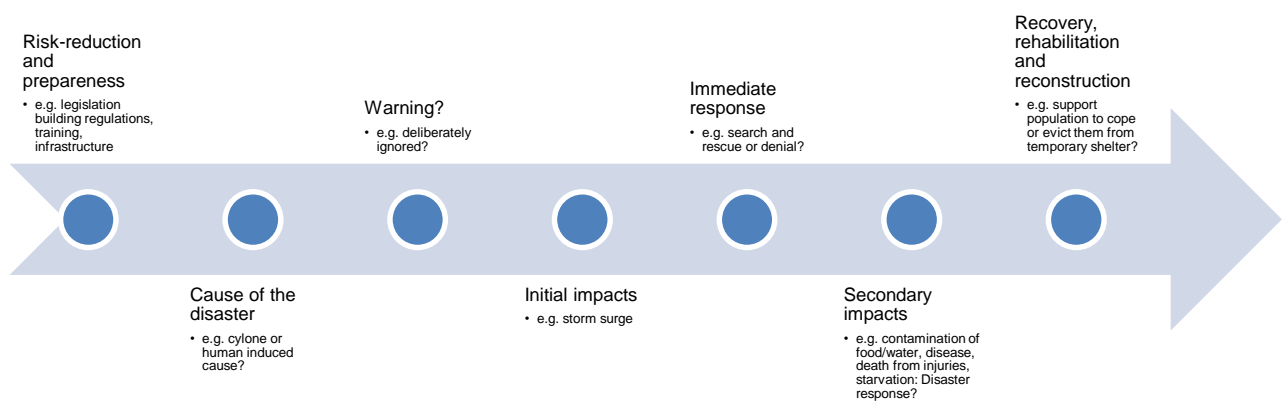


Figure 1: Timeline of a disaster with various points at which (adverse or positive) human agency can intervene.

At each of these possible junctures in the ‘disaster cycle’⁴³, humans could take decisions that harm others. Not coincidentally, these are the same junctures as the ones identified for the disaster risk reduction (DRR) agenda in the Sendai Framework for Disaster Risk Reduction 2015-2030 (Sendai Framework): early warning, preparedness, response, recovery, rehabilitation and reconstruction.⁴⁴ It is at these moments in the disaster cycle that human agency plays a particularly significant role and this role can be both positive and negative. Hence, international

⁴³ Daniel A. Farber, ‘International Law and the Disaster Cycle’ in David D. Caron, Michael J. Kelly and Anastasia Telesetsky (eds), *The International Law of Disaster Relief* (Cambridge University Press 2014).

⁴⁴ UN World Conference in Sendai, *Sendai Framework for Disaster Risk Reduction 2015 - 2030* (18 March 2015) para 14.

crimes occurring in relation to disasters could be seen as an extreme manifestations of ‘reverse DRR’. While the Sendai Framework strives for ‘protecting persons and their property, health, livelihoods and productive assets, as well as cultural and environmental assets, while promoting and protecting all human rights’,⁴⁵ international criminal law on the other hand criminalizes some of the worst disaster-related abuses against these same human and environmental interests.

Hence, rather than ‘simply’ focusing on the question of who or what caused a disaster, we should take into account the full range of points at which human conduct can alter the ordinary course of events. In some cases, such conduct can result in significant gains in terms of DRR. In others, human conduct can be so inadequate or so misanthropic that it is relevant for international criminal law.

Where does this leave us in the assessment of the relevance of international criminal law in relation to disasters? The next section will discuss the elements of some crimes that seem particularly relevant for disaster law as well as the defences that can be raised.

5 Particularly relevant crimes

5.1 Crimes against Humanity

Crimes against humanity are of particular importance in relation to disasters. Crimes against humanity today do not require the existence of an armed conflict. This emancipation from the law of armed conflicts is highly significant as many disasters occur outside the context of armed conflicts. Moreover, the relationship between crimes against humanity and violations of human rights is particularly strong, albeit complex,⁴⁶ and this category of crimes is therefore potentially useful to consider in relation to adverse human agency causing or exacerbating a disaster or its effects.

⁴⁵ Sendai Framework (n 44) para 19(c).

⁴⁶ For a concise overview on the complexities of the relationships between international criminal law and human rights law, see in particular Andrew Clapham, ‘Human Rights and International Criminal Law’ in William Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge University Press 2016). [later add page nr]

Before specific crimes against humanity offences can be examined, it is crucial to note that this category of international crimes has specific threshold elements. Namely, only conduct that is ‘committed as part of a widespread or systematic attack directed against any civilian population, with the perpetrator’s knowledge of the attack’,⁴⁷ can be a crime against humanity.

While much has been written about the interpretation of some of the contextual elements of crimes against humanity, the independent meaning of the term ‘attack’ has been neglected.⁴⁸ Yet, knowing what can constitute an attack is crucial in cases of disasters and other situations in which a population is harmed in a context that seems different from the crimes against humanity situations that criminal tribunals have so far dealt with, such as the Holocaust, Rwanda, the situation in the former Yugoslavia. What we know is that an attack is a pattern of activity and the acts or omissions which form part of the attack need not amount to any crime,⁴⁹ nor to a military attack.⁵⁰ It is more controversial whether an attack necessarily involves violent conduct.⁵¹ My own view on this point is that the attack requirement serves the purpose of limiting the scope of crimes against humanity and does indeed require violent conduct, but that at the same time, violence must be conceptualized in accordance with a modern social science understanding of the term rather than restricting it to *armed* violence only.⁵²

⁴⁷ Rome Statute (n 9), art 7(1).

⁴⁸ On this point and the other threshold elements, see Schmid (n 5), 76-93. See also Göran Sluiter, “Chapeau Elements” of Crimes against Humanity in the Jurisprudence of the UN ad hoc Tribunals’ in Leila Sadat (ed), *Forging a Convention for Crimes against Humanity* (Cambridge University Press 2011) 125.

⁴⁹ *Prosecutor v Kunarac, Kovac and Vukovic, IT-96-23-T, 22 February 2001*, ICTY, 415.

⁵⁰ *Prosecutor v Kunarac, Kovac and Vukovic, IT-96-23-A, 12 June 2002*, ICTY, para 86; ICC Elements of Crimes, ICC-ASP/1/3, 9 September 2002, art 7, Introduction, para 3; *Prosecutor v Bemba, Decision on the Charges of the Prosecutor, 15 June 2009, Pre-Trial Chamber II, ICC-01/05-01/08-424*, ICC, para 75.

⁵¹ See e.g. *Prosecutor v Akayesu, ICTR-96-4-T, 2 September 1998*, ICTR, para 581. The ICTR Trial Chamber in *Akayesu* argued that an attack could be non-violent, such as the imposition of a system of apartheid. For a different view, see David Luban, ‘Crimes against Humanity’ (2004) 29 *Yale Journal of International Law*, 1, 85–167: 103, note 68.

⁵² These thoughts are further developed in Schmid (n 5), 76-80.

For the purposes of the threshold of crimes against humanity, an attack can thus constitute a range of social phenomena wider than acts of direct armed violence. Hence, it is arguably possible to find an attack against a civilian population if a government, for instance, deprives people of access to relief aid in the wake of a disaster or if it deliberately imposes a harmful policy on a population and this policy is either itself violent or is accompanied by acts of violence. An example of how the attack requirement can conceivably be met by the infliction of disastrous conditions of life are contained in the recent UN report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea. This commission found that the North Korean regime perpetrates an attack against the population by 'knowingly aggravating starvation in order to preserve the political system' and by abducting and displacing persons in order to gain labour and skills.⁵³ Given the level of violence described throughout the report,⁵⁴ it is convincing to argue that there is reason to believe that the criteria for an attack for the purposes of crimes against humanity have indeed been met in North Korea. In situations in which the threshold elements are established, the following crimes against humanity offences can be particularly relevant in relation to disasters.

5.1.1 Murder or extermination

The basic *actus reus* requirement for the crime of murder is that the perpetrator must have caused the death of one or more persons.⁵⁵ As with all international crimes, a high threshold of *culpable mind* is required and it is necessary to show that the perpetrator intended to engage in the conduct leading to death and meant to cause the consequence or was at least aware that death would

⁵³ North Korea Inquiry, A/HRC/25/CRP.1, 7 February 2014, para 1025; see also para 1133.

⁵⁴ *ibid* para 1133: 'Decisions and policies [aggravating starvation and related deaths] were enforced through executions and other violent measures.'

⁵⁵ ICC Elements of Crimes, art 7(1)a. As a war crime, the act needs to take place in the context of an armed conflict and the victim must have protected status under IHL. Otherwise, the elements of murder as a crime against humanity and as a war crime are arguably the same.

normally occur after depriving someone of food, water or essential medicine.⁵⁶ A range of conduct related to disasters could constitute murder, particularly in scenarios in which it is ‘practically certain’ that, for instance, people will die if disaster relief is obstructed or individuals under a perpetrator’s control and with no option to sustain themselves are turned adrift when sufficient resources are available.

If killings occur on a massive scale, it might be possible to qualify them not as murder but as extermination. The elements of these two crimes are identical with the only difference that extermination must happen on a massive scale.⁵⁷ Numerous killings resulting from the deprivation from essential food, water, shelter or health care, for instance, will constitute extermination if committed with intent and knowledge and if inflicted in the context of a broader attack against a civilian population.

5.1.2 Forcible transfer or deportation

‘Forcible transfer’ refers to displacement within the same state,⁵⁸ while ‘deportation’ has been defined as the forced displacement of persons across international borders.⁵⁹ This crime requires that someone displaces individuals by expulsion or coercive acts and with knowledge and intent.

⁵⁶ Rome Statute (n 9), art 30. *Prosecutor v Katanga, Jugement rendu en application de l’article 74 du Statut*, 7 March 2014, Trial Chamber II, N° ICC-01/04–01/07, ICC, paras. 775–7. In the same vein, Trial Chamber II recently confirmed this stance in the *Katanga* judgment, excluded the *dolus eventualis* and repeated that ‘virtual certainty’ is required. At the same time, the chamber stressed that the certitude does not need to be absolute. Rather, the perpetrator must realize that the consequence will occur except if the course of events would take an unexpected turn.

⁵⁷ E.g. in *Krstić*, the ICTY Trial Chamber held that ‘the definition should be read as meaning the destruction of a numerically significant part of the population concerned’. *Prosecutor v Krstić, IT-98–33-T, 2 August 2001*, ICTY, para 502. The ICTR held that a ‘mass scale’ but no numerical minimum must be reached. *Prosecutor v Munyakazi, ICTR-97–36a-T, 5 July 2010*, ICTR, para 506.

⁵⁸ For an overview of definitions of displacement, see Michèle Morel, *The Right Not to Be Displaced in International Law* (Intersentia 2014).

⁵⁹ Charter of the IMT, Nuremberg, 8 August 1945, art 6(c).

Importantly, the term ‘forcibly’ captures the full range of coercive pressures, i.e. it is not restricted to physical force.⁶⁰ This is noteworthy in this discussion on the relationship between this crime and disasters. The essential objective element is that the displacement is involuntary in nature: that ‘the relevant persons had no real choice’.⁶¹

The crime of deportation or forcible transfer furthermore requires the victims to have been lawfully present in the area from which they were removed and that there are no grounds permitting the displacement. In situations of a disaster, the authorities can sometimes have legitimate reasons to move people away from an area, .e.g. for safety reasons or to facilitate rescue operations. Yet, such restrictions of rights must be in accordance with international law, particularly international human rights law.⁶² It is also important to note that the protection against displacement extends to all sorts of dwellings, including those established without valid permits,⁶³ thus including temporary shelter established in the wake of a disaster.

As alluded to in the introduction, many population displacements are not, or not exclusively, due to the forces of nature. Pressure to leave could stem from policies that render people’s humanitarian situation more difficult than it would otherwise be, e.g. because of restrictions on access to water, jobs, housing, food, etc, and hence exacerbating an existing disaster or even creating one. If inflicted with intent and knowledge and in the context of an attack against a civilian population, it is possible that the conduct amounts to a crime against humanity. Hence, it is worth verifying if refugee flows, for instance, stem from a deliberate conduct aimed at making it very difficult for people to stay. As mentioned earlier and as recognized in the Sendai Framework, displacement is unfortunately a very frequent aspect of disasters.⁶⁴

⁶⁰ ICC Elements of Crimes, footnote 12. *E.g. Prosecutor v Milošević, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, ICTY, para 75.*

⁶¹ *Prosecutor v Simić, IT-95-9, 17 October 2003, ICTY, para 125.*

⁶² For an overview, see Schmid (n 5), 103-108.

⁶³ *E.g. Buckley v United Kingdom, Application No. 20348/92, 25 September 1996, ECtHR, paras. 52–5. Or ERRC v Greece, Complaint No. 15/2003, 8 December 2004, ECtSR, para 51.*

⁶⁴ Sendai Framework (n 44) para 4. Cite chapter by Walter Kälin and Hannah Entwisle here.

5.1.3 Other inhumane acts

The open-ended nature of the crime against humanity of ‘other inhumane acts’ causes difficulties in determining the circumstances under which disaster-related abuses can fall within the ambit of the crime. The crux of this crime is that the category of ‘other inhumane acts’ was introduced to catch up with the imagination of future perpetrators,⁶⁵ while the interpretation of the crime must comply with the requirements of criminal law, in particular the principle of legality.

In addition to the threshold requirements of all crimes against humanity and for the purposes of the Rome Statute, the conduct must involve acts that are ‘inhumane’ and ‘of a similar character’ to the other acts listed in the first paragraph of article 7 of the Rome Statute.⁶⁶ Considering the ordinary meaning of the elements of the crime and the scope of ‘fundamental rights’ in international law, the notion of ‘other inhumane acts’ is not limited to a narrow list of human rights infringements. Rather, chambers in previous cases have stressed that the seriousness of the act is the limiting criteria, not the type of human rights infringement.⁶⁷ Indeed, in his memorandum on the Nuremberg Principles, the UN Secretary-General mentioned in 1949 that the deprivation of means of sustenance is an act that this phrase might cover.⁶⁸ This implies that devastating cases of undernourishment resulting from a deliberate hindrance of people’s means to cope with a disaster, for instance, can potentially be addressed by this provision. In addition to similarity with other acts, the crime requires that the perpetrator must cause great suffering or serious injury. The ICTY found the infliction or exacerbation of inhumane living conditions to be one possible way of meeting this element of the crime of ‘other inhumane acts’.⁶⁹

⁶⁵ *Prosecutor v Kupreškić, IT-95-16-T, 14 January 2000*, ICTY, para 563.

⁶⁶ *Prosecutor v Katanga and Chui, Decision on the Confirmation of Charges, 30 September 2008, Pre-Trial Chamber I, ICC-01/04-01/07*, ICC, para 448.

⁶⁷ *Prosecutor v Kupreškić* (n 65), para 566.

⁶⁸ The Charter and the Judgment of the Nuremberg Tribunal, Memorandum Submitted by the SG, A/CN.4/5, 1949, 67.

⁶⁹ *Prosecutor v Delalić, IT-96-21-T, 16 November 1998*, ICTY, paras. 1092, 1096 (food), 1100 (water), 1105 (medical care), 1108 (sleeping facilities), 1111 (sanitation) and 1119 for the conclusion that these deprivations amounted to great suffering, or serious injury to body or to health.

After Cyclone Nargis, the crime against humanity of ‘other inhumane acts’ attracted particular attention. Indeed, it seems reasonable to believe that the inadequate response to the storm might have fallen under the scope of the crime of ‘other inhumane acts’.⁷⁰

5.1.4 Persecution

Persecution consists of severe deprivations of fundamental rights inflicted with intent and knowledge and on discriminatory grounds in the context of a widespread or systematic attack against a civilian population.⁷¹ In the context of disasters, it is, for instance, conceivable that a government comprehensively destroys the homes of certain groups with discriminatory intent. If committed with discriminatory intent and in the context of a situation of crimes against humanity, such conduct can constitute persecution.⁷² Similarly, if government officials deliberately withhold food aid or otherwise prevent access to food to particular groups, the elements of this crime against humanity will warrant closer examination. The ICTY Trial Chamber indicated that the discriminatory deprivation of humanitarian assistance could give rise to a persecution conviction.⁷³ Similar suggestions are contained in a number of reports of UN commissions of inquiry.⁷⁴

⁷⁰ Summarising the literature on the relationship between crimes against humanity and Cyclone Nargis, Russo finds that ‘it is not unreasonable to argue that an inadequate response to a humanitarian crisis caused by a disaster might fall under the definition of “other inhumane acts”’. Francesca Russo, ‘Disasters through the Lens of International Criminal Law’ in De Guttry Andrea, Gestri Marco and Venturini Gabriella (eds), *International Disaster Response Law* (T.M.C. Asser Press 2012) 455.

⁷¹ Rome Statute (n 9), art 7(2)(g).

⁷² Prosecutor v Kupreškić (n 65), paras 628-631.

⁷³ Prosecutor v Gotovina and Markač, IT-06–90-T, 15 April 2011, ICTY, para 1843. In the case at hand, the chamber found that no or limited evidence was received.

⁷⁴ E.g. Report of the SG’s Panel of Experts on Accountability in Sri Lanka, 31 March 2011, para 251. Final Report of the UN Fact Finding Mission on the Gaza Conflict, A/HRC/12/48, 15 September 2009, para 1733.

5.2 War crimes

To constitute a war crime, conduct must violate a rule of IHL protecting important values, and violations of this rule must have been criminalized as war crimes.⁷⁵ Some conduct constitutes a war crime in international armed conflicts alone, some in armed conflicts not of an international character (e.g. civil wars) alone and some in all conflicts. The various types of armed conflicts must carefully be distinguished to determine the applicable law.⁷⁶ The long list of war crimes can be divided into four groups of punishable acts that constitute war crimes and all of them can be inflicted preceding, during or in the wake of a disaster: (i) war crimes against persons, (ii) war crimes against property, (iii) war crimes consisting in the use of prohibited methods of warfare and (iv) war crimes consisting in the use of prohibited means of warfare. In contrast to crimes against humanity, there are some ecocentric prohibitions in the law of war crimes, i.e. criminal prohibitions that specifically protect against environmental damage that might result from disasters.⁷⁷

In the context of armed conflicts, disaster-related displacement could be a war crime and the considerations made above for the crime against humanity of forcible transfer are relevant for the war crime as well. In addition, pillage (plundering), destroying protected property or contaminating water supplies can all constitute war crimes and capture types of conduct that can occur in the context of disasters. Furthermore, the above mentioned considerations for

⁷⁵ Victims must have a protected status under IHL, e.g. because they are civilians, wounded or sick. See also Robert Cryer, 'The Interplay of Human Rights and Humanitarian Law: The Approach of the ICTY' [2009] 14 *Journal of Conflict and Security Law* 511, 514-516.

⁷⁶ For a short overview of the qualification of armed conflicts with further references, see for instance Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Beck 2008) 290-293 (Michael Cottier).

⁷⁷ Matthew Gillett, 'Environmental Damage and International Criminal Law' in Sébastien Jodoin and Marie-Claire Cordonier Segger (eds), *Sustainable Development, International Criminal Justice, and Treaty Implementation* (Cambridge University Press 2013).

murder/killings are relevant in armed conflicts as well. The lack of food in armed conflicts, for instance, regularly results from intentional acts inflicted with a purpose to harm victims.⁷⁸

5.3 Particularly relevant other crimes

As mentioned earlier, there are crimes that are not contained in the Rome Statute but in other international treaties. Corruption is one of them.⁷⁹ If earthquake fatalities correlate so strongly with high levels of corruption, it may be worth exploring the connections between the effects of an earthquake and the international criminal law provisions aiming at the suppression of corruption. It therefore makes sense to argue that DRR efforts should also encompass strategies to curb corruption and the growing awareness of the influence of corruption is a welcome development in this regard.⁸⁰ Although an explicit mention of corruption is lacking, the Sendai Framework at least recognizes that DRR requires a strong institutional basis for implementation, including appropriate legislation and political commitment.⁸¹

In addition to corruption, a range of other potentially relevant international offences deserve at least a brief reference: transboundary movements of waste,⁸² terrorist offences,⁸³

⁷⁸ See, e.g. Alain Mourey, 'Famine and War' [1991] 31 *International Review of the Red Cross* 549, outlining the the types of intentional acts resulting or exacerbating famines in armed conflicts.

⁷⁹ Julio Bacio Terracino, *The International Legal Framework against Corruption: States' Obligations to Prevent and Repress Corruption* (Intersentia 2012).

⁸⁰ United Nations Office for Disaster Risk Reduction and others, *Behind Every Effect, There Is a Cause* (UNISDR 2011) Annex III, How Corruption Kills Lives. See also Enrico Calossi, Salvatore Sberna and Alberto Vannucci, 'Disasters and Corruption, Corruption as Disaster' in Andrea de Guttry, Marco Gestri and Gabriella Venturini (eds), *International Disaster Response Law* (T. M. C. Asser Press 2012).

⁸¹ Sendai Framework (n 44) paras 6 and 19(e) *Sendai Framework for Disaster Risk Reduction 2015 - 2030* (18 March 2015).

⁸² Rob White, *Crimes against Nature: Environmental Criminology and Ecological Justice* (Willan 2008) 115-143, e.g. referring to the waste dumping in Abidjan or the disposal of shipyards notorious for putting workers and the environment at risk. *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, UNTS 1673, 29 March 1989 (entered into force 5 May 1992) *Bamako Convention on the Ban of the Import*

environmental modifications⁸⁴ or transnational organized crime, including the laundering of proceeds of crime.⁸⁵ The latter in particular can increase vulnerabilities – consider, for instance, the relationships between rapid deforestation in Cambodia and allegations of laundering proceeds of illegal logging and the loss of livelihoods.⁸⁶ It is thus a range of crimes can potentially capture aspects of the negative human influence on disasters.

Efforts to hold alleged perpetrators to account will inevitably be met with challenges, such as defences, challenges to jurisdiction or individual challenges to evidence put forward to establish criminal responsibility. In particular, the following defences can be expected to be raised in attempts to hold someone to account for causing or exacerbating the effects of a disaster.

6 Particularly relevant defences

Defences are grounds for excluding criminal responsibility.⁸⁷ In relation to disasters the defences of duress/necessity and mistake of fact seem particularly relevant.

If a person's conduct which allegedly constitutes an international crime has been caused by duress resulting from a threat of imminent death or of imminent serious bodily harm against that person or another person, and the person acts necessarily, reasonably and proportionately to avoid this threat, he or she will not be found guilty. The Rome Statute recognizes that the threat does

into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Bamako, 30 January 1991 (entered into force 22 April 1998)

⁸³ E.g. *International Convention for the Suppression of Acts of Nuclear Terrorism, GA Res. 59/290, 13 April 2005 (entered into force 7 July 2007)*

⁸⁴ *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 18 May 1977 (entered into force 5 October 1978).*

⁸⁵ *UN Convention against Transnational Organized Crime, GA Res. 55/383, 15 November 2000 (entered into force 29 September 2003)*

⁸⁶ Schmid (n 5), 260-262.

⁸⁷ Rome Statute (n 9), arts 31-33. Sliedregt Elies van, 'Grounds for Excluding Criminal Responsibility' in Sliedregt Elies van (ed), *Individual Criminal Responsibility in International Law* (Oxford University Press 2012).

not need to come from another person but can also be constituted by other circumstances beyond the defendant's control.⁸⁸ In relation to disasters, the defence of duress/necessity is, for instance, conceivable if a defendant stole medical equipment or food aid in order to save him or herself or a loved one. Yet, a government official in charge of an abusive policy restricting access to available relief supplies could hardly rely on this defence. The defendant must have been in a situation that allows the exercise of duress (i.e. a situation of choice of evils or compulsion). If the international community offers relief but the defendant turns it away without valid reason, this is not a choice-of-evils situation.⁸⁹

Mistake of fact can be a ground excluding the international criminal responsibility if the mistake is such as to prevent the accused from having formulated the necessary subjective elements of the offence.⁹⁰ In a situation of disaster, someone could, for instance, claim that he or she misjudged the effects of a policy on human well-being. For instance, if a senior government official honestly but wrongly believed that local search and rescue teams would cope with an mudslide and had no reason to believe otherwise, he or she could not be found guilty of a crime for the simple fact that intent and knowledge were lacking. Yet, the defence would not easily be available in cases such as the faminogenetic policies employed in Cambodia or Ethiopia, for instance: Existing literature concludes, for instance, that even if there is no single piece of evidence conclusively establishing the mental elements necessary for a crimes against humanity conviction in relation to the famine in Cambodia, 'an overview of all available evidence strongly suggests that these leaders had notice of widespread food shortages and even took steps to blame

⁸⁸ Rome Statute (n 9), art 31(1)d.

⁸⁹ For a brief overview on the confines of the defence, how it was interpreted in the famous *Erdemović* case and the discussion it sparked prior to the adoption of the Rome Statute, see, e.g. James Darcy, 'Defences to International Crimes' in William Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011).

⁹⁰ Rome Statute (n 9), art 31(1).

these shortages on others'.⁹¹ For Ethiopia, Marcus shows that even if the government policies resulting in the famine were 'perhaps not intentionally faminogenic', they 'were pursued in spite of significant evidence that they were leading to disaster. ... But the Dergue was not just recklessly indifferent. The famine did not strike all of Ethiopia equally but, rather, was targeted at [the areas that] were homes to separatist rebellions that were assailed in accordance with a withering counterinsurgency strategy.'⁹² If there is evidence that policies are deliberately pursued to harm others, the defence of mistake of fact will be unavailable.

Given the above, a number of crimes are relevant in relation to disasters and the defences most likely raised in such scenarios are narrow. Yet, even if international criminal law holds potential to address some aspects of malicious adverse human agency in the creation, exacerbation and aftermath of a disaster, we must consider the limitations of international criminal law. After all, international criminal law is quite clearly not an ideal body of law to address all aspects of a disaster and there is a risk of overemphasising the use of international criminal law to remedy all sorts of evils.

7 Limitations of international criminal law

First of all, there are important general limitations of international criminal law that deserve to be taken into account. Even where it is legally appropriate to rely on international criminal law, reliance on this body of law will rarely be sufficient to deal with the humanitarian and environmental aspects of a disaster. Prosecutions in criminal tribunals are expensive, lengthy, highly complex and narrow in focusing on the question of guilt or innocence of specific individuals. Criminal proceedings are not particularly well placed to provide a holistic understanding of all aspects of a disaster nor do they necessarily serve a forward-looking

⁹¹ Randle DeFalco, 'Accounting for Famine at the Extraordinary Chambers in the Courts of Cambodia: The Crimes against Humanity of Extermination, Inhumane Acts and Persecution' [2011] 5 International Journal of Transitional Justice 142, 150.

⁹² David Marcus, 'Famine Crimes in International Law' [2003] 97 American Journal of International Law, 257.

purpose.⁹³ It is often challenging to demonstrate that all the elements of a crime are present, in particular where contextual threshold criteria must be met (such as the existence of an armed conflict, or a widespread or systematic attack directed against a civilian population). Linking abuses to specific perpetrators is easier in some cases than in others, but it must be kept in mind that evidentiary challenges are inherent to any proceedings of international criminal law and not intrinsically negative, considering the requirements of due process and the need to avoid miscarriages of justice.⁹⁴ Furthermore, international criminalization is incomplete and depends on contextual elements that states introduce for political rather than legal reasons.⁹⁵ For instance, some abuses are only criminalized if committed in international conflicts but not in civil wars or in ‘peacetime’.⁹⁶ Unrealistic expectations about the potential of international criminal law thus have to be avoided, and the question whether courtrooms are a suitable place to grapple with a disaster or its impact should always be raised. This can be particularly true in the aftermath of a disaster that affects a society in which financial and other resources are very scarce.

8 Conclusion

Disasters are usually complex and rarely entirely ‘natural’ nor entirely ‘human-made’. In order to gauge the relevance of international criminal law in relation to disasters, this chapter stressed that adverse human agency can intervene at various moments in the course of the development,

⁹³ On the limitations of international criminal law in general, see, for instance, Mark Drumbl, *Accountability for Property and Environmental War Crimes: Prosecution, Litigation, and Development*, (November 2009) 22-23. See also Kate Cronin-Furman, ‘Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity’ [2013] 7 *International Journal of Transitional Justice* 434.

⁹⁴ It should be noted, however, that other mechanisms relying on international criminal law, such as commissions of inquiry or truth commissions, have more flexibility in this regard.

⁹⁵ See e.g. Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press 2004) 39.

⁹⁶ Steven Ratner, ‘The Schizophrenias of International Criminal Law’ [1998] 33 *Texas International Law Journal* 237, 249-250.

impact, exacerbation of and recovery from a disaster. Depending on the circumstances, adverse human agency can be such that it meets the elements of an international crime. If so, it is worth exploring whether the invocation of international criminal law is useful, either for purposes of deterrence, retribution or because of the expressive potential of claims based on international criminal law.⁹⁷ Politically, symbolically and legally, it matters whether lawyers frame a disastrous situation as an unfortunate ‘natural’ event or as a result of potentially criminal human agency. Yet, even where there is a role for international criminal law in relation to a disaster, it will never be sufficient to rely on international criminal law in order to avoid, mitigate or overcome the effects of a disaster, let alone to prevent its occurrence in the first place.

While the volume as a whole shows how important it is to look at all bodies of applicable law, this chapter has also shown how important it is to look at all norms *within* one and the same body of applicable law. Rather than relying on a priori assumptions of what ‘looks’ like an international crime and what might not, a standard criminal law analysis based on the elements of particularly relevant crimes promises to provide more reliable conclusions of the relevance of international criminal law in relation to the human influences on a disaster and their effects.

What Rob White wrote about environmental criminology applies to the relevance of international criminal law for disasters more broadly: ‘Crime is socially constructed... The ways in which we ‘measure crime’ are ... intertwined with both ‘how crime is defined’ (and what is deemed to be serious and harmful) and ‘how it is responded by the institutions of criminal justice’.⁹⁸ Based on Hilary Charlesworth’s description of international law as a ‘discipline of crisis’,⁹⁹ it is accurate to conceive that we are more likely to recognize something as a disaster when its development is a sudden crisis rather than a slow and gradual decline over time. Similarly, we are more likely to label conduct as a crime if, for instance, someone is intentionally executed with firearms, rather than when death is deliberately inflicted through conditions of life

⁹⁷ On the expressive benefits of international criminal law, see in particular Robert Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law’ [2007] 43 *Stanford Journal of International Law* 39.

⁹⁸ Rob White, *Crimes against Nature: Environmental Criminology and Ecological Justice* (Willan 2008) 106.

⁹⁹ Hilary Charlesworth, ‘International Law: A Discipline of Crisis’ [2002] 65 *The Modern Law Review* 377.

with lethal consequences.¹⁰⁰ Yet, the law does not prescribe this distinction. Indeed, international law criminalizes both ways of causing death and the elements of crimes of various offences are capable of accommodating claims related to conduct that inflicts harm over time, including conduct that relates to victims' socio-economic and environmental interests.¹⁰¹ Of course, a distinction between sudden and slow-onset situations also does not seem warranted from the perspective of human rights and human security as the level of harm inflicted by disasters unfolding over time might equal (or even exceed) the harm resulting from a sudden crisis. By focusing on the reduction of a broad range of the factors and mechanisms that can result in the loss of life, health, social and economic disruption or environmental degradation, the Sendai Framework provides additional and fertile ground to abandon the view that a disaster is necessarily a suddenly erupting crisis.¹⁰²

The question can be raised whether the considerations provided in this chapter serve to argue that the applicable legal regimes are increasingly interconnected and that, therefore, 'disaster law' as a new and arguably separate body of law could be said to emerge. It is certainly true that attention to what Cubie termed the *acquis humanitaire*¹⁰³ has significantly gained in prominence over the last century (although this progress may not be irreversible). The role of international law in international relations has arguably significantly increased, together with a trend of judicialization. Yet, disasters have always been multifaceted and it is not a very recent phenomenon that various bodies of law are simultaneously applicable in times of disaster. What has changed is rather the awareness of interconnections and the readiness to consider more closely how states treat their citizens, including in terms of 'preventing and/or mitigating the

¹⁰⁰ Sonja Starr, 'Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations' [2007] 101 Northwestern University Law Review. Starr perceives an unjustified reductionism in the focus of international criminal lawyers.

¹⁰¹ On the limitations of this finding, see Schmid (n 5), 311-336.

¹⁰² Sendai Framework (n 45), in particular para 15.

¹⁰³ Dug Cubie, 'Clarifying the Acquis Humanitaire: A Transnational Legal Perspective' in David D. Caron, Michael J. Kelly and Anastasia Telesetsky (eds), *The International Law of Disaster Relief* (Cambridge University Press 2014).

likelihood or effects of disasters; responding effectively to them during their immediate aftermath; and effectively engaging in the longer term process of post-disaster reconstruction'.¹⁰⁴ Indeed, it is very welcoming that the fragmented scholarly attention to disasters has recently started to be drawn together. Yet, this trend may not necessarily involve the 'discovery' of a new body of law, but seems to constitute a logical and necessary step in using the international legal system and its institutions to 'achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character'.¹⁰⁵

¹⁰⁴ [Editors words – included .e.g in the intro of the volume?]

¹⁰⁵ United Nations Charter, art 1(3).

9 Further Reading

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