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Dug Cubie, *The International Legal Protection of Persons in Humanitarian Crises: Exploring the Acquis Humanitaire*, Bloomsbury Studies in International Law No.67, Hart (2017) 348pp.

Concern for alleviating human suffering in times of crisis is long-standing; it can be traced as far back as the 697 AD Cain Adomnain, to Vattel's call in 1758 for nations to contribute to aid in other nations suffering from disaster such as in the aftermath of the earthquakes in Portugal, and the eventual emergence of the International Committee of the Red Cross and Red Crescent after Henri Dunant observed the aftermath of the battle at Solferino in 1859. However, the complexity of humanitarian crises and of designing appropriate responses thereto continues to challenge the international community. Even a cursory glance at a newspaper verifies this; from Yemen where there is now a large-scale outbreak of cholera amidst the conflict, to the displacement of millions people due to conflicts in Syria and Sudan, and FARC offering support to the town of Mocoa where a mudslide killed over 300 people, humanitarian crises are complex, often transnational, and multi-actor. In contrast with human rights and humanitarian actors, international law and the international community's response to disasters tends to be driven by the type of disaster in question, and particular whether it is caused by conflict, displacement, or natural or manmade disasters. In other words, international law on disaster exists at present in silos, with different regimes applying to different situations, and ineffective responses to the real nature of complex crises. As between those silos there is a hierarchy of laws in response to human suffering, with the laws of war and human rights law more embedded, compared to the softer law approaches that tend to characterise responses to disasters or are aimed at the protection of displaced persons.

Dug Cubie's book proposing an *acquis humanitaire* comes at an auspicious time; when the need to cohere these seemingly disparate legal regimes is clear. Having worked as a practitioner and witnessed first-hand disasters, conflicts and displacements in the field over the past decade and a half, Cubie is well-placed to find a way forward for humanitarian action. While conflict, displacement and disaster are being precipitated and compounded by the wider impact of global warming, he shows that international law and the international community's response is moving, and should continue to move, from silos to a more comprehensive body of law. Cubie suggests that there is a 'common conceptual and operational thread running through our preparations for and responses to a broad range of different humanitarian crises...' ¹ to the extent that there is an emerging 'law of humanitarian assistance'. Tracing these movements, Cubie proposes an *acquis humanitaire* as a framework to draw together the existing diffuse strands of policy, law and practice on humanitarian action into a principle based on human

¹ Pxxxvii.

dignity and humanity. This would improve accountability for failure to ensure the protection of persons in times of humanitarian crisis.

Part I of the book sets out the conceptual framework of the *acquis humanitaire* beginning with the foundations of humanitarianism. Cubie explores the underpinnings of humanitarianism, noting that the imperative for humanitarian action is found in moral or ethical obligations, rather than legal ones, enabling states and humanitarian agencies to interpret it from their own institutional or philosophical stance. Indeed such tensions on the philosophical basis of interventions have witnessed splits within large humanitarian organisations, such as *Médecins Sans Frontières* (MSF) breaking away from the ICRC in 1971 over the Biafra conflict. Moreover, different agencies and states operate under a range of ambits, whether on just ‘humanitarian assistance’ to the much broader ‘humanitarian action’ that includes a array of activities ‘at all stages of the emergency prevention, mitigation and response, not simply material assistance.’² In addition, Cubie argues the protection of persons plays a fundamental part alongside humanitarian assistance. It is here that international law has taken a stronger role in obliging states to take preventive and responsive actions, which are explored in later chapters in Part II. Together Cube tempers these two principles with realities on the ground under the headings of hazards, vulnerability and resilience. Cubie then briefly traces these tenets of humanitarianism in the laws of war and disaster law, finding that, in spite of some differences in substance and practice, there are two common underpinning principles: ‘humanity’ and ‘respect for human dignity’. These then form the starting point for his *acquis humanitaire*.

In Chapter Two Cubie defines the parameters of his *acquis humanitaire*. While not a strict definition, he outlines the that *acquis humanitaire* is a ‘body of laws, policies and practices relating to the protection of persons in humanitarian crises.’³ He takes a ‘broad tent’ approach, demarcating a conceptual framework for engaging and discussing humanitarian action that draws from legal and non-legal sources followed by states and agencies. Indeed this wide umbrella includes hard and soft law, and both needs-based and rights-based approaches to humanitarian action. As such, it is intended to provide a one-stop-shop for states, civil society and institutional agencies to find common ground on law and practice so as to provide a conceptual basis and ‘space for discussion’ in moving forward the creation of new law in this area.⁴ Cubie delineates that there are three constituent parts of the *acquis humanitaire*: (1) the prime objective of the protection of persons, (2) the conceptual basis of humanity and human dignity, and (3) accountability mechanisms provided by international and domestic oversight. These three parts are inter-related and mutually supportive, but will vary depending on the humanitarian crisis. The *acquis* draws from a wide range of international law, from

² P22.

³ P38.

⁴ P38.

humanitarian crises to refugee law, the law of armed conflict, and disaster law. Despite this diversity, there are emerging legal instruments that connect these conceptual and legal spheres, such as the AU Kampala Convention for the Protection and Assistance of Internally Displaced Persons. Yet there are also tensions, such as a rights-based vs. a needs-based approach, the proliferation of laws and forums, and the increasing variety of humanitarian actors. Cubie never shies away from these tensions, instead recognising and tackling them head on throughout the book.

In Chapter 3 Cubie interrogates the prime objective of the *acquis humanitaire* of the protection of persons, looking at the international legal context and the frictions between the rights-based and needs-based approaches to humanitarian action. He finds that a human rights protection approach should not be completely and blindly endorsed during by humanitarian actors in responding to crises, but can inform humanitarian organisations in their operations. He argues that four human rights principles can be useful at such a juncture: empowerment of rights-holders, participation in decision-making processes, non-discrimination and prioritisation of vulnerable groups, and accountability of duty-bearers to rights-holders. Whilst these principles will not by themselves ensure individuals' rights in humanitarian crises, they may ensure procedural fairness for affected communities. Such a stance may not please some human rights actors, but Cubie's framework offers a useful and workable way to ensue the integration of human rights in these situations, while still allowing that a more specialised regime may have *lex specialis* status.

Chapter 4 acknowledges the challenges in developing the normative promise of the *acquis humanitaire* across the different international legal spheres. Cubie draws upon Harold Koh's theory of norm internalisation via transnational legal process for promoting compliance and implementation of the *acquis humanitaire* by actors involved in humanitarian action. Such norm implementation comes into conflict with state sovereignty and state consent and, as in all areas of international law, that conflict inhibits action; in this case military intervention and the establishment of the responsibility to protect doctrine. On the other hand, humanitarian crises can also be used as a pretext to undermine a state's government and governance structures, as happened in Ukraine/Crimea. Intervention, particularly the use of military force, can 'exacerbate the suffering of the affected population'⁵ so that greater legal accountability is needed at the international and domestic level to ensure that states and other responsible actors respect the law in humanitarian crises and honour its central purpose: the protection of the civilian population.

Part II of the book maps out the normative content of the *acquis humanitaire* through the five bodies of international law of which it is composed: international human rights law,

⁵ P125.

the law of armed conflict, international criminal law, international disaster law, and refugee and displaced persons law. Starting with Chapter 5, Cubie surveys the position of international human rights law and its implications for humanitarian crises, focusing in particular on the rights to access to protection and assistance, an adequate standard of living, and physical security and integrity. He finds that a right to humanitarian assistance in all types of humanitarian crises remains debateable and has not yet solidified in human rights law. However, the benefit for Cubie of engaging with a human rights approach for humanitarian action is that it can promote a more effective way to protect persons in such crises through rights discourse, such as the inclusion of affected communities in decision-making processes on humanitarian assistance. Cubie tempers such optimism with a caveat that human rights law is ‘not necessarily the panacea for strengthening the protection of persons in humanitarian crises.’⁶ This position plays into his construction of the *acquis humanitaire* as a broad framework drawing from different legal spheres, where even international humanitarian law in certain circumstances can provide greater protection than human rights law.

Chapter 6 turns to examine the law of armed conflict and its place in the *acquis humanitaire*, drawing upon the examples of humanitarian flotillas to Gaza, state-building and the occupation of Iraq by US-led forces, and cross-border humanitarian operations in Syria. While the law of armed conflict has specific provisions on humanitarian operations and obligations on belligerents to respect the work of relief societies (such as the protection of relief personnel), the law does differ depending on whether the conflict is international or non-international. Cubie finds that although the law of armed conflict recognises that individuals have a right to request humanitarian assistance during international armed conflicts, it is very much constrained by military considerations. For non-international armed conflicts the legal terrain is much bleaker: relief societies’ ability to offer and provide assistance to the civilian population suffering undue hardship is predicated on the consent of the affected state. Connected to his earlier argument on accountability, Cubie highlights the practical challenges that arise as humanitarian actors are increasingly being directly targeted by belligerents in order to cause further suffering to civilian populations, gain political capital or remove international organisations from their territory. Rarely is anyone held responsible for these actions. Resolving this is perhaps beyond the scope of Cubie’s study, but the targeting of relief agencies and humanitarian actors clearly places important practical obstacles in the way of delivering humanitarian assistance in real terms.

In Chapter 7 Cubie assesses the protection of persons in international criminal law. Despite the protection afforded to humanitarian actors in the laws of war and similar provisions on criminalisation in international criminal law, attacks continue to be made against them, with

⁶ P174.

few prosecutions. Cubie considers in particular war crimes involving attacks against humanitarian personnel and medical facilities, misuse of emblems, and the use of starvation as a means of warfare. This he does by examining case studies in Afghanistan, Syria and Bosnia. Cubie also discusses the implications of wilful denial of humanitarian assistance amounting to genocide, drawing upon the *Al-Bashir* case at the ICC.⁷ While there is not an explicit recognition of such wilful denial as constituting genocide, the jurisprudence in the *Akayesu* case at the International Criminal Tribunal for Rwanda (ICTR) suggests that the deliberate infliction of conditions intended to cause physical destruction of the group can amount to genocide.⁸ However, Cubie notes that genocide has a high threshold of special intent to destroy, in whole or in part, a protected group. He then turns to examine the potential for crimes against humanity to occur when civilian populations are mistreated, including in the aftermath of disasters, such as the delayed response for humanitarian aid in Myanmar after Cyclone Nargis. Again satisfying the evidential requirements of proving mistreatment through the contextual elements of crimes against humanity of widespread or systematic attacks directed against a civilian population may make such a prosecution difficult, but not impossible. Nonetheless there is an increasing recognition that intentional attacks or barriers to humanitarian assistance that result in the deaths of civilians can amount to international crimes in war and peace. Such criminalisation may provide a deterrent effect, but given the lack of prosecutions for denying humanitarian assistance or targeting humanitarian workers it remains questionable whether it would be an effective tool in fighting for the protection of persons with humanitarian needs in crises.

Chapter 8 surveys international disaster laws. Although these laws have only recently captured the attention of academics and practitioners, Cubie argues that they include a range of initiatives over the past 100 years. Most of the law comes from UN resolutions, declarations and guidelines or draft international instruments (such as the ILC draft articles on humanitarian response and recovery),⁹ reflecting the proliferation of soft law in this corpus. That said there has been increasing awareness amongst different actors to improve the response to humanitarian disasters, such as the Disaster Risk Reduction, Prevention and Preparedness (DRR) agenda. Cubie offers the 2004 tsunami in the Indian Ocean that killed 226,000 people across 14 countries and the post-earthquake intervention in Haiti and subsequent cholera outbreak as examples of where hard lessons have been learned in responding to large-scale disasters with multiple agencies and organisations. While there is a nascent field of

⁷ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09.

⁸ *The Prosecutor v Jean-Paul Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, paras 505–508.

⁹ International Law Commission's Draft articles on the protection of persons in the event of disasters 2016.

international disaster law, it remains very much in soft law practice of promoting the protection of persons, but does provide a fertile area of growth for the *acquis humanitaire*.

Chapter 9 is the last piece of the normative *acquis humanitaire* outlined in Part II. Here Cubie considers the place of refugee and displaced persons law in the protection of persons in humanitarian crises. This area comprises both hard law (especially the 1951 UN Convention Relating to the Status of Refugees) and soft law, both of which are canvassed by Cubie who focuses especially on. legal and resettlement solutions to sexual and gender-based violence in Bhutanese refugee camps in Nepal, and the internalisation of guiding principles of internal displacement in Colombia to illustrate their operation. This area of law reflects the intertwined links between the different normative bases of the *acquis humanitaire*, where in the aftermath of conflict or disaster it can have a knock-on effect on the location, living conditions and legal situation of civilians both domestically and internationally. This is apparent in Syria, where large-scale and long-term conflict has witnessed the displacement of civilian population within and outside the country's borders, which requires an understanding of the different and interrelated parts of international law in responding to such a humanitarian crisis.

The final part of the book draws together the conceptual and substantive aspects of the *acquis humanitaire*. Chapter 11 reflects on whether or not a general right to humanitarian assistance has crystallised in international law. Cubie finds that there is a limited individual right to request and receive humanitarian assistance from aid agencies in armed conflict, but there are no avenues for redress to seek compliance for this right, and such a right differs between international and non-international armed conflicts. This would suggest a lack of legal basis for an individual right classically understood. In times of peace, Cubie points out that a right to humanitarian assistance only exists in refugee law for children, although there have been suggestions that this should be broadened to include internally displaced persons.¹⁰ This is a sensible development given the high numbers of civilians who died because of conflict displacement and lack of assistance, such as in the conflict in eastern Congo. What does seem a stronger basis in international law is the entitlement of humanitarian agencies to offer assistance, but this often is limited by states not giving consent, reflecting the overbearing nature of international law's commitment to sovereignty over the protection of persons. As such Cubie, acknowledges that the right to humanitarian assistance is starting to crystallise, but more work needs to be done in to achieve the overarching goal of the protection of persons in humanitarian crises. Despite this, in his final chapter Cubie remains optimistic that the broad-tent, flexible approach of the *acquis humanitaire* can contribute to better attaining the protection and assistance of persons in humanitarian crises. Accordingly the *acquis*

¹⁰ P325.

humanitarian remains the best way to actualise our underlying goals of humanity and human dignity in times of crises.

In all, Cubie's monograph pulls together the different strands of international law in the face of ever-complex humanitarian crises to shape a well-thought out and sober approach to humanitarian action. The valuable contribution this book makes to the number of fields it touches upon is clear, but it also potentially provides a pivot point for our legal and practical continuum as an international community in how we respond to some of the greatest challenges we face as the human race. It is apparent that this book will be helpful for practitioners in the field of humanitarian assistance, a vital guide to policy makers in developing legal responses and states' obligations in humanitarian crises, and a provocation to scholars in the disparate areas of law Cubie engages with. Yet the value of this book is not just in how it speaks to and moves the debate on for different stakeholders, but how it pulls together the key principles of humanity and human dignity to illustrate how, as an international community, we can respond to and reduce the suffering of humankind when war and disaster strike.

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