Identifying Solidarity: the ILC project on the protection of persons in disasters and human rights

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Abstract

The article considers the ambitious International Law Commission (ILC) project on the draft articles on the protection of persons in disasters and its declaration of solidarity on the part of the international community towards disaster-stricken individuals. The project adopted a rights-based approach and by its focus on a duty of international cooperation initially suggested a radical move to a more explicit intertwining of protective duties of disaster-affected states and various external actors. The ILC project also seemed to signpost a new direction for human rights protection. By moving away from the oft-criticized, but still

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powerful, model of treaty-making driven by identity politics, the ILC draft Articles focused instead on a broad notion of universal humanity and needs-based assistance. This article considers the need for the ILC project, its rationale and its particular provisions as regards the responsibilities of various actors when a natural disaster strikes. In articulating what he understood by "solidarity," the project's Special Rapporteur invoked specific writings by Emer de Vattel. This article evaluates the ILC draft Articles in the light of this particular understanding of solidarity. The article concludes that the draft Articles in their current form do not meaningfully establish a partnership of immediate post-disaster humanitarian assistance between a disaster-affected state and relevant external actors (particularly third states). The full potential of the duty of cooperation has been thwarted by concerns and objections expressed by states during the drafting process. Further, by allowing offers of assistance to remain a matter of discretion, for states in particular, the draft Articles simply privilege the Westphalian preserve. It would seem that for many external actors, the plight of disaster victims will continue to be someone else's problem and one which they do not wish to identify or identify with.

I. INTRODUCTION

Natural disasters and their effects can seriously compromise the basic human rights of vulnerable individuals. Loss of life, missing people, and serious life-threatening injuries can occur on a huge scale.[1] Rescue and recovery processes are compromised by damage to essential utilities.[2] In particular, the destruction of clean water supplies can pose serious risks to the health and wellbeing of survivors.[3] Substantial property loss produces thousands of homeless and displaced people requiring shelter.[4] Fleeing refugees perilously cross international borders to seek assistance.[5] The financial damage wrought by a disaster can disable a state indefinitely.[6] Because of the rapid-onset nature of geophysical and weather-related hazards such as earthquakes, volcanic eruptions, floods, and storms, states often have little warning before these catastrophes occur. Natural disasters can be devastating for any

[1] This was exemplified in the recent April 2016 earthquake in Ecuador. See 'Ecuador Quake Deaths Pass 500 with Hundreds Still Missing', http://www.bbc.co.uk/news/world-latin-america-36089792 (last visited 28th April, 2016)

[2] 2013 Global Assessment Report on Disaster Risk Reduction (GAR13) *From Shared Risk to Shared Value: The Business Case For Disaster Risk Reduction*.

[3] *Emergency Planning for Water Utilities* (M19), pp. 7, 11 28, 41 (American Water Works Association) 4th ed. (2001).

[4] The Internal Displacement Monitoring Centre estimated that more than 19.3 million people were forced to flee their homes due to disasters in 100 countries in 2014. http://www.internal-displacement.org/global-estimates/

[5] Refugees, Next Steps New Dynamics of Displacement http://www.un.org/en/globalissues/briefingpapers/refugees/nextsteps.html

[6] The total damages resulting from the Great East Japan earthquake and tsunami of 2011 were estimated at $300 billion dollars (about 25 trillion yen), according to the Japanese government. Becky Oskin, 'Japan Earthquake & Tsunami of 2011: Facts and Information' *http://www.livescience.com/39110-japan-2011-earthquake-tsunami-facts.html*

state, even a wealthy one, and it is true that Nature "knows no political boundaries."[7] The Japanese tsunami and earthquake of March 2011, numerous bushfires and floods in Australia, the Christchurch earthquake of February 2011, and the aftermath of Hurricane Katrina in the U.S. state of Louisiana, all testify to disaster-related suffering in affluent, developed countries.[8] However, a territory with poor infrastructure, a deprived population, compromised building safety, and an under-resourced health service will undoubtedly suffer more profoundly from the catastrophic consequences of a disaster, as can be seen in Myanmar following Cyclone Nargis in 2008 and in Nepal and Haiti following the earthquakes of April 2015 and January 2010 respectively.[9] Perhaps the fact that certain events become "disasters" "speaks more to the susceptibility of human beings to the adverse effects of natural hazards,"[10] and it is often *vulnerability* which concretizes a disaster's catastrophic impact.[11] A caveat should probably be attached to the term "natural disasters" which really only describes event-manifestations rather than underlying causes. As Mike Davis notes in his work on the making of the Third World, "[w]hat historians . . . have so often dismissed as 'climactic accidents' turn out to be not so accidental at all." [12] Indeed, many of the effects of natural disasters may be prevented with appropriate planning and investment in infrastructure. Given that the subject of disasters is an area of current legal reform and codification, drafters should keep in mind law's reactive propensity and guard against its instrumentalization in the service of superficial crisis management.

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[7] International Law Commission *Report on the work of its Fifty-eighth session* (2006) UN Doc. A/61/10, Annex III, para.4.

[8] See EM-DAT: The International Disasters Database http://www.emdat.be/.
Since 1988 the Centre for Research on the Epidemiology of Disasters (CRED) has been maintaining an Emergency Events Database.. EM-DAT was created with the initial support of the WHO and the Belgian Government. EM-DAT contains essential core data on the occurrence and effects of over 18,000 mass disasters in the world from 1900 to present. The database is compiled from various sources, including UN agencies, non-governmental organisations, insurance companies, research institutes and press agencies.

[9] 'Access isn't enough in Myanmar' International Herald Tribune 29 May, 2008, *After the Storm: Voices from the Delta* (2009) A Report by Emergency Assistance Team-Burma and the Center for Public Health and Human Rights at Johns Hopkins Bloomberg School of Public Health, A.Oliver-Smith 'Haiti and the Historical Construction of Disasters' NACLA Report on the Americas, 32.

[10] *Supra* n.7, A/61/10, Annex III, para.4

[11] Matthew E. Kahn 'The Death Toll from Natural Disasters: The Role of Income, Geography, and Institutions' *The Review of Economics and Statistics* Vol. 87, No. 2 (May, 2005), pp. 271-284

[12] Mike Davis *Late Victorian Holocausts; El Niño Famines and the Making of the Third World* (Verso, 2001) p.279 and Hilary Charlesworth, "International Law: A Discipline of Crisis" 65(3) *Modern Law Review* 377.

Although disaster-prevention strategies are absolutely crucial to minimizing human suffering, it is also necessary to create contingency plans for when disasters actually strike.[13] The "disaster context," with its scale of human suffering and its potential to disable normal internal governance institutions,[14] makes clear the need for organized and concerted international, external assistance. When disasters strike, United Nations-driven flash funds are established,[15] pleas for international assistance are made and humanitarian agencies and politicians alike are at pains to stress for politics to be put aside. Calamitous events[16] are occasions to prioritize humanitarianism and demonstrate international solidarity. Nevertheless, natural disasters present situations of large-scale human suffering without any systematic legal regulatory regime. There is no international, multilateral, disaster response treaty of general application. International Disaster Response Law (IDRL) comprises material drafted by expert bodies such as the Red Cross, internal U.N. rules and regulations, bilateral treaties, regional arrangements, and soft law.[17] While existing general human rights provisions can apply to disaster-affected populations, these are not focused upon the particular difficulties wrought by disasters.[18] The absence of a specific "disaster human

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[13] *Contingency Planning for Natural Disasters*
http://reliefweb.int/sites/reliefweb.int/files/resources/59D109D27B44E277C1256C7C0040C6DB-unicef-contingency-2000.pdf

[14] See, for example, the 2010 Haitian earthquake, 'Haiti Earthquake Response: Emerging evaluation lessons' Jonathan Patrick, Evaluation Adviser, UK Department for International Development 2011 Evaluation Insights p.2

[15] United Nations Central Emergency Response Fund, 'CERF Rapid Response Window and Flash Appeals' https://docs.unocha.org/sites/dms/CERF/CERF_and_FA_20.11.08.pdf

[16] Draft Article 3 of the ILC Draft Articles on the protection of persons in disasters offers a definition of disasters.
'"Disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.'
The 2014version of the draft Articles (which incorporates previous article numbering) has been used since this is the version approved adopted by the Drafting Committee on first reading. See International Law Commission (ILC), *Report on the work of its Sixty-sixth session* (2014) UN Doc. A/69/10 (2014) and UN Doc. A/CN.4/L.831 (15 May 2014). A revised version of the draft Articles has been proposed very recently in the ILC Special Rapporteur's Eighth Report. This report reviewed the comments and observations made by Governments, international organizations and other entities on the draft articles on the as adopted on first reading, in 2014, together with the recommendations of the Special Rapporteur. The Special Rapporteur has proposed a preamble and made recommendations for the final form of the draft articles. In May 2016, the Commission decided to refer the draft preamble and draft articles, as recommended by the Special Rapporteur, to the Drafting Committee. However, until the work of the Drafting Committee is completed, the 2014 version of the draft articles is the one to which we refer.

[17] Notable examples include the 1994 Mohonk criteria, the 2007 IFRC/IDRL Guidelines and the San Remo Principles as discussed *infra*. See also the 2007 Oslo Guidelines on the Use of Foreign Military and Defence Assets in Disaster Relief, 2003 Stockholm Principles and Good Practice of Humanitarian Donorship and the Sphere Project's Humanitarian Charter and Minimum Standards in Disaster Response (http://www.sphereproject.org/handbook/)

[18] *Preliminary Report on the Protection of Persons in the Event of Disasters,* by Mr. Eduardo Valencia-Ospina U.N. Doc. A/CN.4/598 (May 5, 2008) , paras.25-26

rights" treaty might be partially explained by the fact that the creation of many human rights treaties have been driven by identity politics whereby particular identity groups sharing certain, sometimes socially-constructed, characteristics coalesce around specific issues of grievance to press for change.[19] Notable examples of this approach are the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the 2006 Convention on the Rights of Persons Living with Disabilities (CPRD).[20] However, notwithstanding its capacity for empowering subaltern groupings, the approach of identity politics is unsuitable for the project of enshrining the rights of disaster-struck individuals. Such individuals would only have the fact of their disaster as linkage--their needs and experiences of harm in different geographical locations, cultures, stages of development, and climate can be so diverse as to make any common experience difficult to discern. In any event, the approach of identity politics, and thus at least in part traditional human rights law, has been increasingly condemned as blunt, introverted, counter-productive, and inhibitive of empathy and solidarity.[21] It often fails to take account of instances of complex discrimination, (for example when race, sexuality and the legacies of colonialism multiply the impact on individuals' lives) and has been charged with ignoring broader and wider issues in society such as the pernicious and crushing influence of capitalism.[22] Again, bearing in mind the previously mentioned thoughts of Davis,[23] it would seem that to be effective and meaningful, "disaster law" requires a much more holistically-minded approach which recognizes historical contingencies and wealth inequality.

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[19] Mary Bernstein, "Identity Politics' Annual Review of Sociology*;* 31 (2005) 47 Mindy Jane Roseman & Alice Miller "Normalizing Sex and its Discontents: Establishing Sexual Rights in International Law" 34 Harvard Journal of Law and Gender (2011) 314

[20] See also the 1965 Convention on the Elimination of Racial Discrimination (CERD).Even international "universal" standard-setting treaties which did not articulate such particular groupings and which appeared to adopt a model of formal equality were understood to have a hidden "affirmative action" agenda. See the 1966 International Covenant on Civil and Political Rights (ICCPR), 1966 International Covenant on Economic, Social and Cultural Rights and the 1950 European Convention on Human Rights and Fundamental Freedoms and their, often spirited, interpretations for more information on the anti-discrimination clauses of major human rights treaties.

[21] This is so despite the important influence of intersectionality perspectives. *See, e.g.*, Emily Grabham, *Intersectionality and beyond : law, power and the politics of location* (Abingdon, Oxon ; New York, NY : Routledge-Cavendish) (2009), Angelia R. Wilson (ed.) , *Situating Intersectionality* , Palgrave Macmillan September 2013, Andrea Krizsan, Hege Skjeie and Judith Squires (eds.), *Institutionalizing Intersectionality* , Palgrave Macmillan July 2012

[22] *See* Michael Rectenwald 'What's Wrong With Identity Politics (and Intersectionality Theory)? A Response to Mark Fisher's "Exiting the Vampire Castle" (And Its Critics)' The North Star, December 2nd, 2013, for an interesting discussion of leftist perspectives on both identity politics and intersectionality.

[23] Davis, *supra* n. 12.

Given the clear need for international assistance in major disasters, the haphazardness of IDRL and the seemingly unfocused approach of existing human rights law, there was a call among key non-governmental organizations (NGOs) and specialized U.N. agencies for clearer legal regulation.[24] The project of highlighting the need for, and operationalization of, international solidarity by way of legal systematization was embraced by the International Law Commission (ILC) via its current study on the protection of persons in disasters.[25] The project explicitly adopts a rights-based approach to addressing vulnerability in emergencies, [26] and is thus not driven by any particular identity, which, as noted, potentially represents a new direction in human rights.[27] Further, although the ILC notes the primary responsibilities of the disaster-affected state, it initially encouraged a sense that human rights responsibilities might be on the verge of being de-territorialized by declaring an international duty of cooperation.[28] This was another potentially paradigm-shifting development because human rights law has been classically constructed in a way whereby responsibilities for human rights are territorially-based.[29] In his preliminary report[30] outlining the thrust and scope of the project, the Special Rapporteur Eduardo Valencia-Ospina[31] quoted Emer de Vattel's 1758 work as follows:

> [W]hen the occasion arises, every Nation should give its aid to further the advancement of other Nations and save them from disaster and ruin, so far as it can do so without running too great a risk.[32]
>
> [i]f a Nation is suffering from famine, all those who have provisions to spare should assist it in its need, without, however, exposing themselves to scarcity. . . . *To give assistance in such dire straits is so instinctive an act of humanity that hardly any civilized Nation is to be found which would absolutely refuse to do so.* . . . Whatever be the calamity affecting a Nation, the same help is due to it.[33]

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[24] IFRC 'International Disaster Response Laws (IDRL): Project Report 2002-2003'

[25] See the Analytical Guide to the work of the ILC in relation to this particular project http://legal.un.org/ilc/guide/6_3.shtml.

[26] *Supra* n.18 *Preliminary Report* paras. 12, 26, 51 and 62

[27] Draft Article 2 Commentary, para.2,*supra* n.16, A/69/10, p.91

[28] *Supra* n.16, A/69/10, p.105

[29] See, e.g., Article 2 of both the ICCPR and the International Covenant on Economic, Social and Cultural Rights. Although there has been judicial recognition of extra-territorial human rights responsibilities for states, this has been a fairly narrowly understood extension of jurisdiction, principally resting on notions of "effective control".

[30] *Supra* n.18, *Preliminary Report*

[31] *Ibid* para.14.

[32] E. de Vattel, *The Law of Nations of the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns,* Text of 1758, volumes I, II, III, IV, translation by Charles G. Fenwick with an introduction by Albert de Lapradelle, Carnegie Institution of Washington, 1916, vol. III, p.114, s*upra* n.7, A/61/10 Annex III para.18

[33] *Ibid*, p.115 (emphasis added).

This "Vattelian imperative," which spurred the ILC project, regularly appears in the Special Rapporteur's reports, and it finds expression throughout the draft Articles and commentaries.[34] Draft Article 2 emphasizes that the 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."[35] Respecting and protecting the inherent dignity of the human person is stressed in draft Article 5 [7] and is recounted as being the core principle informing international human rights law and as acting as a guide for any action to be taken in the context of relief provision.[36] Draft Article 6 [8] also makes clear that disaster-stricken persons are entitled to respect for their human rights.[37] Draft Article 7 [6] which concerns humanitarian principles boldly states that "[r]esponse to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable."[38] Draft Article 8 [5] stresses that states shall, as appropriate, cooperate among themselves and with a number of key international organizations including the United Nations and NGOs to protect persons in the event of disasters.[39] As can be seen, none of the aforementioned provisions specify any qualifying criteria for assistance other than being human and disaster-stricken.[40] Therefore, the proposed legal regulation of natural disasters ostensibly provides an example of moving on from identity politics as a tool for respecting and honoring rights and for thinking about international responsibilities of external actors, towards disaster-affected peoples.

Much of this Article's discussion refers to the role of the international community in the event of a disaster's occurrence. This is particularly pertinent in the discussion regarding the role of external actors in the provision of humanitarian assistance. The ILC draft Articles invoke the phrase "international community" to describe particular actors; third states, intergovernmental organizations (IGOs), and NGOs which are empowered to offer

[34] *Supra* n.16, A/69/10 pp.90-138
[35] *Supra* n.16, A/69/10, p.91
[36] *Ibid* n.16, and A/69/10, pp.93-95
[37] *Supra* n.16, A/69/10, p.102
[38] *Supra* n.16, A/69/10 p.103
[39] *Supra* n.16, A/69/10 p.105
[40] Draft Article 2 Commentary, para.2,*supra* n.16, A/69/10, p.91

humanitarian assistance.[41] However, "international community" is also being invoked conceptually. A sensibility or *sentiment* regarding a community which is international, and presumably sees itself inter-connected and as capable of empathy, seems to infuse much of the Special Rapporteur's writings and is particularly evident in his invocation of Vattel.[42] Both characterizations and uses of "international community" are utilized throughout.[43]

This article considers the ILC's draft Articles in their current, un-finalized form, the motivation behind the project, and what is meant by a rights-based approach in the disaster context. Although the ILC draft Articles do not confine themselves to naturally-occurring disasters, the focus of this article will be on natural disasters and those occurring outside of armed conflict. The specific responsibilities of disaster affected states, in particular in their interactions with the international community, and the responsibilities of the latter in relation to cooperation and offering assistance, will be a major focus of Part VI of this Article. In Part VII, the draft Articles will then be evaluated in terms of their comportment with the Vattelian imperative. Finally, in Part VIII, the Article re-examines universal humanity and international solidarity (as invoked by the Special Rapporteur) in the light of the current draft Articles.

The Article will conclude in Part IX that the proclaimed ideology of solidarity has not really materialized in the actual draft provisions. Thus, this particular opportunity to move from classical Westphalian-driven responsibilities towards a focus on the international community's cosmopolitan duty to practice humanity irrespective of color, creed, gender, belief or impairment seems to have been lost for the time being.

II. HUMAN RIGHTS AND DISASTERS

Although the scope and content of human rights are contested,[44] it seems uncontroversial to acknowledge that natural disasters do engage human rights issues.[45] Given the scale of

[41] Draft Article 16 and see *supra* n.16, A/69/10 para.46
[42] *Supra* notes 30-33
[43] *See* Dino Kritsiotis, 'Imagining the International Community', 13(1) European Journal of International Law (2002) 961, for very interesting thoughts on the concept of international community.
[44] Hurst Hannum, S. James Anaya, Dinah L.Shelton, *International Human Rights: Problems of Law, Policy, and Practice* (Aspen, 2011 5th ed), See also Philip Alston 'Does the Past Matter? On the Origins of Human Rights' 126 Harvard Law Review (2013) 2043
[45] The rights to life (Article 6, ICCPR) and health (Article 12 ICESCR) are clearly in peril.

human misery and harm occurring in a disaster and the evident vulnerability of stricken populations, it would be hard to think of a scenario which better demonstrates personal loss and vulnerability, the protective responsibilities of sovereignty, and the opportunity to demonstrate international fellowship.[46] As noted above, ILC draft Article 6 [8] seemingly makes this presumption and emphasizes that disaster-affected persons have a right to respect for their human rights.[47] Indeed an abundance of specific human rights law is apparently available to victim populations.[48] Key rights include the right to life,[49] the right to food,[50] the right to health and medical services,[51] the right to the supply of water,[52] the right to adequate housing,[53] clothing and sanitation,[54] and the right not to be discriminated against.[55] However, haziness pervades the precise content of these rights and the extent of associated state duties.[56] The international outcry in the face of the incontestable examples of human misery following Hurricane Katrina highlighted how disaster-stricken individuals' human rights can be extremely compromised.[57] In 2006, the U.N. Human Rights Committee (UNHRC) made this clear when it issued its Concluding Observations on the second and third U.S. periodic reports.[58] Specifically referencing Hurricane Katrina, the UNHRC referred to the various rules and regulations prohibiting discrimination in the provision of disaster relief and emergency assistance.[59] It expressed specific concern that poor people, and in particular African-Americans, were disadvantaged by the rescue and evacuation plans implemented when the hurricane hit and also noted that these very people continued to be disadvantaged

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[46] Dug Cubie and Marlies Hesselman, "Accountability for the human rights implications of natural disasters: a proposal for systemic international oversight" N.Q.H.R. 2015, 33(1), 9-41.
[47] Draft Article 6 *supra* n.16, A/69/10, p.102
[48]Notably in the detail of the ICESCR and the ICCPR illustrated *infra.*
[49] *Supra* n.45. See *"*Natural disaster: mudslide - positive obligations - arts 2, 13 and art.1 of Protocol 1*"* E.H.R.L.R. 2008, 4, 541-545, and Mark Stallworthy, "Human rights challenges and adequacy of state responses to natural disaster", Env. L. Rev. 2009, 11(2), 123-132, for a perspective on European human rights law in this context. See S. Ford "Is the Failure to Respond Appropriately to a Natural Disaster a Crime Against Humanity? The Responsibility To Protect And Individual Criminal Responsibility In The Aftermath Of Cyclone Nargis" 38 Denv. J.Int'lL.& Pol'y (2010) 227, for a criminal law perspective.
[50] ICESCR Article 11
[51] *Supra* n.45
[52] CEDAW Article 14(2)
[53] Rebecca J. Barber, "Protecting the right to housing in the aftermath of natural disaster: standards in international human rights law", I.J.R.L. 2008, 20(3), 432-468
[54] ICESCR Article 11
[55] ICCPR Article 2
[56] See subsequent discussion regarding the various provisions of the ICESCR in Part VI.
[57] http://news.bbc.co.uk/1/shared/spl/hi/americas/05/katrina/html/
[58] Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee (2006) U.N. Doc. CCPR/C/USA/CO/3 (2006). See also Jason David Rivera, DeMond Shondell Miller, "Continually Neglected: Situating Natural Disasters in the African American Experience", Journal of Black Studies, Vol. 37, No. 4, Katrina: Race, Class, and Poverty (Mar., 2007), pp.502-522.
[59] Concluding Observations *Ibid* para.26

under the reconstruction plans, thereby specifically compromising Articles 6 and 26 of the International Covenant on Civil and Political Rights (ICCPR.)[60] The UNHRC reminded the United States to review its practices and policies to ensure the full implementation of its obligation to protect life and of the prohibition of discrimination, whether direct or indirect.[61] Similarly, in its 2013 Concluding Observations on the third periodic report of Japan,[62] the U.N. Committee on Economic, Social and Cultural Rights (UNCESCR) noted the complexity of relief response to the consequences of the 2011 Great East Japan Earthquake and tsunami and the Fukushima nuclear accident.[63] However, the Committee also expressed concern that the specific needs of disadvantaged and vulnerable groups, such as older persons, persons with disabilities, and women and children, were not sufficiently met during the evacuation and in the rehabilitation and reconstruction efforts, thereby raising concerns as to the full observance of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) Articles 11, 2(2).[64]

Thus, it is clear that disasters present human rights challenges, and that, absent any relevant derogations, human rights law continues to operate during disasters. As the Special Rapporteur noted in his preliminary report, states are under a "permanent and universal obligation to provide protection to those on their territory under the various international human rights instruments and customary international human rights law."[65] These are obligations principally attaching to disaster-affected states and as noted earlier, reflect the classic model of verticalized "host" state protection. Indeed, disaster victims' rights to request and receive assistance are outlined in the 2003 Bruges Resolution,[66] as is the affected state's primary responsibility in this regard.[67] Other documents such as the 2007 IFRC Guidelines for The Domestic Facilitation and Regulation of International Disaster Response and Initial Recovery Assistance (2007 IFRC/IDRL Guidelines), the 2006 Convention on the

[60] *Ibid*

[61] *Ibid*
[62] Committee on Economic, Social and Cultural Rights, Concluding Observations on the Third Periodic Report of Japan, adopted by the Committee at its fiftieth session (29 April-17 May 2013), E/C.12/JPN/CO/3
[63] *Ibid* Paragraph 24
[64] *Ibid*
[65] *Supra* n.1830, *Preliminary Report*, para.25
[66] Article II(2) 2003 resolution of the Institut de Droit International on *Humanitarian Assistance* (2 September 2003*)* (hereinafter Bruges Resolution)
[67] *Ibid* Article III Bruges Resolution

Rights of Persons with Disabilities (CRPD)[68], and the 1989 Convention on the Rights of the Child (CRC),[69] are often cited as evidencing an *emerging* right of individuals to receive and request humanitarian assistance.[70] However, existing international human rights law seems general and blunt, and when it comes to the more specialized IDRL provisions, even experienced practitioners in the field of disasters acknowledge how uncertain and precariously authoritative the rules in this area can be.[71]

III. INTERNATIONAL DISASTER RESPONSE LAW

The core of International Disaster Response Law (IDRL) has been defined as "[t]he laws, rules and principles applicable to the access, facilitation, coordination, quality and accountability of international disaster response activities in times of non-conflict related disasters, which includes preparedness for imminent disaster and the conduct of rescue and humanitarian assistance activities."[72] However, IDRL has been described as a patchwork area, yearning for structure and organization.[73] As the Special Rapporteur noted in his preliminary report in 2006, while there are two international agreements dealing specifically with disaster relief,[74] a number of multilateral agreements and bilateral agreements are also relevant.[75] A large number of memoranda of understanding and headquarters agreements, typically entered into between IGOs and NGOs and states, are also relevant, as is a significant amount of soft law including resolutions of the U.N. General Assembly (notably UNGA Res 46/182 of 1991), U.N. Economic and Social Council, the International Committee of the Red Cross (ICRC), political declarations, codes of conduct, operational guidelines, and internal U.N. rules and regulations.[76]

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[68] Article 11
[69] Article 24(4) regarding the (progressive) attainment of the highest standard of child health). See generally Articles 4, 17, 22, 24
[70] J.Benton Heath 'Disasters, Relief and Neglect: the Duty to Accept Humanitarian Assistance and the Work of the International Law Commission' 43 N.Y.U.J.Int'l.L.&P. (2011) 419, 440
[71] *Supra* n.18 *Preliminary Report* para.54
[72] *Supra* n.24, p.14, *supra* n.7, A/61/10, Annex III. para.12
[73] Craig Allan & Thérèse O'Donnell, 'An Offer You Cannot Refuse? Natural Disasters, the Politics of Aid Refusal and Potential Legal Implications' Amsterdam Law Forum 5(1) (2013) 36-63, II.1
[74] 1986 Convention on Assistance in the case of a Nuclear Accident; 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations.
[75] Supra n. 18 *Preliminary Report* p.150
[76] *Supra* n.7, Annex III paras. 12-15

The desire to codify and cohere IDRL has been evident for some time.[77] However, despite the establishment in 1927 of the International Relief Union and an attempt at a treaty in 1984,[78] no systematization has until now occurred.[79] Given the miscellaneous and unstructured nature of IDRL, there was a perceived need for such systematization from among the ranks of the disaster relief community, both within and beyond the United Nations.[80] As well as having a focus upon disaster prevention, the ILC saw itself as assisting in the establishment of a regulatory framework which would substantially expedite technical arrangements of assistance in the event of a disaster.[81]

The ILC project aims to remedy legal uncertainties by producing a text to serve as a "basic reference framework for a host of specific agreements between various actors in the area, including, but not limited to, the United Nations."[82] The work would be primarily limited to the codification of existing norms and rules, with emphasis on progressive development[83] "as appropriate."[84] No unnecessary developments regarding new norms were envisaged as being undertaken.[85] The project was also to be guided by a number of core principles.[86] These included the principle of humanity ("[h]uman suffering is to be addressed wherever it exists, and the dignity and rights of all victims should be respected and protected")[87] and the principle of impartiality (whereby the provision of humanitarian assistance is based on needs assessment).[88] The needs of the particularly vulnerable were to be especially taken into

[77] *Supra* n.1830, *Preliminary report,* paras. 14-20
[78] Draft Convention on Expediting the Delivery of Emergency Assistance, U.N. Doc. No. A/39/267/Add.2 – E/1984/96/Add.2 (June 18, 1984) See the Protection of persons in the event of disasters Memorandum by the Secretariat A/CN.4/590 and David Fisher, The Law of International Disaster Response: Overview and Ramifications for Military Actors in Michael Carsten (ed.) *Global Legal Challenges: Command of the Commons, Strategic Communications and Natural Disasters* (U.S. Naval War College, International Law Studies, Vol.83, (2007) p.293 at p.295.
[79] *Supra* n.7, A/61/10 Annex III paras. 18-23 for detail.
[80] *Supra* n.7, A/61/10 Annex III para.2
[81] *Supra* n.7, A/61/10 Annex III, para.8
[82] *Supra* n.7, A/61/10, Anne III para.24, p.475
[83] Supra n. 1830, *Preliminary report* para.55 & ILC *Report of the International Law Commission on the work of its sixty-third session* UN Doc. A/66/10 para.285.
[84] *Ibid Preliminary report* para.55
[85] *Supra* n.7 A/61/10 Annex III paras.24-25
[86] *Supra* n.7 A/61/10, Annex III para.34.
[87] *Ibid*
[88] *Ibid*

account.[89] Such core principles could be seen to reflect much of the content of international human rights law and the law of armed conflict.[90]

IV. THE RATIONALE OF THE ILC PROJECT ON THE PROTECTION OF PERSONS IN DISASTERS

The ILC justified the inclusion of the disasters-project on its agenda on the basis that the topic would fall within the category of "new developments in international law and *pressing concerns of the international community as a whole*"[91] which again stressed the globally-inclusive nature of the project to protect disaster-stricken populations.

The Special Rapporteur's chosen excerpt from Vattel[92] might be considered a highly selective invocation of his writings.[93] Nevertheless, his particular understanding of Vattel seems clear enough insofar as it stresses the importance of the international community's duty of assistance to populations *in extremis*. Much of the ILC's and Special Rapporteur's[94] analysis rejects particularism and circumnavigates a central notion of solidarity, best described as the international community's desire to assist stricken communities.[95]

In a passage from one of his early reports, the Special Rapporteur made a bold and attractive statement which suggested the possibility of not merely an international duty of assistance, but a transnational duty which transcended and bypassed the nation state and in a way updated Vattel. He declared as follows:

> The underlying principles in the protection of persons in the event of disasters are those of solidarity and cooperation, both among nations and *among individual human beings*. It is in the solidarity inspired by human suffering

[89] *Supra* n.8330, A/66/10, p.254
[90] *Supra* n.18, *Preliminary Report* paras.22 and 25
[91] *Yearbook ...1997,* vol.II (Part Two), pp.71-72, para.238 referenced s*upra* n.7, A/61/10 Annex III, para.1 (emphasis added).
[92] *Supra* n.30, *Preliminary Report*
[93] The selection could perhaps be set more helpfully in the context of Vattel's supreme theme of sovereignty and consent, and against Grotius' "moral order." *See* Hersch Lauterpacht, 'The Grotian Tradition in International Law' 23 British Yearbook of International Law (1946) 1. See John T. Parry, 'What is the Grotian Tradition in International Law?', 35 U. Pa. J. Int'l L. 299 (2014), for an account which critiques this tradition.
[94] Fourth report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, UN Doc. A/CN.4/643 and paras .78 and 84.
[95] *Second report on the protection of persons in the event of disasters* by Eduardo Valencia-Ospina UN Doc. A/CN.4/615, paras. 50-70

> that the Commission's mandate finds *telos*, as an expression of our common heritage in a global context.[96]

This imperative of solidarity might be described as the ideology of the ILC draft Articles and it seems to broadly reflect the extracts from Vattel's writings.[97] The commentary to draft Article 1 states that the orientation of the draft articles is primarily focused on the protection of persons whose life, well-being and property are affected by disasters.[98] As noted already, draft Article 2 [2] focuses upon the importance of an adequate and effective response which simultaneously meets the needs of stricken persons and respects their rights.[99]

In his referencing of Vattel, the Special Rapporteur was invoking a proclamation of solidarity so strong that the Westphalian sovereign preserve was to be overtaken by humanitarian considerations. Such considerations, suggesting a duty of care, would transcend borders.[100] Thus, a fairly simple notion of universal international comradeship, which might be termed "transnational solidarity," at least ideologically if not practically, was being proclaimed. The world was being viewed as a totality and human inter-connectedness was being recognized. Not only was victims'-identity downplayed, responsibility for alleviating their plight was being de-territorialized. In terms of which entities might owe human rights obligations, this was a potentially revolutionary re-understanding of cooperative obligations. Further, any notion of particularism, or any version of identity politics was implicitly rejected in favor of humanitarianism which focused upon assisting vulnerable victims. In the ILC Draft articles, the ideology materialized in the provisions which stressed duties of international cooperation,[101] significantly restricted a stricken state's capacity to refuse aid,[102] and afforded an opportunity to external actors to offer aid and assistance.[103] However, in relation to the last of these, this is a right, and not a duty, to offer; a right which may or may not be exercised. Thus, the universal need for assistance is re-particularized into individual

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[96] *Ibidpara*.50 (emphasis added).
[97] *Supra* notes32-33
[98] *Supra* n.16, A/69/10, pp.90-91
[99] *Supra* n.16, A/69/10, p.91

[100] See Wilfried Hinsch and Markus Stepanians 'Sever Poverty as a Human RightsV iolation' in *Real World Justice: Grounds, Principles, Human Rights, and Social Institutions* edited by A. Follesdal, T. Pogge (Springer, 2005) 295 at p.312, for an interesting discussion on such ideas.
[101] Draft Article 8 [5]
[102] Draft Article 14 [11]
[103] Draft Article 16

discretion regarding the offer. This seems a retrograde step given the Vattelian proclamation. In trying to understand this turn, it is worth examining how the ILC approaches human rights.

V. THE ILC PROJECT'S RIGHTS-BASED APPROACH

As the Special Rapporteur noted, only two international human rights instruments are expressly applicable in the event of disasters and both are moderate in their terms.[104] Article 11 of the CRPD does not refer to a right to protection: rather, the relevant provision is formulated as an obligation on the contracting state to ensure protection and safety in the occurrence of a natural disaster.[105] Similarly, the African Charter on the Rights and Welfare of the Child explicitly sets forth the obligation to ensure that a child receives appropriate protection and humanitarian assistance.[106] Given their limited scope, the Special Rapporteur gave a cautious estimation of these provisions' impact and saw them not as providing individual rights, but rather setting public order standards for states, informed by the principle of humanity.[107] He maintained that a rights-based approach was the appropriate one for the draft ILC Articles.[108]

A rights-based approach is not necessarily the same as an approach which itself directly endows rights.[109] Indeed draft Article 6 [8] is envisaged as acting as an *operationalizing mechanism* for existing human rights.[110] The Office of the High Commissioner for Human Rights has defined a human rights-based approach, in the particular context of development, as follows:

> [a] conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyze inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.[111]

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[104] *supra* n.130 *Preliminary Report,* paras.25-26
[105] CRPD, supra n. 68.and associated text
[106] Article 23(1) & (4)
[107] *supra* n.18 *Preliminary Report,* para.26
[108] *supra* n.1830 *Preliminary Report*, *supra* n.15 para.26
[109] See for example the terms of the ICCPR, ICESCR and CRPD which directly endow rights.
[110] *Supra* n.16 A/69/10, p.102
[111] OHCHR *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, 2006, p.15, available at http://www.ohchr.org/Documents/Publications/FAQen.pdf (last visited March 31, 2016). See also http://hrbaportal.org/faq/what-is-a-human-rights-based-approach (last visited March 31, 2016)

A rights-based approach has been mainstreamed into diverse international initiatives such as sustainable development, children-focused programs, conflict resolution, and poverty reduction strategies. What is clear from the above definition is that this approach displays a clear desire to identify the underpinning systemic causes of vulnerability, inequality, and abuse. As the United Nations Children's Emergency Fund (UNICEF) maintains, "[e]quity cannot be effectively pursued outside of a human rights framework, just as human rights cannot be realized so long as inequity persists."[112] Excavating underlying causes is crucial, and human rights norms and standards are the primary frame of reference for a rights-based approach.[113] Such an approach characterizes the rights of disaster-stricken populations as follows:

> The title . . . [of the project] . . . also imports a distinct perspective, that is, of the individual who is a victim of a disaster, and therefore suggests a definite rights-based approach to treatment of the topic. The essence of a rights-based approach to protection and assistance is the identification of a specific standard of treatment to which the individual, the victim of a disaster, in casu, is entitled. To paraphrase the Secretary-General,[114] a rights-based approach deals with situations not simply in terms of human needs, but in terms of society's obligation to respond to the inalienable rights of individuals, empowers them to demand justice as a right, not as a charity, and gives communities a moral basis from which to claim international assistance when needed.[115]

Thus, a rights-based approach presumes the existence of rights-holders and in recalling notions of justice, rights, and entitlements, clearly complements an ideology of solidarity. It rejects welfarist or charitable approaches to victim-assistance and side-lines the historical mind-set of *noblesse oblige*. In the humanitarian field, there has recently been an unfortunate misunderstanding of rights-based approaches as being those which reject impartially-oriented, needs-based assistance in favor of implying a contingency in aid and assistance support.[116] That is certainly the case for certain organizations which have imported notions of conditionality into support programs, thereby implying that there exist deserving and

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[112] UNICEF Human Rights-based Approach to Programming http://www.unicef.org/policyanalysis/rights/index_62012.html (last visited March 31, 2016)

[113] See also the UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming (the Common Understanding) (2003)

[114] UN Secretary-General Official Records of the General Assembly, Fifty-third Session, Supplement No.1(A/53/1), para.174.

[115] *supra* n.1830, *Preliminary Report*, para. 12.

[116] F. Fox, 'New Humanitarianism: Does it provide a moral banner for the 21st century?', *Disasters* 2001-25(4), pp. 275

undeserving victims.[117] This understanding of rights-based assistance has been roundly rejected, notably in the landmark 2007 IFRC/IDRL Guidelines which stress the importance of a needs-based approach[118] which is fully supported by the ILC Draft Articles.[119] Thus, what the draft Articles mean by a rights-based approach to disasters is the use of the framework of human rights law as a key reference point for understanding the rights of stricken persons and the obligations of states, rather than aid-conditionality. If a rights-based approach re-affirms the rights of stricken populations to have their needs responded to, upon whom does this duty or obligation, as human rights law would understand it, fall according to the draft Articles? This Article will next examine the responsibilities of disaster-affected states and of the international community.

VI. THE ILC PROJECT AND RESPONSIBILITIES FOR RIGHTS PROTECTION

A. Disaster-affected states' responsibilities

In the first instance, obligations regarding rights protection would fall logically upon the jurisdictionally-relevant state, that is the disaster-affected state.[120] Indeed the ILC draft Articles are clear that, by virtue of its sovereignty, such a state has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.[121] That state also has the primary role in determining the direction, control, coordination, and supervision of such relief and assistance.[122] In the event that its national response capacity is exceeded, a stricken-state has a duty to seek assistance from other states, the United Nations, other competent IGOs, and relevant NGOs.[123] While the consent of the affected state is a requirement for the provision of external assistance, such consent is not to be "arbitrarily" withheld[124] and it should facilitate the prompt and effective provision of external assistance.[125] Thus, an affected state should provide appropriate aid and assistance to victims and, in the event that it is overwhelmed, it should seek external help. The due diligence duty

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[117] *Ibid*
[118] 2007 IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (hereinafter 2007 IFRC/IDRL Guidelines), Part. I(4). *See* the 'Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance' http://www.ifrc.org/docs/IDRL/MODEL%20ACT%20ENGLISH.pdf (last visited April 1st, 2016). See http://www.ifrc.org/en/what-we-do/idr_l/idrl-guidelines/new-legislation-adopted-on-idrl/ (last visited April 1st, 2016), for guidance on domestic legislation reflecting the guidelines.
[119] Draft Article 2 Commentary, para.2,*supra* n.16, A/69/10, p.91
[120] Draft Article 12 [9]
[121] *Ibid*
[122] Draft Article 12(2) [9]
[123] Draft Article 13 [10]
[124] Draft Article 14 [11]
[125] Draft Article 17 [14]

for affected states to provide and seek assistance relies upon human rights practice for much of its authority.[126] ICESCR Article 12 ordains a fundamental right to enjoy the "highest attainable standard of health."[127] ICESCR Article 11 contains a right to food (which clearly links with the right to life) for which states are responsible both directly and indirectly.[128] UNCESCR General Comment 12 prohibits states from preventing access to humanitarian food aid in internal conflicts or "other emergency situations."[129] The clear message is that food and health should never be manipulated.

B. Disaster-affected states' interactions with the international community

In the case of states, the 2008 Memorandum prepared by the Secretariat, which outlined the law relating to disasters, noted as follows:

> Notwithstanding assertions of the existence of a generalized "right to humanitarian assistance", . . . such position, to the extent that it imposes a "duty" (as opposed to a "right") on the international community to provide assistance is not yet definitively maintained as a matter of positive law at the global level. . . .
>
> Positive obligations to provide assistance, upon request, are more typically the subject of specific agreements.[130]

The Memorandum did note that a more definitive obligation existed in the context of the responsibilities of international organizations.[131] However, this was possibly ascribable to the nature and mandates of those organizations, which, in some cases, specifically include the provision of assistance to member states.[132] By its references to the affected state's responsibility and the interest of the international community in the event of a disaster, the

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[126] ICESCR Articles 11,12 and UNCESCR General Comment 12.

[127] E.D.Kinney, 'The International Human Right to Health: What Does This Mean for Our Nation and World?' 34 Indiana L.Rev (2000-2001) 1457, 1469.

[128] GC12, para.15 discussed *infra* States may be responsible not only for themselves but also, for example, for insufficiently regulated entities such as NGOs.

[129] UN Committee on Economic, Social and Cultural Rights General Comment 12 'The right to food', UN Doc. E/C.12/1999/5 (12 May 1999) (GC12) para. 19

[130] Protection of persons in the event of disasters Memorandum by the Secretariat A/CN.4/590, para. 61. For example, in the 1999 Food Aid Convention, parties committed themselves in advance to providing assistance to specified categories of States in predetermined amounts. The Memorandum also notes that some treaties also contain more limited obligations on states receiving requests. For example, the Tampere Convention requires a state party to respond to a request directed to it, inter alia, by indicating "whether it will render the assistance requested, directly or otherwise, and the scope of, and terms, conditions, restrictions and cost, if any, applicable to such assistance." Tampere Convention, *supra* n.74.

[131] *See, e.g.*, *supra* n.66, Bruges Resolution sect. V, para. 2 ("Intergovernmental organisations shall offer humanitarian assistance to the victims of disasters in accordance with their own mandates and statutory mandates").

[132] For example, the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency provides that the International Atomic Energy Agency (IAEA) "shall respond . . . to a . . . request for assistance in the event of a nuclear accident or radiological emergency." Article 2(6).

ILC approach reflects many existing (soft but important) IDRL provisions which consider both the primacy of the internal response and the *possibility* of external assistance.[133] In General Assembly Resolution 46/182[134] and the 2007 IFRC/IDRL Guidelines,[135] the issue of disaster aid and assistance can be immediately internationalized upon a disaster's occurrence. The 2003 Bruges Resolution outlines the very diverse range of actors from whom relief may be sought[136] and the 2007 IFRC/IDRL Guidelines stress the duties of affected states to seek international and/or regional assistance from a variety of actors.[137] The important Oslo Guidelines have a similar provision.[138] Although there are variations between the IDRL instruments as to which are the relevant external entities to be asked for help, there is nevertheless a clear expectation that external assistance exists and that it will be sought.[139]

In relation to the existing framework of more general international human rights protection, the ILC proposals also seem to fit well with the expectation that all states will respect, protect, and fulfill human rights' protection. ICESCR Article 2(1) refers to parties' obligations to take steps at the *international* level to secure Covenant rights with more specific cooperative obligations being mentioned in Articles 11, 15, 22 and 23,[140] and in UNCESCR General Comments 2,[141] 7,[142] 14[143] and 15.[144] UNCESCR General Comment 3 emphasizes that resources include those available internally and from the international community.[145] UNCESCR has also maintained that if individuals/groups cannot enjoy the right of food-access by available means, states have to fulfil that right directly.[146] A state would only avoid findings of a violation by demonstrating both its inability to carry out its

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[133] The 2007 IFRC/IDRL Guidelines note that states, with appropriate regional/international organizational *support,* should devote adequate resources to the legal, policy and institutional disaster frameworks for prevention, mitigation, preparedness, relief and recovery. *Supra* n.118, 2007 IFRC/IDRL Guidelines, Part II Sec.8.
[134] Strengthening of the coordination of humanitarian emergency assistance of the United Nations, (December 19, 1991) A/RES/46/182, Paragraph 5
[135] *Supra* n.118, 2007 IFRC/IDRL Guidelines Part I 3(2)
[136] These actors include competent IGOs, third States, group members, local/regional authorities and national or international organizations. Bruges Resolution, supra n.66.
[137] *Supra* n.118, 2007 IFRC/IDRL Guidelines, Part I, 3(2)
[138] Guidelines on the Use of Foreign Military and Defence Assets in Disaster Relief, para.58
[139] *Ibid* footnotes 125-133 inclusive and associated text.
[140] ICESCR Articles 2(1), 11, 15, 22, 23.
[141] GC2'International technical assistance' (E/1990/23)
[142] GC7 'Forced evictions and the right to adequate housing '(E/1998/22)
[143] GC14 'The right to the highest attainable standard of health' (E/C.12/2000/4)
[144] GC15 'The right to water' (E/C.12/2002/11)
[145] UNCESCR General Comment 3 'The nature of states parties' obligations' (E/1991/23) paras.10 & 13
[146] *Supra* n.129, GC12 paras. 6 & 15 respectively. See Dinah Shelton 'The Duty to Assist Famine Victims' 70 Iowa Law Review (1985) 1309, 1312, for an early insight into the possibilities of ICESCR Article 11.

obligations unilaterally *and* that it had "unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food."[147] However, UNCESCR has also suggested a joint *and* individual responsibility of states to contribute in emergencies to the maximum of their capacities[148] which suggests an intertwined obligation of assistance. This will be discussed further below.

This imperative of meeting a vulnerable population's needs in respect of aid and relief reflects international humanitarian law (IHL).[149] Rule 55 of the 2005 ICRC IHL Customary Study, Article 23 of Geneva Convention IV (GC IV), Article 70(2) of Additional Protocol I, Article 18(2) of Additional Protocol II, and U.N. Security Council Resolution 1296 (2000) all indicate a customary obligation of rapid and unimpeded passage of relief for civilians in need in all armed conflicts.[150] The ICRC customary study maintained that host states must not refuse assistance from humanitarian organizations "on arbitrary grounds."[151] As regards IHL treaty law, Article 30 GCIV allows protected persons to make aid-applications to the ICRC, national associations and any assisting organization.[152] Article 38 provides that protected persons should be enabled to receive relief sent to them.[153] Occupying powers are generally prohibited from diverting relief consignments from their intended purposes.[154] National Red Cross and other relief societies should "be able to pursue their activities" without obstruction or interference.[155] Under Article 59 GC IV, if an occupied territory is "inadequately supplied" the occupying power shall agree to relief schemes, facilitating them "by all the means at its disposal."[156] Principle 3 of the 1993 San Remo Guiding Principles on the Right

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[147] *Supra* n.129, GC12 para.17.
[148] *Supra* n.129, GC12 para 38 and GC14 (*supra* n.143 regarding Art 11 of the Covenant)', E/C.12/2000/4 (11 August 2000) para 40.
[149] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949,75 UNTS 287 Articles 23 30, 38, 59, 60, 61,62, 63, International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 Art. 70(2) and International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Article 18(2) of Additional Protocol II.
[150] Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian law Vol I: Rules* CUP: Cambridge, 2005) (ICRC Study), Rule 55, GCIV Art.23, API Art. 70(2), APII Article 18(2), UNSC 1296(2000).
[151] *Ibid* ICRC Study, 197
[152] *Supra* n.149
[153] GCIV, Article 38.
[154] GCIV Article 60, see also Articles 61 & 62.
[155] GCIV Article 63
[156] *Supra* n.149

to Humanitarian Assistance[157] states that a right to humanitarian assistance may be invoked when essential humanitarian needs in emergencies are unmet, and their abandonment threatens human life or gravely offends human dignity.[158] In citing traditional IHL principles,[159] the ILC Special Rapporteur was conscious of their specialized nature but nevertheless considered that they could apply beyond armed conflicts to non-armed conflict disaster victims[160] by seeing 'humanity' as providing a meeting point between humanitarian and human rights law.[161] While this approach of legal transplantation has been criticized,[162] it re-emphasizes the underlying ideology of the ILC draft Articles: the putting aside of politics for civilian assistance.

The Special Rapporteur argues that to realize ICESCR rights, states must cooperate internationally.[163] That is undoubtedly true, but it is not a one-way street only for disaster-stricken states. Given the thrust of the ILC Articles towards international cooperation it is important now to consider what the duties or obligations of non-stricken, external actors might be.

C. Responsibilities of the international community–cooperation and offering assistance

i. Co-operative duties

The duty to cooperate is a longstanding and rather general one in international law, although it is not clear that it necessarily entails an obligation of cooperation.[164] Wolfrum suggests that cooperation "describes the voluntary coordinated action of two or more states which takes place under a legal regime and serves a specific objective" and "to this extent marks the

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[157] These guiding principles were drafted by the International Institute of Humanitarian Law. Guiding Principles on the Right to Humanitarian Assistance' 33 (297) International Review of the Red Cross 1993, 521.

[158] All local possibilities and domestic procedures must have been exhausted within a reasonable time without vital needs being satisfied, leaving no other possibility to ensure the prompt provision of supplies and services essential for affected persons. Id. See also Principle 6, which notes that in the event of refusal of either offers of assistance, or access to the victims when humanitarian access is agreed upon, state and organizations concerned may "undertake all necessary steps to ensure such access" according to humanitarian and human rights principles.

[159] First Geneva Convention 1864, Saint Petersburg Declaration 1868, Hague Conventions with respect to the Laws and Customs of War on Land, the Martens Clause, Common Article 3 of the Geneva Conventions

[160] ILC, Report of the International Law Commission on the work of its sixty-second session, UN Doc. A/65/10, para.327

[161] *Ibid* A/65/10, para.304, although see also the ICRC's caution, para.309. See also ILC, *Report of the International Law Commission on the work of its sixtieth session*, UN Doc. A/63/10 at para.223.

[162] Craig Allan and Therese O'Donnell **"**A Call to Alms?: Natural disasters, R2P, duties of cooperation and uncharted consequences" 17(3) J.C. & S.L. (2012) 17(3), 337-371, pp.361-362

[163] *Supra* n.94, *Fourth report* para.61

[164] R. Wolfrum in Rudolf Bernhardt (ed.*), Encyclopedia of Public International Law*, Vol. II (1995), 1242-1247,

effort of States to accomplish an object by joint action, where the activity of a single State cannot achieve the same result."[165] This latter point seems particularly pertinent in the case of natural disasters. The duty to cooperate can be operationalized through bilateral diplomacy, regional institutional cooperation, cooperation with the United Nations and NGOs, and even unilateral or multilateral sanctions to alter a recalcitrant state's behavior.[166] Draft Article 8 [5] of the ILC draft Articles states that "[i]n accordance with the present draft Articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of the Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations."[167] Draft Article 8 [5] captures the particular spirit of the ILC project which is to overcome unnecessary obstacles which might hamper the prompt provision of humanitarian assistance.[168] It reflects the terms of the key General Assembly Resolution 46/182, which noted that the magnitude and duration of emergencies may overwhelm affected states, thereby necessitating international cooperation to strengthen the response capacity of those stricken.[169] An obvious example of simple international cooperation would be the waiving by states of various normal customs and visa requirements.[170]

All of the draft Articles should operate in concert with each other.[171] In his fifth report, the Special Rapporteur recognized that the existence of a right of external actors to offer assistance (draft Article 16 [12] to be discussed subsequently in Part VI.C.ii.) brought to the fore how the cooperative duty might be delineated. He commented as follows:

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[165] *Ibid* p.1242. See Lori Fishler Damrosch, 'Obligations of Cooperation in the International Protection of Human Rights' in J. Delbrück (ed.) *International Law of Cooperation and State Sovereignty,* Proceedings of an International Symposium of the Kiel Walther Schücking Institute of International Law (2001), for specific application in the field of human rights.
See Articles 1(3), 55 & 56 of the UN Charter, Preamble of the Universal Declaration of Human Rights, 1948, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations General Assembly Resolution 2625 (XXV) of 24 October 1970, Annex, para.1, ICESCR Articles 11, 15, 22 and 23 and the aforementioned UNCESCR General Comments 2, 3, 7,14 and No 15 (E/C.12/2002/11), for general provisions regarding duties of cooperation.
[166] Jost Delbrück, 'The International Obligation to Cooperate – an Empty Shell or a Hard Law Principles of International Law? – A Critical Look at a Much Debated Paradigm of Modern International Law', in Hestermeyer, König, Matz-Lüc, Röben, Seibert-Fohr, Stoll and Vönecky (eds.) *Coexistence, Cooperation and Solidarity in International Law* Vol. 1 (Martinus Nijhoff, Leiden, Boston, 2012), p.3 at p.7
[167] *Supra* n.16, A/69/10, p.105
[168] See the commentaries to draft Articles 17 and 18 which give examples of potential obstacles, *supra* n.16, A/69/10, p.132
[169] *Supra* n.134, para.5
[170] Indeed this is specifically referenced in draft Article 17 [14]
[171] *Supra* n.16, A/69/10, Commentary to draft Article 1 pp.90-91

> …the nature of cooperation has to be shaped by its purpose, which in the present context is *to provide* disaster relief assistance. Seen from the larger perspective of public international law, *to be legally and practically effective* the States' duty to cooperate in the provision of disaster relief must strike a fine balance between three important aspects. First, such a duty cannot intrude into the sovereignty of the affected State. Second, the *duty has to be imposed on assisting States as a legal obligation of conduct*. Third, the duty has to be relevant and limited to disaster relief assistance, by encompassing the various specific elements that normally make up cooperation on this matter.[172]

However, a duty to provide assistance found no support in the "overwhelming majority" of written submissions by states to the UNGA Sixth Committee.[173] Thus, the Special Rapporteur reaffirmed that the duty of cooperation did not currently include a legal duty for states to *provide* assistance when requested by an affected state.[174] His terminology of "currently include" might suggest his sympathy for the view that one day it would so include, despite many states' resistance. One ILC delegate thought that a solution might lie in drawing up an additional article regarding a duty to give "due consideration" to requests for assistance from an affected state.[175] This might progressively suggest the need for the requested state to fulfill its duty to cooperate in good faith. Obviously, however, this option leaves much discretion for non-affected states and room for endless debate as to the requirements and limits of "due consideration." Ultimately, the Austrian Government's comments, made during consultations on the draft Articles, articulate the current dominant view as follows:

> Austria emphasizes that draft article 8 must not be interpreted as establishing a duty to cooperate with the affected state in disaster relief matters including a duty on states to provide assistance when requested by the affected state. Austria takes the view that such a duty does not exist and should not be established. It would contradict the basic principle in the field of international disaster relief, namely the principle of voluntariness.[176]

Thus, it would seem that draft Article 8 recognizes the rights of stricken-populations only in rather abstract terms as far as external actors' actions are concerned.[177] The more bespoke

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[172] Fifth report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, UN Doc. A/CN.4/652 para 81 (emphasis added).
[173] ILC, *Report on the work of its sixty-fourth session*, UN Doc. A/67/10 (2012) para 57; *Ibid* Fifth Report para 52. See also *supra* n.83 A/66/10, (2011) para.283
[174] *Ibid* Fifth Report para 68.
[175] See statement by Mr Hassouna in ILC, *Provisional summary record of the 3139th meeting*, UN Doc. A/CN.4/SR.3139 (14 August 2012) 4
[176] ILC Draft Articles on the Protection of persons in the event of disasters, Comments by Austria, 11 January 2016, available at http://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/pop_austria.pdf&lang=E
[177] See Article 8 and its associated commentary *supra* n.16, A/69/10 pp.105-108

provision of draft Article 16 might be expected to deliver something more concrete in terms of international camaraderie towards disaster-affected populations.

ii. The right to offer assistance

The ILC was in agreement with the Special Rapporteur's view that offering assistance in the international community is the practical manifestation of solidarity.[178] Thus, ILC draft Article 16 declares the legitimate interest of the international community, states and organizations when disaster strikes.[179] It states that "[i]n responding to disasters, States, the United Nations, and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State."[180]

As a preliminary aside, draft Article 16 is interesting in that it acknowledges the role of NGOs and their capacity to make offers of assistance.[181] The Special Rapporteur considered non-state actors part of "the *acquis* of the international law of disaster response"[182] and indeed as noted, their role is acknowledged in various IHL provisions.[183] The 2007 IFRC/IDRL Guidelines define "assisting actors" as including humanitarian organizations, states, foreign individuals, and private companies providing charitable relief, or other foreign entities responding to a disaster on the territory of the affected state or sending in-kind or cash donation.[184] Principle 5 of the San Remo Principles acknowledges their rights, and, providing certain conditions are complied with, notes that their exercise of the right of offering assistance should not be regarded as an unfriendly act or interference.[185] However, draft Article 4 is narrower in its understanding of what it terms "other assisting actors" and it

[178] *Supra* n.83, A/66/10, para.279
[179] *Supra* n.830, A//66/10, para.277
[180] International Law Commission (ILC), *Draft Articles on the Protection of Persons in the Event of Disasters supra* n.16, A/69/10 p.129.
[181] *Ibid*
[182] *Fourth report*, *supra* n.94, A/CN.4/643 para.97, despite occasional concerns regarding the authenticity of their motives and the dangers of 'open door' policies, see K.Beeckman 'International Response to Non-armed Conflict Disasters: legal challenges encountered in light of the current regulatory framework' 25(4) Refugee Survey Quarterly (2006) 129 134-135. However, see potential safeguards mentioned in 2007 IFRC/IDRL Guidelines, *supra* n.118, 'Introduction, p.6
[183] *Supra* n.149 and associated text

[184] *Supra* n.118, 2007 IFRC/IDRL Guidelines, Introduction 2.14
[185] International Institute of Humanitarian Law, *Guiding Principles on the Right to Humanitarian Assistance* (1993) (San Remo Principles)

notably excludes individuals.[186] Further, NGOs are not to be understood as being in possession of the same rights[187] or subject to the same obligations as states and IGOs.[188] The subsequent analysis regarding potential duties of assistance is primarily focused upon these other actors, in particular, states.

While he drew inspiration from IHL, as can be seen from the following detail, the Special Rapporteur also cast a wider legal net in relation to offers of assistance by third states. [189] Article 3 of the Convention for the Pacific Settlement of International Disputes (Hague I) 1907 established the right of third parties to offer their assistance in the event of an international dispute.[190] Similarly, Article 2(4) of the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency notes that "States Parties shall, within the limits of their capabilities, identify and notify the Agency of experts, equipment and materials which could be made available for the provision of assistance to other States Parties in the event of a nuclear accident or radiological emergency."[191] Two key regional treaties were of particular interest.[192] Articles I and II of the 1991 Inter-American Convention to Facilitate Disaster Assistance refer to offers and acceptance of assistance from one state party to another.[193] Article 3(1) of the 2005 Agreement of ASEAN on Disaster Management and Emergency Response Agreement also acknowledges the possibility of externally-provided assistance.[194] Further, in Article 3(3) of this treaty it is stated that "[t]he Parties shall, in the spirit of *solidarity and partnership* and in accordance with their respective needs, capabilities and situations, strengthen cooperation and co-ordination to achieve the objectives of this

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[186] '(c) "other assisting actor" means a competent intergovernmental organization, or a relevant non-governmental organization or any other entity or individual external to the affected State, providing assistance to that State at its request or with its consent;…' *Supra* n.16, A/69/10, p.95
The Czech Government commented on the exclusion of individuals, noting that it contrasted with the position in the 2005 ASEAN Agreement on Disaster Management and Emergency Response Agreement and the Oslo Guidelines. Comments and Observations of the Czech Republic (1 January, 2016) http://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/pop_czech_republic.pdf&lang=E

[187] The original draft Article was re-drafted to clarify this, but see Austria's remaining concerns http://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/pop_austria.pdf&lang=E.

[188] *Ibid*

[189] Special Rapporteur's *Fourth Report supra* n.94 para.85

[190] *Ibid* Special Rapporteur's *Fourth Report supra* n.94, para 85. The Convention established this right while recognizing the right of the disputing states to reject such means of reconciliation.

[191] 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency Article 2(4) (emphasis added).

[192] Inter-American Convention to Facilitate Disaster Assistance (adopted 7 June 1991) and Association of Southeast Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response (26 July 2005)

[193] See also Tampere Convention (*supra* n.74) Article 4; and *Ibid* 2005 ASEAN Agreement Articles 3-4.

[194] *Ibid* ASEAN agreement.

Agreement."[195] Thus, treaty law clearly envisages the possibility and necessity of externally provided assistance. Provided it is done in a fashion which respects the territorial integrity of the affected state, it is clearly viewed as an attractive course of action.

In terms of customary and soft law duties of external actors, as will be seen a number of provisions are relevant.[196] Articles V and VI of the 2003 Bruges Resolution indicate that all states and IGOS should "to the maximum extent possible" offer humanitarian assistance to the disaster-affected victims.[197] The influential 1994 Mohonk criteria notes that where disaster-affected state authorities are unable or unwilling to provide life-sustaining aid, it is both the right *and* the obligation of the international community "to protect and *provide* relief to affected and threatened civilian populations in conformity with the principles of international law."[198] Despite being soft law, the Mohonk criteria articulates an obligation, not just a duty, of assistance on the part of external actors.[199] Further, as noted already, the UNCESCR in its General Comments has suggested a wider responsibility of third states to contribute in emergencies to the maximum of their capacities.[200] Unfortunately, this UNCESCR idea of an intertwined responsibility has not been creatively or significantly developed and certainly not to the extent that a stricken people could complain directly regarding a non-disaster affected state's failure to assist them.[201] A potential inter-state complaint regarding a detrimental lack of cooperation also seems highly unlikely.[202] Further, there has been significant resistance to any suggestion that draft Article 16 implies a duty to assist on the part of external actors.[203] Indeed, some ILC members were explicitly hesitant regarding implications of any secondary duties of the international community for disaster

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[195] *Ibid* ASEAN agreement Article 3(1) Such assistance should be in response to a request from/with the consent of the affected state. (emphasis added).

[196] *Supra* n.66 Bruges Resolution and the *Mohonk Criteria infra* n.198

[197] *Supra* n.66, Bruges Resolution. Article VI of the same instrument states that in organizing, providing and distributing assistance "assisting States and organizations *shall* cooperate with the authorities of the affected State or States." Id. at Art. VI. See also Article VI(2) which directs states regarding mitigating consequences where a disaster affected more than one state.

[198] See, the Task Force on Ethical and Legal Issues in Humanitarian Assistance formed by the Program on Humanitarian Assistance, *Mohonk Criteria for Humanitarian Assistance in Complex Emergencies* (February 1994) (hereinafter Criteria); PtII(4) (emphasis added). JM.Ebersole 'The Mohonk Criteria for Assistance in Complex Emergencies' 17 HRQ (1995) 192.

[199] *Ibid*

[200] *Supra* n.129, GC12 para 38 and *supra* n.143, GC14 para 40.

[201] Although there have been developments in human rights law to recognize extra-territorial responsibilities of states (notably pioneered in *Loizidou v Turkey* 23rd March, 1995, judgment-preliminary objections) this has principally been found on the basis of the defendant state having effective control.

[202] The inter-state complaint procedure has never been used, http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx

[203] *Supra* n.160, A/65/10 paras 318-319.

victims.[204] Draft Article 2's commentary notes that any general statement on the obligation of states to ensure an adequate and effective response was avoided for fear of failing to clearly demarcate the differing and specific rights and obligations of affected and assisting states.[205] The same is true of differences in capacity between different external actors, including third states.[206] Further, the procedural model followed by the Responsibility to Protect doctrine (R2P) whereby the international community will step in where a state is unable or unwilling to protect its own population was expressly rejected by the Special Rapporteur.[207]

As noted already, there was serious opposition to the creation of any obligation to provide assistance but there were some states which were supportive of a duty to *offer* assistance.[208] However, rather than pursuing this progressive route, draft Article 16 appears to embody a conservative codification of existing, discretionary practice.[209] Obviously it would have been unrealistic to impose a uniform duty of offering humanitarian assistance upon all states.[210] Indeed, draft Article 1's commentary refers to entities "in a position to cooperate" and differentiated obligations are standard practice in human rights law and are already envisaged in the notion of proposals of particular kinds of help.[211] For example, the agreement of the Black Sea Economic Cooperation (BSEC) on collaboration in emergency assistance provides that a party needing assistance in case of a natural or man-made disaster can "require

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[204] *Ibid*. See also statements by Ms Jacobsson and Mr Vasciannie in UN Doc.A/CN.4/SR.3057 (1 July 2010) (Provisional summary record of the 3057th meeting) 4-5 and the References to the *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) (Advisory Opinion*) ICJ Rep 1962, 151. This anxiety was at least partly about stopping external actors receiving a *carte blanche* to act without the consent of the affected state.

[205] *Supra* n.16, A/69/10, pp.91-92

[206] Commentary to draft Article 1, *Supra* n,15, A/69/10, p.90

[207] Commentary to draft Article 12 [9] , *supra* n.16, A/69/10, pp. 118-119

[208] See Poland's position, *Summary record of the 21st meeting*, UN Doc. A/C.6/66/SR.21 (2 December 2011) para 86. Thailand and Sri Lanka also questioned the use of the word "right." Thailand considered "duty" more appropriate since offers of assistance from the international community were part of international cooperation (as opposed to an assertion of rights). UNGA Sixth Committee, Summary record of the 24th meeting, UN Doc. A/C.6/66/SR.24 (1 December 2011) para 92, and UNGA Sixth Committee, Summary record of the 27th meeting, UN Doc A/C.6/66/SR.27 (8 December 2011) para 20

[209] Craig Allan & Thérèse O'Donnell 'A Duty of Solidarity?: the International Law Commission's Draft Articles and the right to offer assistance in disasters' in *Research Handbook on Disasters and International Law* (Edward Elgar) (Susan C. Breau, and Katja L.H. Samuel eds.) forthcoming in September 2016.

[210] See *Fifth Report* n.172 paras. 44-54 for a discussion on the background to this draft Article

[211] *Supra* n.16, A/69/10, pp.90-91

assistance from the other Parties," subject to the limitation that "the Parties shall render one another assistance according to their possibilities."[212]

It is puzzling that in the ILC project's overall rhetorical context of international fellowship, an offer, already limited in its terms by being at the instance of the offeror, is further limited by being a right to offer rather than a duty to do so. The commentary to draft Article 16 does say that states, the United Nations, and other IGOs are "*encouraged* to make offers of assistance" to a disaster-affected state[213] and indeed this was raised in the ILC itself as being desirable on the basis of the principles of cooperation and international solidarity.[214] This might fit well with the relevant draft Articles concerning the duty to cooperate and the forms that cooperation might take.[215] It would also more clearly balance draft Articles 13 [10] and 14 [11] which put pressure on affected states to accept externally-provided aid.[216] Perhaps overall, it is arguable that the draft Articles point to a strong encouragement of assistance from able actors, which might eventually turn into an expectation. That, however, does return disaster assistance to a rather old-fashioned, philanthropic, paternalistic model. It also seems to challenge the trend which was emerging from relevant, specialist IDRL instruments such as the 2003 Bruges resolution and 1994 Mohonk criteria which, as noted, both suggest a duty of assistance.[217] However, given the already mentioned levels of anxiety, [218] it is probably wise to assume that the Vattelian imperative is unlikely to be refashioned in the disaster-context any time soon. Thus, for the time being, disaster-stricken peoples are returned to the realm of unreliable altruism.

VII. EVALUATION OF THE ILC DRAFT ARTICLES AND THE VATTELIAN IMPERATIVE

A. The step back

The draft Articles, and Article 16 in particular, traverse a fine line between the Vattelian solidarity imperative and the hard-headed world of resource-implications. If it was hoped

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[212] *Supra* n.130, Secretariat Memorandum, para.62, Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on collaboration in Emergency Assistance and Emergency Response to natural and man-made disasters, Article 3

[213] *Supra* n.16, A/69/10 130, para 4. (emphasis added).

[214] *Supra* n.830, A/66/10, para.283

[215] Draft Articles 8 [5] and 9 [5*bis*] respectively

[216] These are the duties of the affected state to seek, and consent to, external assistance respectively.

[217] *Supra* n.66 and see detail and associated text offered at n.197notably regarding the 1994 Mohonk criteria at Pt.II(4)

[218] *Supra* n.160, A/65/10 (2010) paras 318-19.

that draft Article 16 might at least suggest a duty, if not an obligation, on the part of the international community to assist in disasters, this hope has so far not been fulfilled.[219] The actual terms of draft Article 16 merely reflect an optional right to offer assistance, which is held by non-affected actors, non-vulnerable entities, non-victims.[220] Some have even doubted the worth of its articulation,[221] given that, absent any prohibition, any entity can make an offer any time.[222] Further, although the draft Article 8 duty of cooperation interacts closely with draft Article 6 concerning human rights,[223] the deletion of a sentence from draft Article 6's commentary that "[a] corresponding obligation on relevant actors to protect such rights is implicit in the draft article," gives pause for thought.[224] This is especially the case when considering that the draft commentary continues as follows:

> (2) . . . The formulation adopted … indicates the broad field of human rights obligations, *without seeking to specify, add to, or qualify those obligation* . . .
>
> (4) . . . the scope *ratione personae* of the draft articles includes the activities of States and international organizations and other entities enjoying specific international legal competence in the provision of disaster relief and assistance. The Commission recognizes that *the scope and content of an obligation* to protect the human rights of those persons affected by disasters *will vary considerably between these actors*. The neutral phrasing adopted by the Commission should be read in light of an understanding that distinct obligations will be held by affected States, assisting States, and various other assisting actors respectively.[225]

Despite these caveats regarding the non-creation of new rights and the recognition of differentiated obligations, it seems unarguable that key cooperative duties are premised on an expectation that aid *will* be forthcoming. While there may be dangers with imposing an obligation of assistance,[226] the imposition of the lighter "duty," at least to offer assistance, rather than the exercise of a right, would have communicated more effectively the Vattelian imperative as interpreted by the Special Rapporteur. While historically states resisted

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[219] *Supra* n.16, A/69/10, p.129
[220] *Ibid*
[221] *Supra* n.830, A/66/10, para.282 and *Fifth Report* n.172 para.50
[222] Further, as noted, any anxieties regarding potential over-reach of duties are addressed by draft Article 1's commentary, *supra* n.16, A/69/10 pp.90-91
[223] "Draft Article 6 [8] seeks to reflect the broad entitlement to human rights protection held by those persons affected by disasters. The Commission recognizes an intimate connection between human rights and the principle of human dignity reflected in draft article 5 [7], reinforced by the close proximity of the two draft articles." *Supra* n.16, A/69/10, p.102
[224] *Supra* n.83 A/66/10, p.260
[225] *Supra* n.16, A/69/10, p.102 (emphasis added).
[226] Such potential dangers may include over-zealous aid provision by external actors, perhaps with questionable motives. *See* Allan & O'Donnell *supra* n.209.

creating a right to humanitarian assistance as being inconsistent with sovereignty principles[227] it might have been hoped that there had been some progress given the rapid development of IDRL. However, if anything, the rather inert approach of draft Article 16 may be said to set back any sense of an international duty to assist stricken populations. Indeed, Austria's depressing intervention may make observers feel less confident about the possibility of solidarity in disasters than they did prior to the ILC project.

In the end, disaster-stricken individuals' complaints regarding lack of access to food, shelter, hygiene and medicine will continue to exist under extant general human rights instruments such as the ICESCR or the ICCPR and remain only exercisable against states within which the individuals were located or those with jurisdiction: the disaster-affected states. Thus, disaster-stricken individuals would not be in position to complain about external actors refusing to offer aid and assistance. Individuals will also not be able to make a claim *to*, or enforce, a duty of cooperation.

While the draft articles "apply to the protection of persons in the event of disasters," they only protect them in an indirect sense, as draft Article 1's commentary makes clear in its language as follows:

> The draft articles cover, ratione materiae, the *rights and obligations of States* affected by a disaster in respect of persons present on their territory (irrespective of nationality) or under their jurisdiction or control, *third States and international organizations* and other entities in a position to cooperate. . . .
>
> Such rights and obligations are understood to apply on two axes: the rights and obligations of States *in relation to one another*, and the rights and obligations of States in relation to persons in need of protection. *While the focus is on the former,* the draft articles also contemplate, *albeit in general terms*, the rights of individuals affected by disasters, as established by international law.[228]

Thus, the ILC approach is really primarily about rights and obligations of states and international organizations and other entities, and, secondarily, about stricken populations.[229] Insofar as it is about this last group, the human rights obligations seem primarily focused upon the disaster-affected state. Although this reflects the classic position, it seems at odds

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[227]R Hardcastle and A Chua, 'Humanitarian Assistance: Towards a Right of Access to Victims of Natural Disasters' (1998) 325 IRRC 589, refer to debates on UNGA Res. 46/182 (1991) (*supra* n.134) detailing the relevant state objectors.

[228]*Supra* n,16, A/69/10, p.90 (emphasis added)

[229] *Ibid*

with the project's rationale, its strong ethos of responsibility on the part of, variously, the international community, third states and disaster-affected states, and its explicit duty of cooperation. It would also seem a pity that an opportunity to reaffirm the spirit of the aforementioned ICESCR obligation of international cooperation was not taken. Indeed, the ILC project has been challenged as not truly being human rights focused.[230]

B. The obscurity of the ILC project

Not only is there some obscurity surrounding the ILC project's subject, the draft Articles themselves suffer from an inherent confusion. As has been stressed throughout, the ILC project offered an opportunity for a rights-based approach which envisioned transnational assistance, unconstrained by particular identities aimed at addressing vulnerability in emergencies. However, as the ILC draft Articles testify, constant reaffirmation of the ideology of solidarity will simply not reify it in any material sense. What are states to do in the event of a disaster? Duties, rights, and obligations jostle with each other in the ILC draft Articles.[231] One ILC delegate thought it better to opt for wording that simply encouraged states to offer and accept assistance in disasters rather than determine rights and duties.[232] Another was clear that the draft Articles should not seek to establish state responsibility for the breach of obligations or the application of sanctions in the case of non-fulfillment.[233] It is true that legal consequences may flow from underpinning treaties, custom, and soft law. However, as noted, these are complicated and patchy. Although there is merit in avoiding an overly-bureaucratic approach to law, the project's aim of codifying and streamlining IDRL would be comprehensive if it indicated expected conduct when disaster strikes and referred to the consequences of non-fulfillment. Indeed, the ILC at points refers to "obligations" of states[234] and occasionally utilizes the word "duty" in a context which reads more like an obligation.[235] One way of looking at the duty/obligation distinction is to suggest that a duty of due diligence is owed to one actor by another, whereas an obligation of due diligence is

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[230] Flavia Zorzi Giustiniani 'The Works of the International Law Commission on "Protection of Persons in the Event of Disasters"' in A De Guttry, M Gestri and G Venturini (eds.), *International Disaster Response Law* (TMC Asser Press, 2012) 69.

[231] O'Donnell & Allan *supra* n.209.

[232] See statement by Mr Murphy in *Provisional summary record of the 3139th meeting* UN Doc. A/CN.4/SR.3139 (14 August 2012) 18.

[233] See statement by Mr Murase in *Provisional summary record of the 3102nd meeting*, UN Doc. A/CN.4/SR/3102 (25 January 2012) 14.

[234] relative to draft articles 11[16], 12[9], 13[10], 14[11], 17 [14] and 18, see draft Article 2's commentary. This is despite draft Articles 11, 12 & 13 using the term "duty." Draft Articles 14, 17 and 18 also use obligatory language, the "affected State shall."

[235] See draft Article 8 [5] and the duty to cooperate ('States shall…')

automatically binding upon an actor.[236] In any event, duty implies an expectation of certain behavior. The ILC's characterization has favored "duty" as falling "somewhere between a moral dictate and a legal obligation."[237] This is slightly obscure in its legal consequences. Although there have been increasingly sophisticated moves in public international law away from the rule observance/breach dichotomy towards devising rules which exert a "pull towards compliance,"[238] thereby diminishing the likelihood of breaches, relevant actors are still concerned regarding the consequences of rule non-observance.[239] The ILC draft Articles do not have to *create* or contain specific legal consequences for their non-observation.[240] However, they will embody an influential benchmark text (indeed the Special Rapporteur favors the development of a treaty)[241] and the ILC should acknowledge that there will probably be ramifications for entities which disregard this explicit exposition of IDRL.[242] Indeed, accountability of actors has been defined as a cornerstone of any human rights-based approach[243] and it was the Special Rapporteur himself in his preliminary report who noted that "[e]nhanced international solidarity in the event of disasters has reinforced the need for greater regulation of international law."[244]

Arguably this project has simply involved the ILC in an organizational exercise requiring some general standard-setting. However, it contains a lexical confusion and vagueness of ambition (the protection of stricken populations) which is unnerving. These issues, when combined with the unevenness of duties and draft Article 16's entirely discretionary right to offer assistance, put into doubt the effective, and perhaps even committed, execution of the Vattelian imperative. As noted earlier in Part I, a rights-based approach envisages some excavation of the underlying causes of vulnerability.[245] However, although the draft Articles

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[236] Mary Footer in *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Jernej Letnar-Cernic and Tara Van Ho eds.), pp. 179-228 (Chapter 6), at p. 184, fn.17
[237] See statement by Mr Murase, *supra* n.233132, 14.
[238] Tom Franck, *The Power of Legitimacy Among Nations* (OUP: New York) (1990)
[239] See the debates examined in Allan & O'Donnell, n.162 and Allan and O'Donnell *supra* n.73
[240] That can be determined by the terms of relevant treaties, customary international law and the rules regarding state responsibility and the responsibilities of international organisations.
[241] *Supra* n.1830 *Preliminary Report* para 60; *supra* n.830 A/66/10 (2011) para 285; *supra Fourth Report* n.94, para 25
[242] Indeed the commentaries to draft Article 14 hint very strongly that there will be consequences for a disaster-stricken state which has withheld its consent to offers of external assistance made in accordance with the draft Articles *supra* n.16, A/69/10 pp.123-126
[243] http://www.scottishhumanrights.com/humanrights/humanrightsbasedapproach
[244] *Supra* n.1830, *Preliminary Report* Para.16
[245] *Supra* n.95, *Second Report* paras.16-17 and International Law Commission, *Report on the work of its sixty-first session* (2009) U.N. Doc. A/64/10, para.154

make disaster-prevention a top priority,[246] it is not entirely clear how they excavate or analyze the root causes[247] of vulnerability. Indeed in his second report the Special Rapporteur explicitly eschewed any inquiry into a calamity's root cause, arguing that it was the disruption itself, not the originating causal phenomena which gave rise to the need for protection.[248] It is true that disasters generally do arise from a complex set of factors, but as mentioned already, vulnerability and lack of resilience in communities is generally what results in increased catastrophic consequences of such disasters.[249] There is an accumulation of events and an effective protective response strategy needs to address these issues. Part VIII will consider the ideology of the ILC draft Articles and their attempts to embody a version of universal solidarity and humanitarianism unhampered by politics.

VIII. UNIVERSALISM AND SOLIDARITY

A. Instrumentalizing universal humanity and solidarity

The Special Rapporteur noted very early on that "considerations of humanity have informed the moral appeals to assist disaster victims"[250] and that they found their expression in the language of cooperation and solidarity. If it is true that "the idea of international law is an important form of power in international politics,"[251] then it is worth excavating this notion of universal humanity as it has been instrumentalized in the ILC's draft legal provisions.

As Martti Koskenniemi notes, it has long been a strategy of hegemons to present their particular interests as universal ones.[252] This of course echoes Marx and Engels who identified this strategy of the ruling class to present their ideas as "the only reasonable ones, the only ones universally valid," thus obscuring the historical contingencies of certain doctrines while simultaneously elevating their provenance and cementing their future

[246] See Draft Article 10 [5 *ter*] and 11 [16] and the clear referencing of the 2005 Hyogo Framework initiative. See also the Sendai Declaration and the Sendai Framework for Disaster Risk Reduction 2015–2030, adopted at the Third United Nations World Conference on Disaster Risk Reduction, as endorsed by the General Assembly in its resolution 69/283 of 3 June 2015. See also UN General Assembly Resolution on an International Strategy for Disaster Reduction, resolution 70/204 of 22 December 2015.
[247] Susan Marks 'Human Rights and Root Causes' 74 Modern Law Review (2011) 57
[248] *Supra* n.95, *Second Report*, para.49
[249] See Mike Davis, *supra* n.12, Chapter 9, for an excellent analysis of the production of vulnerability and under-development.
[250] *supra* n.1830, *Preliminary Report*, para.14
[251] Shirley V. Scott 'International Law as Ideology: Theorizing the relationship between International Law and International Politics' 5 EJIL (1994) 313-325, p.324. See Susan Marks, *The Riddle of All Constitutions* (OUP: Oxford) (2000), for a landmark discussion of the role of ideology in international law.
[252] Martti Koskenniemi 'International Law in Europe: Between Tradition and Renewal' 2005 European Journal of International Law 16(1) 113-124.

existence.[253] In terms of the cynical use of universality in law, texts can be created and invoked to demarcate the distinction between the civilized and uncivilized,[254] modern and not-yet-modern societies[255] and between "great" powers and outlaw states.[256] In the context of the ILC draft Articles, it is inhumane, and possibly uncivilized and illegal, to arbitrarily refuse aid (without clarity as to what constitutes arbitrariness).[257] However, despite Vattel's urgings, it is not uncivilized, inhumane or illegal for third states not to offer assistance. Although both wealthy and poor states can suffer disasters, given the vulnerability to increased hardship on the part of historically poorer states, such legal asymmetry must raise concerns. To be clear, there is no suggestion intended here that the ILC is engaged in some mendacious exercise in power-building. A sinister and harmful project is not being undertaken. However, when terms such as "universal," "humanity," and "solidarity" are being utilized freely in a legal document, it is important to be clear as to what such language means and entails. Currently it is not clear as regards this particular project.

In the ILC draft Articles a variety of things might be happening. They might be a practical guide. That is, by discussing humanitarian assistance, the draft Articles are recognizing existing practice, or what relevant actors maintain is the existing practice or is the relevant practice given optimum circumstances. They reflect "best in the circumstances" solidarity. Alternatively, the draft Articles are a type of international manifesto, they reflect a commitment to a particular ideology of universal humanity, but being more "big picture," they are less clear on its operationalization. Arguably this operationalization is left to the underpinning, often soft, instruments. That is a "best case scenario" solidarity. A different view considers that there is something partial in the draft Articles' focus, particularly given the targeting of those disaster-affected states which arbitrarily refuse aid and which might therefore be seen to challenge universal humanity. In this version, the draft Articles are simultaneously universal and particular in their targets, what might be termed "tactical solidarity." The final perspective suggests that the draft Articles are not really about universality and solidarity, because, when it most matters, when it comes to the possibility of

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[253] Marx and Engels *The German Ideology* within Marx, *Early Political Writings* p.146; see Susan Marks (ed.) *International Law on the Left* p.7, for comment on this.
[254] Martti Koskenniemi, *The Gentle Civilizer of Nations : the rise and fall of international law, 1870-1960* (CUP: Cambridge, New York) (2002)
[255] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP: Cambridge) (2005)
[256] Gerry Simpson, *Great Powers and Outlaw States* (CUP: Cambridge) (2004)
[257] *Supra* n.16, A/69/10, pp.123-126

self-sacrifice in draft Article 16, there is a complete retreat from any possibility of transnational humanity back to a model of choice, and notably to Westphalian-constructed preferences. In this respect, given the level of discretion afforded in this draft provision, there is a move from the universal to the (very) particular, and, what is being particularly protected and sustained is not choice, but privilege. This perspective reveals an irony given that those who supported a duty not to arbitrarily refuse aid charged their opponents with supporting outdated Westphalian notions.[258] Yet, the characterization of offering aid and assistance as a right, rather than even just a duty to offer assistance, relies precisely on those same Westphalian notions of sovereignty emerging through territorially defined power, discretion, and difference. Thus, what emerges is a protectionist, not protective, view of humanity and the solidarity-alliances which the draft Articles reify simply reflect the world we currently live in, not the one to which we could aspire.

C. The ILC project's subject

Perhaps it would be useful at this point to reconsider who it is that the ILC project seeks to assist. The project seeks to help, without distinction, all persons who are disaster-stricken: the essence of the rights-based approach.[259] Draft Article 2 notes its focus is upon ensuring that the essential needs of directly affected disaster-victims are met.[260] Draft Article 4 refers to the "affected State."[261] Draft Article 5 refers to protecting "the inherent dignity of the human person."[262] Draft Article 6 refers to "persons affected by disasters."[263] Draft Article 7 refers to the "needs of the particularly vulnerable."[264] Draft Article 12 refers to "the protection of persons."[265] Draft Article 15 refers to "the identified needs of the persons affected by disasters."[266] These are neutral and fairly dispassionate terms. How else might such individuals be described? Given a disaster's cataclysmic effects, a better terminological formulation might be "the injured, the dying, the starving, the cholera-struck, the orphans and the homeless." If this is considered unnecessarily emotive and unhelpful perhaps "endangered men, women and children" might suffice. The point remains that legal terminology by its bureaucratic, definitional approach can facilitate dissociation. This is not

[258] See *supra* Allan & O'Donnell, n.73 and n.162
[259] Commentary to draft Article 2, *supra* n.16, A/69/10, p.91
[260] *Ibid*
[261] *Supra* n.16, A/69/10 p.95
[262] *Supra* n.16, A/69/10 p.99
[263] *Supra* n.16, A/69/10 p.102
[264] *Supra* n.16, A/69/10 p.103
[265] *Supra* n.16, A/69/10 p.117
[266] *Supra* n.16, A/69/10 p.127

quite the same as "othering" which is more malign in intention. Nevertheless, there is made possible an obscuring process which makes the problem or person less easy to "find" and assist because the victims are a faceless, uniform mass. They have no identity. Such distancing facilitates a mind-set which makes an issue the problem of another person, state or institution. Whereas the traditional approach of identity politics artificially compartmentalized and fragmented groups of individuals,[267] the draft Articles have homogenized victims, but in such a way as to mean that many external actors need not feel a duty to assist. In this way, the ILC is potentially facilitating a disunion which is the opposite of solidarity.

D. Re-instrumentalizing universal humanity and solidarity

Disasters and disaster-prone states are often presented as a variety of stereotypes but this can be quite superficial[268] and can be self-serving in terms of the types and limits of assistance offered. If some identities are socially constructed perhaps one of the markers of difference between states could be the availability or non-availability of resources (which recognizes historical contingency). Such identities might then be utilized to allow actors to coalesce and agitate for a more equal way of approaching humanitarian assistance in disasters. To be absolutely clear, this article does not argue for dependency. That would be antithetical to any notion of authentic solidarity. However, given that flash funds, even for the most high-profile disasters, routinely fall significantly short of their financial targets,[269] there is a need to interrogate why there is still room for discretion, particularly in an environment where solidarity is routinely proclaimed. A more creative understanding of the duty of international cooperation and a duty to offer assistance might have facilitated redistributive claims and avoided the entrenchment of historical inequalities.

One argument in favor of draft Article 16's current form is that it reflects Article 2(7) of the U.N. Charter which stresses the equality of states.[270] Truly, draft Article 16 extends the right, without difference, to all states.[271] Poor states have the same rights as rich states on paper.[272]

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[267] *Supra* n.19, n.21 and n.22
[268] Ruth A. Miller *Law in Crisis. The Ecstatic Subject of Natural Disaster* (Stanford Law Books)
[269] E Ferris and D Petz, *A Year of Living Dangerously: A Review of Natural Disasters in 2010* (The Brookings Institution, London School of Economics Project on Internal Displacement, April 2011) 22.
[270] Article 2(7) Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.
[271] *Supra* n.16, A/69/10, p.129

That means rich states have the same rights as poor states. However, given the absence of *universal effects* of a natural disaster, a legal approach of formal equality might be questioned. Perhaps legal provisions motivated by Vattelian notions of universality and solidarity should more affirmatively reflect particular vulnerabilities and advantages of states. Another possibility would be to recognize the sometimes very unfortunate historical relationships between particular states with a view to prompting an expectation of assistance as a form of new partnership.

There is almost certainly unrealized potential in the concept of "universal."[273] Re-presenting particular grievances, such as those of a disaster-stricken person, as those of universal concern has potential to construct a reality of universal humanity. This seems to be how the draft Articles began, and one can almost sense the frustration of the Special Rapporteur in his thwarted attempts to convince states to re-understand international cooperation.[274] Nevertheless, the current versions of draft Articles 8 and 16, and their highly conservative understandings of solidarity and partnership are what have resulted.

IX. CONCLUSION

At the close of the twentieth century Judge Bedjaoui issued a proclamation on the evolution of international law as follows:

> The resolutely positivist, voluntarist approach of international law still current at the beginning of the [twentieth] century has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of states organised as a community.[275]

Undoubtedly the ILC hoped that it was engaged in a positivist project which would reflect notions of a common conscience and community. As mentioned earlier, the Special Rapporteur's early reports refer to the common, transnational, humanity which binds human beings together.[276] The idea of an international community is clearly reflected in the various ILC discussions on the draft Articles and in the very existence of the duty of cooperation. However, that idea very much envisages the existing institutions and actors in international

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[272] Supra n.16, A/69/10, p.129

[273] *Supra* n.254, Marks, pp.16-17 and in the same text Koskenniemi 'What Should Lawyers Learn from Marx?' pp.49-52

[274] *Supra* n.172 and n.173 and associated text

[275] Declaration of President Bedjaoui in *Legality of the Threat or Use of Nuclear Weapons* ICJ Reps. pp270-271

[276] *Supra* n.18, *Preliminary Report* and *Third Report on the Protection of Persons in the Event of Disasters,* by Mr. Eduardo Valencia-Ospina A/CN.4/629

law, such as states, IGOs and NGOs playing key parts and so represents an international, rather than transnational, approach to humanitarianism.

The international community can be viewed in various ways: a community of states, of IGOs, of citizens, and of lawyers. The ILC itself is part of that international community and might be considered to be an epistemic community. However, the recent proliferation in the number of actors recognized by international law does not necessarily mean that the "community" has been expanded. Although there have been moves in studies of international personality to refer to the broader notion of "participants" in international law,[277] it is not entirely clear that this has resulted in an increase in stakeholders rather than mere addressees or bystanders. While international law has entered its post-ontological era, it is not clear that the same is true for the international community. Co-existence is not necessarily the same as community and there is a danger that by utilizing words like "solidarity," "dignity," and "universality" without definition and without their clear materialization and implementation, a rather shallow result will be produced. It can also appear as a tactical deployment of such terms to obscure a vagueness and slightness of commitment. In the case of the ILC draft Articles it may even pursue the illusion of the international community being engaged in "self-conscious mass struggle."[278]

If solidarity is about identifying the inter-connected totality of the world then that is an attractive concept because it sees the world in 360 degrees and acknowledges interdependence, history and future survival. In part, the ILC draft Articles do actively pursue this construction, notably in the provisions which deal with the mitigation of disaster risks.[279] However, there is still work to be done in relation to emergency assistance. As noted in Part I, human rights law has traditionally been drafted as a result of identity politics agitating for legal change.[280] The new instrument on disasters offered a first step away from such an approach towards one whereby legal duties arose in relation to human beings suffering from the effects of a cataclysmic event. Instead of being about fault and remedying

[277] Rosalyn Higgins *Problems and Process: International Law and How We Use It* (OUP: Oxford, 1994) p.50 and Robert McCorquodale 'The Individual and the International Legal System' in *International Law* Malcolm Evans (ed.) p.284 at pp.287-288

[278] However, arguably what is happening is a version of elite activism. Obiora Chinedu Okafor 'Marxian Embraces in Baxi's Human Rights Scholarship' *supra* n.253, Marks, p.252 at p.272.

[279] Draft Articles 10 [5 *ter*] 11 [16], supra n.16, A/69/10, pp.111-117

[280] See earlier references to CEDAW and CPRD. See the 2006 Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, for a soft law example.

breaches of human rights, the focus could have been on proactive emergency assistance, offered without regard to the particular identities of victims. However, in this particular area of humanitarian assistance, the draft Articles have probably reinforced the power of elite choice and the traditional position that the key relevant actors in international law are states and IGOs, albeit with some acknowledgment of NGOs. The draft Articles were written with a general context of hardship in mind.[281] Notwithstanding this, at the same time as proclaiming the Vattelian imperative (as it is understood by the Special Rapporteur) disaster-stricken persons are written about in homogeneous and sanitized terms and their assistance from external actors remains a matter for discretion. There has been no move to a duty of solidarity when a disaster strikes and the human rights of disaster-stricken peoples remain precarious. While it might be legally defensible that no new rights have been added, it is disappointing that in fact a potentially retrograde step has been taken because the opportunity to operationalize, rather than merely proclaim, our common humanity as existing beyond any configuration of identity, has been missed.

[281] Supra n.18, *Preliminary Report*