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The International Law of Disaster Relief

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Hunger Without Frontiers: The Right to Food and State Obligations to Migrants

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Disasters lead to displacement and migration. Natural disasters and armed conflict drive people from their homes, often forcing them to look for refuge in other countries, sometimes because they are at risk of political persecution, often because their means of livelihood have been destroyed. The "permanent disaster" of food insecurity is one of the most significant drivers of global migration. Migrants who are forced to flee due to hunger and material deprivation typically do not meet the requirements to be recognized as refugees under the Refugee Convention. But a complementary body of law has developed side by side with traditional refugee law, based on the principle that people cannot be expelled or deported into situations where their human rights would be violated – for example, to a state where they would be tortured or killed. The same logic that underlies this doctrine of "complementary protection" supports its extension to migrants who face starvation, notwithstanding the traditional view that so-called economic migrants do not deserve any of the protections afforded to true refugees. The right to freedom from hunger is an internationally recognized human right, and to expel or deport someone in such a way as to deprive them of that right is contrary to international law.

INTRODUCTION

This chapter explores a new, or at least unorthodox, proposition: When famine resulting from a disaster drives people to move across international borders, the receiving state has an obligation under international law not to send, expel, or deport those people if doing so would put them at risk of being deprived of the right to food.¹ Such an obligation might follow a natural or human-made disaster (such

¹ The "right to food" refers to the "right of everyone to . . . adequate food" as recognized in Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 UNT.S. 3 (ICESCR) and "the fundamental right of everyone to be free from hunger" recognized in Article 11(2). See

as a drought or other extreme weather event, a generalized armed conflict, or a combination of catastrophic circumstances) causing famine, where the domestic authorities either cannot or will not protect people from hunger, and where the needs of the affected population are not sufficiently met with on-site assistance from the international community.

The proposition that people fleeing such a situation might be entitled not to be deported or sent back is based on the international legal principle of non-refoulement. Non-refoulement means the duty not to expel or return international migrants if doing so would result in a deprivation of their rights under international law. This obligation is a key provision of the International Convention relating to the Status of Refugees (the Refugee Convention),² but it has also been recognized as extending beyond the Refugee Convention, with an independent basis in international human rights law. The category of non-refoulement obligations to migrants who do *not* fall under the protection of the Refugee Convention has become known as the doctrine of complementary protection: that is, protections for migrants derived from international legal obligations other than (complementary to) the Refugee Convention.³ This chapter follows the usual practice in international law of referring to people who have been driven from their home countries but are not refugees within the meaning of the Refugee Convention as "migrants," although in common parlance they would typically be described as refugees.

The conceptual foundation of the argument made here is the connection between the development of the doctrine of complementary protection as an outgrowth of refugee law, and certain discernible themes that run through the law, principles, and norms that have grown up around the prevention of and responses to disasters. An overall theme of this book is to understand the latter not just as a disparate jumble of unrelated legal phenomena but as cohering, at least to a degree, around core principles of humanity and human dignity. Dug Cubie brings out the implications of that theme by proposing that transnational processes are creating (if not a fully coherent or settled framework of international disaster law) an emerging, identifiable body of law, principles, and practice that Cubie calls an *acquis humanitaire*.⁴ This chapter borrows Cubie's concept of an *acquis humanitaire*, which is fully laid out in Chapter 17 of this book, as a heuristic device for identifying the fundamental legal principles at work in the context of disasters.

discussion of the content and interpretation of this right in Sections 2 and 3. The argument that human rights guarantees imply a corollary obligation of non-refoulement is not novel (see discussion in Section 2), but there has been little discussion of its implications for socio-economic rights, and particularly not in the context of disasters.

² Convention relating to the Status of Refugees, July 28, 1951, 189 UNT.S. 150, Art. 33(1).

³ Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007), 2–3. See the discussion of complementary protection and examples in Section 2.

⁴ See Dug Cubie, "Clarifying the 'Acquis Humanitaire': A Transnational Legal Perspective on the Internalization of Humanitarian Norms" in Chapter 17 of this volume.

Those fundamental principles, and in particular the cornerstone principle of respect for human dignity, have implications that go further than on-site disaster response and aid donation. They also apply in situations of migration, which is an all too common consequence of disasters. In other words, the doctrine of complementary protection and the principle of non-refoulement, as they come into play with respect to migrants fleeing disaster and its aftermath, should be understood as part of the *acquis humanitaire* and extensions of its underlying rationale. Looking at the law and quasi-law of disaster prevention, relief and assistance as having a degree of coherence around organizing principles suggests that it is worthwhile to think about what the implications are for migration, because migration is one of the survival strategies people resort to in response to disasters, and to connections with developments in the law of migration that are rooted in similar principles of humanity and human rights.

DISASTERS, MIGRATION, AND RIGHTS: THE ROLE OF COMPLEMENTARY PROTECTION

There is tension between traditional state sovereignty and the individual-focused principles of humanity and respect for the needs and rights of individual people affected by disaster. From this tension, difficult and contentious questions have arisen, including when, if ever, it is legitimate for "outside" states to intervene for humanitarian purposes over the objections of the state where a disaster occurs (an issue that was brought into sharp focus by the controversy over the international response to Cyclone Nargis). The same question of constraints on traditional state sovereignty that follows from the imperative of respecting individual human dignity in a disaster situation can also be looked at from another direction – and this way round it may be a less welcome question from the perspective of the outside state. If domestic authorities fail to, or cannot, alleviate the catastrophic effects of a natural or human-made disaster, including famine, when must the sovereignty of other states yield to the needs of migrants whose coping strategies include fleeing across international borders?

What limits apply here to the traditional core discretion of states to control their own borders and populations? The standard answer to this question is straightforward: essentially none, so far as people fleeing the generalized effects of disaster are concerned. Under the Refugee Convention, certainly, states have accepted some constraints on their authority to allow or deny entry, but only when it comes to people who are defined as refugees within the meaning of that Convention. By contrast, "mere" migrants, and in particular so-called economic migrants – typically thought of as people who leave home to escape material and economic deprivation and to find better conditions – have been traditionally seen as having little or no protection under international law. Convention refugees must have a

well-founded fear of persecution on specific grounds: race, religion, nationality, membership of a particular social group, or political opinion.⁵

Natural and human-made disasters are, generally, impersonal and unintended; they are not like the targeted social and political persecution that defines a Convention refugee (although it is perfectly possible for people to be victims of both disaster and persecution, or indeed for non-provision of disaster relief to be used as a way of persecuting political opponents or marginalized groups). To argue that migrants fleeing economic or material deprivation, however extreme or urgent, are entitled to international legal protection and could have a right not to be sent home runs counter to the well-established distinction between economic migrants and political refugees. It is accepted that genuine refugees are forced to leave by the loss of the protection of their home state and need protection under international law; by contrast, economic migrants are usually considered to have left home voluntarily to take advantage of better opportunities in another country.⁶ The general rule that people who move for economic reasons do not merit refugee-like protection is deeply entrenched.

But the Refugee Convention does not exhaust the sources of duties that states may have to people displaced across borders by disaster. Also relevant are principles that connect migration law and the *acquis humanitaire*: the shared responsibility of the wider community of states, triggered when a state is unwilling or unable to protect its own citizens from catastrophe, including starvation;⁷ the cornerstone principle of humanity; and the responsibility of states not to act in ways that deprive people of their fundamental human rights whether or not those people are their own nationals.

The doctrine of complementary protection is a bridge between the realms of refugee and migration law, on the one hand, and international human rights, on the other. Complementary protection is the general term for the protection of migrants based on their human rights, and the corollary duty of states not to deport or expel them, separate and apart from (although sharing conceptual common ground with) Refugee Convention obligations. As the International Law

⁵ Refugee Convention, Art 1(A)(2) (as amended by the Protocol relating to the Status of Refugees, Jan. 31 1967, 606 UNT.S. 8781).

⁶ A useful discussion of this traditional dichotomy is in Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, 2007), 2–21. As Foster observes, a sense of indignation toward 'economic migrants' is sometimes used as a pretext for narrowing the interpretation of obligations under the Refugee Convention. So for example people who are escaping both material deprivation and persecution on Refugee Convention grounds may be classified as economic migrants and denied asylum.

⁷ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (ICISS Report), International Development Research Centre, December 2001, at viii. See discussion in Dug Cubie, "An Enchanted Tool? Humanitarian Assistance and the ILC Draft Articles on the Protection of Persons in the Event of Disasters" (2009–2010) IV-V *Irish Yearbook of International Law* 119–151, at 131–134.

Commission (ILC) has stated, the principle of non-refoulement "has passed beyond the bounds of international refugee law and . . . is also deemed to be an integral part of international human rights protection."⁸

The Convention Against Torture (CAT)⁹ is a useful starting point for discussing the concept of complementary protection. This is a helpful place to begin because the CAT expressly spells out an obligation of non-refoulement – even though this particular obligation is clearly not directly applicable to famine-driven migration, it inarguably establishes the principle that non-refoulement applies in some situations not covered by the Refugee Convention. Article 3(1) of the CAT provides that states have a duty not to expel, return, or extradite a person to a state "where there are substantial grounds for believing that he would be in danger of being subjected to torture." The Committee Against Torture, which can consider communications on behalf of individuals who claim violations of their rights under the CAT by a state party that has recognized the competence of the committee to receive such communications, has become an important venue for protecting people threatened with deportation to torture and addressing some of the specific and practical questions involved in giving effect to the non-refoulement principle, including the standard of proof that a claimant has to meet.¹⁰

The CAT explicitly establishes an obligation not to expel or return based on international rights and duties beyond the scope of the Refugee Convention.¹¹ The principle underlying that obligation could be expressed as states having certain responsibilities not to send people back to a situation where they face being deprived of rights (here, the right not to be tortured) that are enshrined in international law. That same principle can also be implicit, even if not expressly stated, in other contexts and as a corollary of other rights.

One such context, where authoritative (although not universally accepted) interpretations have consistently found that there is an implicit non-refoulement obligation, is the International Covenant on Civil and Political Rights¹² (ICCPR), in particular the right to life under Article 6 and the right not to be subjected to torture or cruel, inhuman, or degrading treatment or punishment

⁸ International Law Commission, "Expulsion of Aliens: Draft articles on protection of the human rights of persons who have been or are being expelled, as restructured by the Special Rapporteur, Mr. Maurice Kamto, in the light of the plenary debate during the first part of the sixty-first session," UN Doc. A/CN.4/617 (2009), 5 n. 8.

⁹ Convention Against Torture (hereinafter "CAT"), Dec. 10, 1984, 1485 UNT.S. 85.

¹⁰ See Brian Gorlick, "The Convention and the Committee Against Torture: A Complementary Protection System for Refugees" (1999) 11 *International Journal of Refugee Law* 479-495.

¹¹ There is overlap between the protections of the Refugee Convention and of the non-refoulement obligations in Article 3(1) of the CAT; a situation where someone faces torture may well also be the basis of a well-founded fear of persecution. But someone might be entitled to the latter and not the former if, for example, he or she were at risk of being tortured but not on the basis of one of the five grounds specified in the Refugee Convention.

¹² Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 UNT.S. 171.

under Article 7.¹³ The United Nations Human Rights Committee has stated that the obligation of states parties to respect and ensure ICCPR rights "for all persons in their territory and all persons under their control" entails "an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm" such as that contemplated by Articles 6 and 7.¹⁴

Similarly, the Committee on the Rights of the Child has found an obligation of non-refoulement implicit in the Convention on the Rights of the Child¹⁵ (CRC). Noting the obligation of states to respect established non-refoulement obligations under international law, including under the Refugee Convention and the CAT, the Committee went on to state that in fulfilling their obligations under the CRC:

States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under Articles 6 [the child's inherent right to life, and the obligation of States Parties to ensure to the maximum extent possible the survival and development of the child] and 37 [the rights to life and liberty, and the right not to be subjected to cruel, inhuman or degrading treatment or punishment] of the Convention.¹⁶

The assessment of whether there is a risk of serious violations, the Committee went on to say, "should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services."¹⁷ As Jason Pobjoy argues, the Committee's open-textured language and reference to risks including but not limited to those contemplated under Articles 6 and 7 suggest that the more general principle recognized in the comment is that the risk of a serious violation of the paramount CRC principle of the best interests of the child can give rise to a non-refoulement obligation.¹⁸

Although these interpretive statements are not in themselves binding law, and states may be reluctant to accept such limits on their right to expel non-nationals that are not expressly agreed to by treaty, many states do expressly recognize the principle of complementary protection in their domestic legal systems. Canada's Immigration and Refugee Protection Act,¹⁹ for example, provides that the same protection available to Convention refugees shall also be extended to "persons in need of protection,"²⁰ defined as persons whose removal would subject them to a danger of torture, or a risk to life or a risk of cruel and unusual treatment or

¹³ See discussion in Jason Pobjoy, "Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection," *Melbourne Law Review* 34(2010): 181-219 at 190-191.

¹⁴ Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNT.S. 3.

¹⁵ *Ibid.* (emphasis added). ¹⁶ Pobjoy, "Treating Like Alike," 192.

¹⁷ S.C. 2001, c.27. ¹⁸ S. 95(1)(b).

punishment.²¹ There is also extensive European law on complementary protection derived in part from Article 3 of the European Convention for the Protection of Human Rights (ECHR),²² which is similar to Article 7 of the ICCPR.²³

What part might the principles of complementary protection and non-refoulement play as a component, or extension, of the constellation of rules and norms that make up an *acquis humanitaire*? International norms on disaster response and the principle of complementary protection share a common foundation in respect for human dignity and human rights and the duty to respond to individual human needs. These core principles are reflected in Article 2 of the ILC's Draft Articles on the Protection of Persons in the Event of Disasters, which states that the overall purpose of the draft articles is "to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights";²⁴ in Article 7, which calls on states and other entities responding to disaster to "respect and protect the inherent dignity of the human person";²⁵ and in Article 8, which confirms that "[p]ersons affected by disasters are entitled to respect for their human rights."²⁶

Honoring the dignity, rights, and essential needs of people affected by a disaster are the overarching guiding principles for on-site response and assistance on the part of domestic authorities, non-governmental and intergovernmental organizations, and outside states. But the implications of those principles and the responsibilities that they entail do not end at the site of a disaster; the individual people affected still have their human rights, and are still entitled to respect for those rights, when they flee the disaster and its consequences, including when they move across international borders.

It is not coincidental that the terminology of *protection* is associated both with non-refoulement obligations (complementary protection) and with disaster assistance. Humanitarian assistance reflects concentric circles of responsibility for

²¹ S. 99.

²² Nov. 4, 1950, Europ. T.S. No. 5; 213 UNTS. 221. Article 8 is the right not to be subjected to torture or to inhuman or degrading treatment or punishment.

²³ The European Court of Human Rights has determined that there is an obligation of non-refoulement in connection with Article 3 and also Article 8, the right to respect for private and family life. See summary of the case law, and discussion of the potential for other ECHR rights to form the basis of a similar obligation, in McAdam, *Complementary Protection*, 156–72. As McAdam points out, the recognition of a principle of non-refoulement under Article 3 has a long history, going back to the early 1960s. *Ibid.*, 137. In 2004 the EU adopted the *Qualification Directive* (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30/09/2004 P. 0012 – 0023), which makes making certain benefits available to persons "genuinely in need of international protection" who are not covered by the Refugee Convention.

²⁴ International Law Commission Sixty-fifth Session (A/CN.4/L.758, July 24, 2009).

²⁵ International Law Commission Sixty-second Session (A/CN.4/L.776, July 14, 2010).

²⁶ *Ibid.*

protecting the needs and rights of those affected. Sovereign states have the first responsibility to protect their own citizens in a catastrophe, as the ILC Draft Articles underline.²⁷ When disaster forces people to move within state borders, this includes, of course, their responsibilities to internally displaced persons in accordance with the UN Guiding Principles on Internal Displacement.²⁸

Residual responsibility lies with the "broader community of States"²⁹ to protect those who are not adequately helped by the domestic authorities, whether because of generalized state failure, lack of resources, deliberate policy choices, or a combination of causes. Whatever extra-territorial obligations or standards of good practice this responsibility entails in connection with providing disaster assistance, donating emergency aid, and other help that flows into the affected state, and whatever degree of intervention in the home state's internal affairs it may or may not justify, it is centered on the individual human beings who need protection. The responsibility of the "broader community of states" towards those people does not disappear if they leave their own state, precisely because it is a responsibility to *people* and not, ultimately, to the geographical location or political entity they inhabit. This implies that other states have a responsibility to give protection, in a manner appropriate to the context, when those displaced by disaster come within their borders.

In certain disaster situations, sending migrants back would involve exposing them to conditions that could amount to cruel, inhuman, or degrading treatment, or to the risk of being deprived of the right to life. The principle of non-refoulement implied by Articles 6 and 7 of the ICCPR would then be at issue. In famine situations, the right to freedom from hunger under Article 11 of the International Covenant on Economic, Cultural, and Social Rights (ICESCR) would also be relevant. Although there has not so far been much attention to the idea of a non-refoulement principle grounded in the right to freedom from hunger, there is no reason in principle why rights enshrined in the ICESCR should not be a valid basis

²⁷ ILC Draft Article 9(1) states that "[t]he affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory." Draft Article 9(2) further specifies that "[t]he affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance." Note 25 above.

²⁸ UN Economic and Social Council, *Guiding Principles on Internal Displacement*, July 22 1998, E/CN.4/1998/53/Add.2.

²⁹ ICISS Report, p. vii. This framework – the primary responsibility lying with the state to protect its own people, and international responsibility triggered when the state in question is unwilling or unable to remedy a situation where the population suffers serious harm – is reflected in the basic principles of the responsibility to protect doctrine as set out in the ICISS Report (see Principles 1(A) and 1(B) (p. xi)). The extent to which these principles support intervention by the international community for humanitarian reasons and their implications in the context of disasters remain highly controversial. See discussion in Cubie, "An Enchanted Tool."

for complementary protection, in a manner analogous to rights recognized in other human rights instruments.

Article 11 is of particular relevance in disaster situations in light of the interpretation of the interpretation of this right by Committee on Economic and Social Rights (CESCR), the body of experts that is responsible for monitoring implementation of the ICESCR. In its General Comment No. 12 interpreting Article 11, the CESCR notes that "immediate and urgent steps may be needed"³² to ensure the fundamental right to freedom from hunger and malnutrition under Article 11(2), and that "States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters."³¹ These interpretive statements underline the specific and pressing nature of state responsibilities to respond to famine and hunger caused by disasters. While these are in the first instance responsibilities of the affected state to its own people, there is a secondary responsibility of the "broader community of states" to protect the right to food in disaster situations. This obligation can be the foundation, in specific circumstances, of a duty not to expel migrants.

HUMAN RIGHTS AND ASSOCIATED STATE OBLIGATIONS: IMPLICATIONS FOR DISASTER RESPONSE

The expansion of non-refoulement protection for migrants has been associated more with civil and political rights than with social and economic rights, perhaps because of the strong influence of the refugee/economic migrant dichotomy, which suggests that migrants fleeing economic or material deprivation are fundamentally different from refugees who deserve protection. But the dichotomy implies a sharp distinction between civil-political and socioeconomic rights that is questionable, and can be difficult to apply to real-world circumstances. Disasters, for example, may give rise to a risk of deprivation of the right to life (an ICCPR right) and also of CESCR rights that are indispensable to sustaining life, or a life of any quality – including the right to freedom from hunger.

More than thirty years ago, Henry Shue argued compellingly against the strain in U.S. foreign policy thinking (and beyond) that economic, social, and cultural rights are "less genuine rights with less binding duties."³⁴ For Shue, rights to the minimum requirements for subsistence are "basic rights," in that "enjoyment of them is essential to the enjoyment of all other rights."³³ Minimal economic security, or

³² General Comment No. 12, May 12, 1999, 20th Sess., UN Doc. E/C.12/1999/5, par. 1.

³¹ *Ibid.*, par. 6.

³³ Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, 2nd ed. (Princeton University Press, 1996), 6 (originally published 1980). I am grateful to Professor Joanna Harrington for drawing my attention to Shue's work.

³⁴ *Ibid.*, 19.

subsistence, including adequate food, is a basic right in the same sense that physical security is, and by the same logic.³⁴

Shue argued that there are three duties that correlate to every basic right, which must be performed (by someone – not necessarily always the same someone) if the right is to be honored. They are the duty to avoid depriving people of the right, the duty to protect people from being deprived of the right, and the duty to aid those who have been deprived.³⁵

The influence of Shue's three-level framework of state duties is evident in the widely accepted concept of state obligations in respect of human rights and especially of social, economic, and cultural rights: that is, the obligations to respect, protect, and fulfill rights. On the right to food in particular, Asbjørn Eide, who was the UN Special Rapporteur on the Right to Adequate Food as a Human Right, presented a detailed discussion of the tripartite respect-protect-fulfill framework in his 1989 report, *Right to Adequate Food as a Human Right*.³⁶ Eide split the third level of duty, the obligation to fulfill, into two sub-components: first, facilitation of access to adequate food, and second, direct provision of food. Eide's framework was in turn adopted by the CESCR in General Comment No. 12,³⁷ as well as by other human rights actors, academic commentators, and domestic courts.³⁸

The CESCR interpretation of Article 11 provides further insight into the practical responsibilities that these obligations entail. The obligation to respect is a negative duty of states "not to take any measures that result in preventing" access to food.³⁹ The obligation to protect "requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food."⁴⁰ The obligation to fulfill (facilitate) "means that the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security."⁴¹

The obligation to fulfill by providing food directly arises "whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal," an obligation that applies "for persons who are victims of natural or other disasters."⁴² The CESCR also notes that, while some obligations of states parties are "of a long-term character, to achieve progressively the full realization of the right to food," the right also implies obligations of an immediate nature (including, it can be surmised, in times of disaster and emergency).⁴³

³⁴ *Ibid.*, 23. ³⁵ Shue, *Basic Rights*, 52. ³⁶ United Nations, 1989.

³⁷ General Comment No. 12, May 12, 1999, 20th Sess., UN Doc. E/C.12/1999/5, par. 1.

³⁸ Kerstin Mechlem, "Harmonizing Trade in Agriculture and Human Rights: Options for the Integration of the Right to Food into the Agreement on Agriculture," *Max Planck Yearbook of United Nations Law*, 2006: 127–190 at 136–137.

³⁹ General Comment No. 12, par. 15. ⁴⁰ *Ibid.* ⁴¹ *Ibid.*

⁴² *Ibid.* ⁴³ *Ibid.*, par. 16.

These state responsibilities, especially those associated with the obligation to fulfill the right to food and its two aspects of facilitation and direct provision, have special relevance for disasters. Fulfillment-facilitation (strengthening access to food) when disaster strikes can be achieved in part through strategies of disaster risk reduction and the development of resilient systems for food security and access to food, lowering the probability of famine in the wake of disaster. Fulfillment-provision, the obligation to provide food directly, becomes relevant when planning and risk reduction have failed, and disaster assistance is needed to ensure that disaster victims will not be deprived of the right to food.

The primary responsibility for disaster prevention and disaster response, and for the enjoyment of human rights including the right to food, rests with the affected state. This understanding is a common thread evident both in the ILC Draft Articles⁴⁴ in the context of disasters, and in international human rights law. Eide has written that the "primary duty-bearers" under the ICESCR are states, and that the primary responsibility "rests with each State in relation to everyone living on its territory."⁴⁵ The wider international community has a secondary responsibility to ensure protection of the right to food when the home state cannot or will not. The text of Article 11(2) refers to obligations to take measures both individually and through international cooperation to improve food production and the equitable distribution of food supplies, confirming that state commitments go further than duties owed to their own citizens and also encompass an obligation of and to the wider international community.

Eide locates this second level of responsibility under Article 11 "with the community of States, which are obligated to ensure the enabling conditions required to ensure the enjoyment of the right everywhere, to abstain from any policy which harms or prevents the enjoyment of the right to food in other countries than their own, and to take separate and joint action to assist States that have difficulties in ensuring the right to food for everyone within their territory."⁴⁶ He contends that it was "clearly envisaged from the earliest drafting of the Charter of the United Nations" that states should have obligations "to the international community and to the peoples of other States."⁴⁷ The CESCR states in General Comment No. 12 that "States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food, and to provide the necessary aid when required."⁴⁸

⁴⁴ A/CN.4/L.776, Article 9.

⁴⁵ *The Right to Food and the Impact of Liquid Biofuels (Agrofuels)* (Rome: Food and Agriculture Organization of the United Nations, 2008): 27. www.fao.org/media/ecosocial/file/Boletin%20ECOS/ECOS%20CDV/Bolet%20C%20AD%204/Right_Food_and_Biofuels.pdf; 27.

⁴⁶ *Ibid.*, 27. ⁴⁷ Eide, *Right to Adequate Food as a Human Right*, 38.

⁴⁸ General Comment No. 12, par. 36.

More recently, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights⁴⁹ (adopted by a group of academics and non-governmental organizations in 2011) have further emphasized and elaborated on the commitment of states under international law to take positive steps, including through international assistance and cooperation, for the universal realization of social, economic, and cultural rights.

In disasters, states often act in accordance with these responsibilities by providing disaster relief assistance at a state-to-state or institutional level. But the common conceptual foundation of disaster relief principles and human rights law in the dignity of the human person suggests that ultimately it is the needs of individuals affected by disaster that underpin state obligations regarding disaster risk prevention and also in the aftermath of disaster. If that is correct, then state-to-state cooperation and assistance do not necessarily amount to a complete fulfillment of state responsibilities. If institutional efforts at disaster relief fail, or are executed inadequately, and if individual people slip through holes the net of protection in their home countries, they still have rights enshrined in international law, and states still have (jointly and severally) responsibilities to ensure their protection.

It is an unfortunate reality that disaster relief efforts do fail, or fail to reach everyone in need, and, as a result, people move. These are the circumstances in which inadequate disaster relief and international protection for migrants become conceptually intertwined.

DISASTERS, FAMINE, AND MIGRATION

Poverty and hunger are strong drivers of international migration. In many cases the background cause is general conditions of poverty and underdevelopment. But often it is a sudden calamity – a catastrophic weather event, the outbreak of armed conflict, a depletion of food supplies caused by misguided government policy, or an urgent situation brought on by a combination of such factors – that brings the situation to the point of crisis and puts people in such a desperate situation that they are forced to move.

The doctrinally clear legal distinction between Convention refugees (targets of persecution who are deprived of the protection of their home state) and economic migrants (supposedly choosing to seek a better life) can be hard to reconcile to the reality of migration. As United Nations High Commissioner for Refugees António Guterres reported to the General Assembly in 2007, economic deprivation is "the strongest driving force" of migration, with

⁴⁹ Final version (February 29, 2012), www.rfn-watchfan.org/uploads/attachment_data/file/12345/publications/2012.02.29_-_Maastricht_ETO_Principles_EN_on_Extraterritorial_Obligations.pdf. Maastricht_ETO_Principles_EN_on_Extraterritorial_Obligations.pdf.

"thousands of poor migrants resorting to illegal and increasingly desperate routes to the global economy."⁵⁰

In 1994, the then-High Commissioner Sadako Ogata observed in a 1994 Note on International Protection that there is a "lack of a complete correspondence between the categories of persons covered by the [Refugee Convention] and the broader class of persons in need of international protection," noting that those fleeing armed conflict are often driven from home by knock-on effects "including the destruction of homes, harvests, food stocks and the means of subsistence."⁵¹ As Guterres indicated, the challenge for the international community is: "How to answer people who have left their country to find food? If they are not refugees, can we knowingly send them back to extreme deprivation?"⁵²

One example that illustrates the connections between disaster, famine, migration, and failure of protection at the domestic and international levels is the recurrent problem of famine in North Korea, which was particularly dire in the 1990s.⁵³ The 1990s food emergency in North Korea was the result of a combination of human and natural causes, floods and droughts in 1995 exacerbating disastrous policy decisions by the North Korean government and the shock of changes in trading relationships with China and the former Soviet Union.⁵⁴

Tens of thousands of North Koreans driven by "desperate hunger and extreme poverty" crossed the border into China.⁵⁵ For some time, these border-crossers were quietly absorbed as undocumented immigrants, until the international media and non-governmental organizations began pressuring China to grant them asylum, following which the Chinese government cracked down on the influx and began deporting border-crossers back to North Korea.⁵⁶ At least some of these escapees from a notoriously politically oppressive regime could have had a good claim for asylum on Refugee Convention grounds; access to food rations through the government's public distribution system was determined in

⁵⁰ Statement by Mr. António Guterres, United Nations High Commissioner for Refugees, to the Third Committee of the United Nations General Assembly, 62nd Session, New York, November 8, 2007. www.unhcr.org/476132d84.html.

⁵¹ UN Doc. A/AC.96/830, p. 15.

⁵² *Ibid.* Note 50 above.

⁵³ The 1990s famine in North Korea is estimated to have killed as many as one million people, about 5 percent of the population. Steven Haggard and Marcui Noland, U.S. Committee for Human Rights in North Korea, *Hunger and Human Rights: The Politics of Famine in North Korea* www.hnk.org/uploads/pdfs/Hunger_and_Human_Rights.pdf, 9.

⁵⁴ *Ibid.*, 18.

⁵⁵ Human Rights Watch, *The Invisible Exodus: North Koreans in the People's Republic of China* (2002), 9. www.hrw.org/reports/2002/northkorea/norkor1002.pdf. See also Elisa Ghang, "North Korean Border-Crossers in Yanbian: The 'Protection Gap' Between the Economic Migrant and Refugee Regimes," *Georgetown Immigration Law Journal* 24 (2010): 361–376.

⁵⁶ Ghang, "North Korean Border-Crossers," 367.

part by party loyalty and geographic location,⁵⁷ so it could be argued that starving North Koreans had been persecuted based on political opinion or membership of a particular social group.

But China would also have quite credible grounds for taking the position that these people, or the majority of them, were victims of generalized, impersonal conditions – government ineptitude, geopolitical forces, and natural disaster – rather than deliberate and targeted state persecution. In that case, the Refugee Convention would not require China to grant them asylum. Yet sending those migrants back to North Korea almost inevitably meant sending them to deprivation of the right to food, and in some cases of the right to life.

Another example is the severe drought in East Africa in 2011 and 2012. Somalia was especially hard hit by a food crisis caused by four years of failed rains, and exacerbated by tensions between international aid donors and the Al Shabaab militants who controlled much of the south.⁵⁸ The UN declared a famine in the Bakool and Lower Shabelle regions of southern Somalia in July 2011.⁵⁹ The food crisis drove mass migration, mainly by land into neighboring Djibouti, Ethiopia, and Kenya.⁶⁰

A smaller, but still significant, number of Somalis fleeing famine and armed conflict have made their way to Europe to seek asylum, many by traveling to North Africa and then undertaking the hazardous boat trip across the Mediterranean to Malta or the Italian island of Lampedusa.⁶¹ The factors driving this stream of migration are multiple and complex, with the food crisis part of the mix and for some people the primary impetus for fleeing. If lack of food is their main reason or even a significant reason for leaving home, migrants are likely to face considerable difficulty making an asylum claim in accordance with the Refugee Convention.

Those who are not granted asylum and are deported back to Somalia face the risk of being sent into an ongoing humanitarian crisis that has rendered a large proportion of the population dependent on food aid, with thousands confined in displaced persons' camps where there is limited access to the necessities of life, including food and water.⁶² In the 2011 case *Sufi and Elmi v. The United Kingdom* (where the claimants' asylum claims had been unsuccessful), the European Court of Human Rights found that being sent back to these conditions amounted to a

⁵⁷ Haggard and Noland, *Hunger and Human Rights*, 9, 14.

⁵⁸ Council on Foreign Relations, "Al-Shabaab and Somalia's Spreading Famine" (Interview with Rashid Abdi) (August 10, 2011). www.cfr.org/somalia/al-shabaab-somalias-spreading-famine/p25630.

⁵⁹ UN News Centre, "UN declares famine in two regions of southern Somalia" (July 20, 2011). www.un.org/apps/news/story.asp?NewsID=39086.

⁶⁰ UNHCR, "Crisis in Horn of Africa: A Worsening Humanitarian Situation," retrieved August 19, 2013 from www.unhcr.org/pages/4e1ff4b06.html.

⁶¹ BBC News, "Lampedusa and Malta take in African migrants," August 21, 2012. www.bbc.co.uk/news/world-europe-19334609.

⁶² *Sufi and Elmi v. the United Kingdom*, ECHR (2011) 1045, paras. 284–292.

deprivation of the right to be free from inhuman or degrading treatment or punishment under Article 3 of the ECHR.⁶³ To the extent that these conditions still prevail, refoulement to Somalia involves a real risk of being deprived of human rights, including the right to food.

In situations like these, the Refugee Convention does not always respond adequately to the loss of basic rights experienced by migrants who are driven from their homes by a disaster; nor does it exhaust the international legal responsibilities of the states to which they flee.

STATE OBLIGATIONS TO RESPECT, PROTECT, AND FULFILL
AS APPLIED TO DISASTER-RELATED MIGRATION

Part of the value of examining rules, guidelines, principles, and practices that have emerged on disaster response holistically (as an "*acquis*") and analyzing the conceptual links between them lies in the insight that such examination reveals further implications of the underlying concepts, and how they might extend to situations that often ensue from a disaster. The full range of human rights, including the right to food, are, insofar as they have to do with the needs of people affected by disaster, in principle part of the *acquis humanitaire*; or at least conceptually linked to it. Disasters force people to migrate. The international rights and responsibilities applicable to such migrations should be considered as part of or connected to the architecture of the *acquis humanitaire*, and interpreted and applied in light of its animating principles.

If respect for the human rights of people affected by disaster is the cornerstone of the *acquis humanitaire*, then socioeconomic rights, including the right to food, must be part of the legal framework for responding to disasters. The requirement to respect, protect, and fulfill the right to food is still applicable when people in need migrate out of their home countries. The doctrine of complementary protection recognizes that human rights can ground an obligation of non-refoulement toward migrants who are not entitled to the protection of the Refugee Convention. If this is the case for rights enshrined in the ICCPR, then in principle it must also be potentially true for ICESCR rights. Although socioeconomic rights in general raise analytical issues that can be different from those associated with civil and political rights, and cannot necessarily be simply dropped into the same template, neither can they be categorically excluded as a possible basis for implicit non-refoulement obligations. A hard categorical distinction would be inconsistent with the principle that human rights are indivisible; interdependent; and related; to be treated in fair and equal manner; on the same footing; and with the same emphasis.⁶⁴

⁶³ Ibid.

⁶⁴ Vienna Declaration of the 1993 World Conference on Human Rights, July 12 1993. UN Doc. A/CONF.157/23 at par. 5

In the context of disaster, the need for complementary protection might arise when the response in the affected country has failed, or has left some people's basic needs unmet. Such situations drive people to move, both within and across borders, in search of what they need to survive, including food. The logic underlying the doctrine of complementary protection implies that a receiving state could not send someone back to the disaster-affected state if it meant that person would face starvation or severely limited access to food. By implication the background circumstances that would lead to this kind of situation would have to involve a significant failure of both the home state and the wider international community to fulfill their responsibilities of disaster prevention and response and to protect the people affected. In such a context, non-refoulement might be thought of as being in the nature of a remedy for the failure; it becomes an aspect of the receiving state's obligation to "facilitate access to food" in a situation where help is needed. Indeed, an obligation of non-refoulement would actually seem to be implied by the first-order obligation to "respect" the right to food by refraining from measures that prevent access to adequate food, here by forcing someone (back) into hunger.

Recognition that the principle of non-refoulement applies to disaster-driven migration is an incremental extension of the complementary protection obligations associated with Articles 6 and 7 of the ICCPR. As the *Sufi and Elmi* case illustrates with respect to Article 3 of the ECHR, if the conditions to which a migrant would be returned involve severe deprivation of basic necessities of life, including food, then they may amount to cruel, inhuman, or degrading treatment—or, indeed, a risk of being deprived of the right to life. The right to food would also be implicated in such a situation.

Going further, the right to food is a separate and distinct right that implies cumulative state obligations. If the situation in the disaster-affected country has improved to the point that it is just good enough for life to be sustained, but there is still a severe shortage of food, migrants should still be entitled to protection and non-refoulement; people have a right to live and also a right not to be hungry or malnourished. It is in the nature of disasters, by contrast to more general conditions of poverty and underdevelopment, that they are limited in time, with a beginning and an end. It might be expected, therefore, that any non-refoulement obligation would lapse when conditions in the home country improve enough that going back would no longer entail a risk of being deprived of basic human rights—all though in practice the effects of disaster can be severe and long-lasting for some of the people affected, as has proved the case in Somalia.

Complementary protection for migrants is by no means a good solution to the problem of disaster-driven migration. It is not an answer to the deprivations of disaster that people can seek shelter in another country (even if they had a recognized legal right to do so); it would be better for them not to be driven from home at all. Complementary protection should, rather, be considered as one ingredient in the mix that makes up the *acquis humanitaire*, which includes

responsibilities first to take preventative measures to stop avoidable disasters from happening at all, to plan for risk reduction and mitigation so that the consequences of disasters are reduced in severity, and to respond in an effective way when disasters do occur. Non-refoulement might be thought of as a residual protection, a last resort that applies when other efforts have failed.

Another concern is that the burden of providing this protection falls disproportionately on immediately neighboring states, often straining their capacity to respond. There is undeniably a risk of unfairness if this responsibility, which neighboring states often have little choice but to assume as a practical matter, is characterized as a legal obligation. On the other hand, it is a more principled approach to consider the obligation to accept disaster-driven migrants in the framework of international law, rather than just an *ad hoc* coping mechanism.

Under the ICESCR, a state's obligations are limited in principle by its available resources.⁶⁵ Migrants fleeing disaster do also make their way to wealthier countries that arguably have more resources available to cope with an influx of displaced people, but the typical reaction of the more privileged countries of the world is interdiction or deportation, and legal cover for that reaction is provided by the distinction between refugees and economic migrants. The doctrine of complementary protection undercuts that excuse. Recognition that the basic proposition on which complementary protection is founded – sending a person back to a serious risk of deprivation of human rights is in itself a failure to protect human rights – also extends to the severe loss of social and economic rights in the wake of disaster. As we face the probability of more frequent catastrophic weather and climate events, bringing in their wake famines and mass movements of people, the importance of dealing with the consequences in a fair and principled way only increases.

CONCLUSION

How to answer people who have left their country to find food? Does international law have no answer for them but "go home?" A solid and enduring state prerogative, that of defining the state's own population, who is in and who is out, stands in the way of their claims. Peter J. Spiro has called this state prerogative – here referring in particular to the definition of citizenship – the "last bastion of sovereign discretion,"⁶⁶ and one remaining area that is relatively undiluted (with limited exceptions, including under international refugee law) by the universalizing concepts of individual rights and shared membership in a single human family. It is

⁶⁵ ICESCR Art. 2(1).

⁶⁶ Peter J. Spiro, "A New International Law of Citizenship," *American Journal of International Law*, (2011): 694-746 at 694.

trite international law that human rights can in principle supersede the usual inviolability of state borders. To recognize that this principle potentially extends, in situations of catastrophic suffering and urgent need, to the right to be free from hunger would be no more than extending the logic of an already widely accepted doctrine.