


International Disaster Law: from centrality in humanitarian response to the formation of international disaster risk reduction duty

Direito Internacional dos Desastres: da centralidade na resposta humanitária à formação do dever internacional de redução de riscos de desastres

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Abstract: Over the past few decades, humanity has experienced a significant increase in the occurrence of disasters, mainly due to global climate change and its effects. Given its various implications to the cosmopolitan society, this situation demands a fresh perspective from law. This paper explores the understanding of International Law associated to disaster risk management (DRM) and, consequently, of the concept of Disaster Risk Reduction (disaster risk reduction), through the lens of International Disaster Law (IDL - International Disaster Law). At the same time, we analyze three important milestones of this movement, namely the Hyogo Framework for Action (2005-2015); the Draft Articles on the Protection of Persons in the Event of Disasters, from the International Law Commission (2016); and the Sendai Framework for Action on Disaster Risk Reduction (2015-2030). The growing concern for the systematization of disaster prevention and response at the international level is producing guidance standards that reflect and assist in the design of national strategies to reduce the various impacts on communities, economy and environment.

Keywords: International Disaster Law; Disaster Risk Management; Humanitarian Response.

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Resumo: Ao longo das últimas décadas, a humanidade vem experimentando uma elevação significativa da ocorrência de desastres, sobretudo em razão das mudanças climáticas globais e seus efeitos. Tal situação, por suas várias implicações na sociedade cosmopolita, acaba por demandar ao Direito um novo olhar. Neste trabalho se explora a compreensão do Direito Internacional concatenado com a gestão de risco de desastres (*DRM - disaster risk management*) e, por conseguinte, do conceito de Redução de Riscos de Desastres (*disaster risk reduction*), pelas lentes do Direito Internacional dos Desastres (*IDL – International Disaster Law*). Paralelamente, se análise três importantes marcos desse movimento, são eles: Quadro de ação (2005-2015); Esboço de Artigos para a Proteção de Pessoas em Eventos de Desastres da Comissão de Direito Internacional (2016); Quadro de Ação de Sendai para Redução do Risco de Desastres (2015-2030). A crescente preocupação para a sistematização da prevenção e resposta aos desastres no plano internacional acaba por produzir padrões de orientação que repercutem e auxiliam no desenho de estratégias nacionais de redução dos vários impactos sobre as suas comunidades, economia e meio ambiente.

Palavras-chave: Direito Internacional dos Desastres; Gestão do Risco de Desastres; Resposta Humanitária.

1. Introduction

Although such events have historically accompanied humanity, recent decades have seen a significant increase in the occurrence of disasters, regardless of whether these are methodologically called "natural", "anthropogenic" or "mixed"². Indeed, in view of the expected climate scenarios for the coming decades, we can predict a worsening of extreme climate events and their disastrous and even generational consequences.

The meaning of disasters lies within a pendular semantic relationship between: (i) causes and (ii) highly specific and complex consequences, converging to the description of social and environmental phenomena of great media appeal and economic, political, legal and environmental repercussions, which are capable of compromising (iii) the stability of the social system. Disasters consist, conceptually, of a systemic cataclysm of causes which, combined, take on catastrophic consequences (CARVALHO, 2020, p. 52-60. SUGERMAN, 2007, p. 3).

² For more information, see CARVALHO (2017).

At the level of International Disaster Law (CARVALHO, 2020, p. 66-76), the incapacity to respond to the event in the face of systemic destabilization is likewise a component of the disaster concept proposed by the Draft Articles for the Protection of Persons in the Event of Disasters of the UN General Assembly Commission on International Law (UNGA).

According to the latest World Disaster Report, prepared by the International Federation of Red Cross and Crescent Societies, in the decade 2006-2016 alone, more than 771,000 deaths have been attributed to disasters, and 2 billion individuals have been affected by severe events. As stated by this report, the damage has exceeded 1.5 trillion dollars (INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES – IFRC, 2016, p. 232-263).

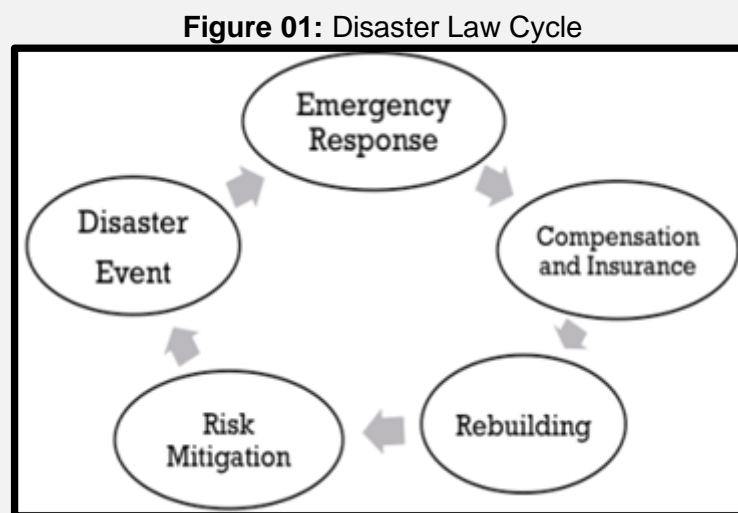
International law has a long standing record of addressing disaster issues, dating back to its origins in the first modern disaster, the Lisbon earthquake of 1755 (URIOSTE, 2006, p. 183). Although the consolidation of this branch is still in its early stages, given its widely fragmented character and with a significant absence of binding rules (hard law), the existing academic work³, as well as the involvement of institutions such as the International Federation of the Red Cross and Red Crescent Societies and the International Disaster Law Programme, has led to great progress in recent years (ARONSSON-STORRIER; COSTA, 2017, p. 1). The United Nations Disaster Relief Office (UNDRO), an agency of the United Nations (UN), was founded in 1971.

However, the main focus of this first historical generation of international law standards was on post-disaster response. To this day the most consolidated area of International Disaster Law is its domain called International Disaster Response Law. In other words, International Disaster Law (IDL) has

³ To mention just a few examples: CARON, David; KELLY, Michael; TELESETSKY, Anastasia. (eds.). *The International Law of Disaster Relief*. Cambridge: Cambridge University Press, 2014; BARTOLINI, Giulio; CUBIE, Dug; HESSELMAN, Marlies; PEEL, Jacqueline. *Yearbook of International Disaster Law (2018)*. Vol. 01. Leiden: Brill | Nijhoff, 2019; SAMUEL, Katja L. H.; ARONSSON-STORRIER, Marie; BOOKMILLER, Kirsten Nakjavani (eds.). *The Cambridge Handbook of Disaster Risk Reduction and International Law*. Cambridge: Cambridge University Press, 2019; GIUSTINIANI, Flavia Zorzi; AOMMARIO, Emanuele; BARTOLINI, Giulio. *Routledge Handbook of Human Rights and Disasters*. Abingdon, 2019.

historically been effective in the phases of emergency response, compensation and reconstruction (FARBER, 2016, p. 43).

It is important to point out that in the (potential or actual) catastrophic scenario, law must perform a number of specific roles of prevention and mitigation, emergency response, compensation to victims and reconstruction of the affected systems, in what is called the Disaster Law Cycle.



Source: FARBER, 2012.

The element that unites all these phases is precisely the need for (circular) management of catastrophic risk, where even in the post-disaster phases (response, compensation and reconstruction), risk management should be a legal duty in order to reduce impacts and prevent new events. Disaster Law holds a leading role during extreme events, with the primary function of providing stability during a process of abnormality, by seeking to reestablish as soon as possible a new normality (CARVALHO, 2020, p. 78). It is a social stabilisation process driven by dynamic legal decisions (CARVALHO, 2020, p. 42-45) seeking to rationalize uncertainties.

In this regard, the first phase of International Disaster Law is strongly focused on disaster response and humanitarian relief, and has only recently expanded its scope and the role it sees for law in addressing disaster prevention and management.

This is a major change in understanding the role of international law as also addressing disaster management in the phases of prevention, mitigation

and disaster preparedness. One example of this movement is the recognition at the international level of concepts such as disaster risk management and, within it, disaster risk reduction. These strategies are part of what is called “a sort of ‘second generation’ within international disaster law, whose legal ramifications and implications are still to be fully explored” (BARTOLINI; NATOLI, 2018).

At this new stage, International Disaster Law, with all its confusing and unclear body of rules, has found coherence and identity in the circular management of disaster risks, or disaster cycle (FARBER, 2014, p. 09).

As already seen, the handling of disasters, also by international law, must be permeated by a circular rationale, with law fulfilling specific roles at each of the stages of prevention, mitigation, emergency response, compensation and reconstruction. These stages should be interconnected by the urgent and continuous need for (circular) risk management (to prevent the aggravation of existing or the occurrence of new disasters).

Risk management thus unites all these phases coherently. This perspective, which presents risk management as a constituent element of the very rationale of Disaster Law, assigns a legal role to the Disaster Risk Reduction mechanism and its insertion in all phases of a catastrophic event.

Despite this prominence, International Disaster Law is still being developed in a rather fragmented manner, which calls for a greater analysis of the regulatory structure of Disaster Risk Management (DRM) and, within it, of Disaster Risk Reduction strategies.

The recent growth in the need for and interest in International Law for Disaster Risk Reduction and its legal implications is demonstrated by the development of a significant body of international law on the subject.

Although fragmented, this legal framework is beginning to coalesce into a system capable of generating decision-making standards and setting guidelines for national legislation on the subject. These successful national experiences (“best practices”) in turn feed back into the international system as a “bottom-up” matrix, which anew serves as a guide for a “top-down” process.

In 1989, the United Nations General Assembly proclaimed the 1990s as the International Decade for Natural Disaster Reduction (IDNDR), thus marking

a first step in raising awareness on this issue. The objective of that decade was “to reduce through concerted international actions, especially in developing countries, loss of life, property damage and social and economic disruption caused by natural disasters” (UNITED NATIONS – UN, 1988).

In that decade, more specifically in 1994, the first World Conference on Natural Disaster Reduction was held in Yokohama, during which the Guidelines for Natural Disaster Prevention, Preparedness and Mitigation, also known as the Yokohama Strategy, were approved (UNITED NATIONS OFFICE FOR DISASTER RISK REDUCTION – UNDRR, 1994). This point also marked an awareness of the rise in the frequency and intensity of natural and technological disasters to unprecedented levels (GIUSTINIANI, 2018, p. 09).

2. Hyogo Framework for Action for disaster risk reduction, 2005-2015

In 1999, the International Strategy for Disaster Reduction (UNISDR) was established at the permanent secretariat level to promote a culture of disaster prevention at the domestic level. In 2005, the second World Conference on Natural Disaster Reduction held in Hyogo resulted in the Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters.

The scope of the *Hyogo Framework for Action* (HFA) is to provide “a strategic and systematic approach to reducing vulnerabilities and risks to hazards through the development of stronger institutions, mechanisms and capacities to build resilience, with the overall goal of an effective integration of DRR into sustainable development policies” (UNITED NATIONS OFFICE FOR DISASTER RISK REDUCTION – UNDRR, 2007).

The HFA for Disaster Risk Reduction, drawing on the lessons and experience of the Yokohama Strategy, set out five priority areas for action in the decade 2005-2015:

1. “Ensure that disaster risk reduction is a national and a local priority with a strong institutional basis for implementation.” According to the HFA, there is greater capability to manage risk and obtain a broad consensus for the engagement and effectiveness of disaster risk reduction measures whenever a

country develops policies, legislation and institutional frameworks for disaster risk reduction.⁴ In other words, there is a clear orientation to form a legal framework for disaster prevention at regional, national and local level, based on the principles of disaster risk reduction, both at organisational, legal and political levels.

2. “Identify, assess, and monitor disaster risks – and enhance early warning”. The starting point for disaster risk reduction and the promotion of a culture of resilience depends on understanding the risks and the physical, social, economic and environmental vulnerabilities.⁵

3. “Use knowledge, innovation, and education to build a culture of safety and resilience at all levels”. Here, the conclusion for setting this priority action is that disasters can be substantially reduced if people are well informed and motivated about a culture of disaster prevention and resilience. This requires collecting, compiling and disseminating relevant knowledge and information concerning threats, vulnerabilities and capabilities.⁶

4. “Reduce the underlying risk factors.” This priority is explained by the realization that disaster risks related to changing social, economic, environmental and land-use conditions, as well as risks associated with geological, climatic and hydrological events, should be addressed in sectoral planning and development programs, as well as in the post-disaster period.⁷

5. “Strengthen disaster preparedness for effective response at all levels”. In times of disaster, impacts and losses can be substantially reduced if authorities, individuals and communities in risk areas are well prepared and ready to act.⁸

The Global Platform for Disaster Risk Reduction was subsequently created in 2006, as a platform for reflecting on natural (or physical) disaster risk

⁴ See B, 1. 16, Hyogo Framework UNITED NATIONS OFFICE FOR DISASTER RISK REDUCTION - UNDRR, 2007).

⁵ See B, 2, 17, Hyogo Framework (UNITED NATIONS OFFICE FOR DISASTER RISK REDUCTION – UNDRR, 2007).

⁶ See B, 3, 18, Hyogo Framework (UNITED NATIONS OFFICE FOR DISASTER RISK REDUCTION – UNDRR, 2007).

⁷ See B, 4, 19, Hyogo Framework (UNITED NATIONS OFFICE FOR DISASTER RISK REDUCTION – UNDRR, 2007).

⁸ See B, 5, 20, Hyogo Framework (UNITED NATIONS OFFICE FOR DISASTER RISK REDUCTION – UNDRR, 2007).

management techniques and keeping abreast of the advances promoted by the HFA. Within its structural composition are States, international organizations, NGOs, academic institutions, among other private entities. It meets every two years.

3. ILC Draft Articles on the Protection of Persons in the Event of Disasters, 2016

The International Law Commission is a body of the General Assembly that plays an important role in the development of codification in international law, under the terms of the United Nations Charter, art. 13(1)(a). In 2007, the Commission initiated a project exploring the legal aspects of protecting people in disaster events.

This work resulted in the preparation and adoption, in 2016, by the same body, of the Draft Articles on the Protection of Persons in the Event of Disasters. Though not binding on States, these articles have significant influence on the international stage, as States and other actors, including the United Nations Office for Disaster Risk Reduction (UNISDR) and the IFRC, were consulted in the process (ARONSSON-STORRIER; COSTA, 2017, p. 2-3).

Clearly, one of the major challenges of any disaster risk reduction and emergency response agenda is the provision that they must be adopted on a voluntary basis by States, in order to align these rules with the principle of State sovereignty and non-intervention.

In this regard, the Draft itself points out in its preamble the importance of “stressing the principle of the sovereignty of States and, consequently, reaffirming the primary role of the State affected by a disaster in providing disaster relief assistance” (UNITED NATIONS – UN, 2016). This balance between the protection of people in disaster situations and State Sovereignty is also outlined in Article 13 of the Draft, which provides that “the provision of

external assistance requires the consent of the affected State”, further stipulating that this consent “shall not be withheld arbitrarily.”⁹

Furthermore, in cases of disasters, States, the United Nations and other potentially assisting actors can offer assistance to the affected State.¹⁰ This assistance is to be provided at the request of the affected country and after its consent. To this end, the affected country may impose conditions for the provision of external assistance, which must be in accordance with the system provided for in the Draft Articles of the Commission on International Law, and also with the rules of international law and the national law of the affected country.¹¹ These conditions are to take into account the needs of the people concerned and the characteristic of the requested assistance.

This Draft of the Commission on International Law, as a true non-binding normative basis for situations of protecting people in the event of disasters, has adopted a rights-based approach (TOKUNAGA, 2014, p. 48-49). As a condition for this, the draft outlined a concept of disaster for international law in its third article, as a legally-protected right, as being “a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.”

While its scope is “the protection of persons in the event of disasters”¹², its purpose “is to facilitate the adequate and effective response to disasters, and reduction of the risk of disasters, so as to meet the essential needs of the persons concerned, with full respect for their rights.”¹³

In terms of post-disaster duties, the Draft stipulates that the affected State has the “duty to ensure the protection of persons and provision of disaster

⁹ “Article 13. Consent of the affected State to external assistance. 1. The provision of external assistance requires the consent of the affected State. 2. Consent to external assistance shall not be withheld arbitrarily. 3. When an offer of external assistance is made in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner.”

(UNITED NATIONS – UN, 2016).

¹⁰ Article 12 (UNITED NATIONS – UN, 2016).

¹¹ Article 14 (UNITED NATIONS – UN, 2016).

¹² Article 1. Scope. UNITED NATIONS – UN, 2016).

¹³ Article 2. Purpose. (UNITED NATIONS – UN, 2016).

relief assistance in its territory, or in territory under its jurisdiction or control.”¹⁴ Similarly, “the affected State has the *primary role* in the direction, control, coordination and supervision of such relief assistance.”¹⁵

Should “the disaster manifestly exceed its national response capacity, the affected State has *the duty* to seek assistance, as appropriate, from other States, the United Nations and other potentially assisting actors.”¹⁶

While the main focus of the Draft is on the response and relief phase, it also applies to disaster risk reduction measures. Article 9 imposes a duty on States to “reduce the risk of disasters by taking appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.”¹⁷ The original intention of this document, led by its special rapporteur Eduardo Valencia-Ospina, was exactly to cover all the phases of the disaster cycle, establishing a “duty to reduce disaster risk” (GIUSTINIANI, 2018, p. 21-22).

Accordingly, the text established a system of rights and duties, based on a structure that sets out (i) the responsibility of the affected State to seek assistance should its national response capacity be exceeded; (ii) the duty of the affected State not to arbitrarily refuse its consent to external assistance, and (iii) the right of the international community to offer assistance (TOKUNAGA, 2014, p. 53). Thus, sovereignty and non-intervention are safeguarded, but in light of the duty of the affected State to provide an appropriate response to those affected, whenever its capacity is compromised, it has a duty not to refuse outside assistance arbitrarily.

Equally, there is an international duty for cooperation and therefore a right of the international community to offer assistance to victims of disasters. From this logic, proposed by Valencia-Ospina, resulted the duty of the affected State to seek assistance (art. 10), the duty of the affected State not to arbitrarily

¹⁴ According to Article 10, 1 (UNITED NATIONS – UN, 2016).

¹⁵ According to Article 10, 2 (UNITED NATIONS – UN, 2016).

¹⁶ According to Article 11 (UNITED NATIONS – UN, 2016).

¹⁷ “Article 9. Reduction of the risk of disasters. 1. Each State shall reduce the risk of disasters by taking appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters. 2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.” (UNITED NATIONS – UN, 2016).

withhold its consent to external assistance (art. 11) and the right to offer assistance (art. 12).

The incorporation of disaster risk reduction (in art. 9), confirms not only the role of law in disaster risk reduction (prevention, mitigation and preparedness), but is primarily a movement towards establishing an international duty for countries to implement disaster risk reduction measures in their national legal spheres.

Notwithstanding the fact that it is another non-binding international instrument, its content serves, in spite of the persistence of interpretative uncertainties, as an important standard and guideline for interpretation and decision making, always starting from the premise of finding “a balance between this intent to protect people, and the principle of state sovereignty” (ARONSSON-STORRIER; COSTA, 2017, p. 03).

This document may in future be adopted as an international treaty, and this is indeed the recommendation of the Commission for the United Nations General Assembly (INTERNACIONAL LAW COMMISSION – ILC, 2016, paragraphs 43-46), that a convention be held on the matter, based on the articles discussed.

4. Sendai Framework for Disaster Risk Reduction , 2015-2030

Following Hyogo, the role assigned to and the references made by international documents to Disaster Risk Reduction has been further developed. The hallmark of the decade of HFA implementation is the adoption of a multi-hazard and multisectoral approach. The integration and convergence with other branches of international law, such as Environmental, Human Rights, Climate Change or Sustainable Development, is another defining feature of the current perspective of International Disaster Law.

In this historical context, comes the Sendai Framework for Disaster Risk Reduction 2015-2030 (*UNITED NATIONS OFFICE FOR DISASTER RISK REDUCTION – UNDRR, 2015*), negotiated during the Third World Conference on Disaster Risk Reduction and approved by the United Nations General Assembly - UNGA. With seven targets and four priorities for action, the Sendai

Framework presents as its objective the substantial reduction of disaster and life risks.

Similarly, the document provides that States bear primary responsibility for disaster risk reduction, shared with stakeholders including local governments and the private sector. Although this is a non-binding agreement, it provides guidance based on “standards” for national actors in disaster management and risk reduction.

Thus, adopting the experiences gained from the implementation of HFA, the priority areas elected by the Sendai Framework to be implemented at the local, national, regional and global levels are:

1. “Understanding disaster risk”. To this end, policies and practices for disaster risk management should be based on an understanding of disaster risks, in all their dimensions of vulnerability, capacity, exposure of people and assets, hazard characteristics and the environment. Such knowledge and information can be harnessed for pre-disaster risk assessments, for prevention and mitigation, as well as for the implementation of appropriate preparedness measures and, ultimately, effective emergency responses.¹⁸

2. “Strengthening disaster risk governance to manage disaster risk”. The Sendai Framework emphasizes that disaster risk governance should be developed at multiple levels, i.e. local, national, regional and global. Clarity, plans, competence, guidance and coordination within and across sectors, as well as the participation of actors and stakeholders are a necessity. Such disaster risk governance is to take place at all stages of the disaster cycle.¹⁹

3. “Investing in disaster risk reduction for resilience. Public and private investment in disaster risk prevention and reduction through structural and non-structural measures are essential to enhance the economic, social, health and cultural resilience of persons, communities, countries and their assets, as well as the environment.”²⁰

¹⁸ See IV, item 23 (UNITED NATIONS OFFICE FOR DISASTER RISK REDUCTION – UNDRR, 2015).

¹⁹ See IV, item 26 (UNITED NATIONS OFFICE FOR DISASTER RISK REDUCTION – UNDRR, 2015).

²⁰ See IV, item 29 (UNITED NATIONS OFFICE FOR DISASTER RISK REDUCTION – UNDRR, 2015).

4. “Enhancing disaster preparedness for effective response and to “Build Back Better” in recovery, rehabilitation and reconstruction”. The Framework draws attention to the need to integrate disaster risk reduction into emergency response preparedness. The steady growth of disasters, combined with lessons learned from past phenomena, gives rise to the need to strengthen emergency response preparedness. In summary, the recovery, rehabilitation and reconstruction phases should be integrated by disaster risk reduction measures in a circular manner.²¹

As such, a simple comparison between the expected outcomes of the HFA in relation to the Sendai Framework demonstrates that the latter has its primary focus on disaster risks, while the former concentrates on disaster losses.

Hence, while Hyogo refers to “reducing disaster losses”, Sendai aims at “substantial reduction of disaster risks and losses.” The difference is quite clear. Whereas the focus on *disaster losses* focuses on mitigating their impacts, the focus on *disaster risks* allows for more effort to *reduce the occurrences* and, consequently, the magnitude of disasters.

In its scope, the Sendai Framework also includes, in addition to "natural" (or physical) hazards, which are strongly emphasized in HFA, man-made and biological hazards, underlining the need for integrated management of the various forms of disaster risk. There is thus an integrated insertion of disaster risk reduction strategies of a broader nature, including anthropogenic and biological to physical (or "natural") hazards, the latter already widely enshrined in the HFA.

The need for collaboration between different levels of government institutions is also highlighted in the text. The Sendai Framework is more concerned with the implementation of policies and legislation aimed at disaster risk reduction at all levels of government, whether local, national, regional or global.

²¹ See IV, item 32 (UNITED NATIONS OFFICE FOR DISASTER RISK REDUCTION – UNDRR, 2015).

5. Final Considerations

In conclusion, there is a growing concern with the regulation of disaster prevention and response at the international level. This branch of international law interacts with other areas such as international environmental law, international climate change law, human rights, among other specific areas of the international arena.

Disaster risk reduction, as a duty of international law, builds on a series of international normative bodies, principles and guidelines, as well as binding and non-binding standards of the same level.

A normative body is thus currently being formed, albeit still in an embryonic stage and lacking in systematization, with a predominantly *soft law* character. Nevertheless, this body does provide highly relevant orientation, with a measure of uniformity, at the international level. On one hand, it has a “top-down” influence on political and legal practices and strategies for disaster governance. On the other, successful practical experiences at the national level return, as such, to the international scenario (“bottom-up”) and are shared globally by the institutions involved.

Therefore, it is very much as a result of the standards produced on the international arena that law professionals have started to develop national strategies within domestic legislations to reduce physical or anthropogenic impacts on communities, economies and the environment. These are internationally established duties that ultimately become reflected, indirectly, in national legislation, as is the case of the Brazilian National Policy for Protection and Civil Defense (Law No. 12.608/12).

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