

A Duty of Solidarity?: the International Law Commission’s Draft Articles and the right to offer assistance in disasters

Thérèse O’Donnell & Craig Allan

1. Introduction*

There has long been an understanding, and indeed an expectation, that after a natural disaster humanitarian relief will emanate from international governmental and non-governmental organisations and states, which stricken states will generally accept.¹ The current International Law Commission (ILC) drafting project regarding the protection of persons in the event of disasters includes an article which refers to the right of external actors to offer assistance to disaster-stricken states. Draft article 16 states that: ‘In 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’.²

In his fourth report the Special Rapporteur on the protection of persons in the event of disasters, Eduardo Valencia-Ospina, noted that when a natural disaster strikes, evidence of

* Reader in Law at the Law School, University of Strathclyde and Solicitor at Pinsent Masons, LLP, Glasgow, respectively. We are indebted to those who commented on earlier drafts. In particular we must thank Dr. Dug Cubie of Queen’s University, Belfast, Professor Dino Kritsiotis of Nottingham University, and Professor Kenneth Norrie of Strathclyde University. All responsibility for errors resides with the authors.

¹ Indeed Article VII of the 2003 resolution of the Institut de Droit International on *Humanitarian Assistance* (2 September 2003) (Bruges Resolution) prohibits ‘arbitrary and unjustifiable’ rejections of good-faith aid offers. See also S Sivakumaran ‘Arbitrary Withholding of Consent to Humanitarian Assistance in Situations of Disaster’ (2015) 64 ICLQ 501; D Schindler, *The right to humanitarian assistance: right and/or obligation*, SHS-95/CONF.805/6 (UNESCO, 1995); R Hardcastle and A Chua, ‘Humanitarian Assistance: Towards a Right of Access to Victims of Natural Disasters’ (1998) 325 IRRC 589; J Benton Heath ‘Disasters, Relief and Neglect: the Duty to Accept Humanitarian Assistance and the Work of the International Law Commission’ (2011) 43 JILP 419.

² International Law Commission (ILC), *Draft Articles on the Protection of Persons in the Event of Disasters* UN Doc. A/CN.4/L.831 (15 May 2014) (ILC Draft Articles) art 16.

international compassion is abundant.³ The manifestation of such humanitarian practices gives encouragement to those seeking to strengthen an international sense of interdependence. However, the notion of the ‘international community’, while intuitively attractive as an ideal, is meaningless without further elaboration,⁴ and its goals need to be instrumentalised. If a key value of the international community is the development of international solidarity then a natural disaster offers the perfect context for demonstrating this value. However, there is no *guarantee* of aid donation. Interestingly, following the devastating Nepalese back-to-back earthquakes of April/May 2015 United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) launched a flash appeal of \$422 million to support people through immediate lifesaving aid operations.⁵ As of early September 2015, only 57 per cent of the total appeal was covered. Further, the less high-profile a disaster, the less assistance it receives. In 2010, the Haiti earthquake and Pakistan floods accounted for 96.56 per cent of all international humanitarian assistance in disasters, leaving 3.54 per cent for the other 54 major disasters occurring that year. A further 317 reported disasters either did not receive funding or were not recorded on the UN Financial Tracking Service.⁶

The ILC Draft Articles are motivated by a sense of solidarity and have a theme of international responsibility. Terms including ‘right’, ‘obligation’ and ‘duty’ appear but their precise meanings are unclear. In ILC discussions, reference has been made to ‘moral’ dictates. Given their potential impact, thematic context and the fact that they cut across such

³ E Valencia-Ospina, *The Special Rapporteur’s Fourth report on the protection of persons in the event of disasters*, UN Doc. A/CN.4/643 (International Law Commission (ILC), 11 May 2011) (Special Rapporteur’s Fourth Report) para.105. See also, E Valencia-Ospina, *The Special Rapporteur’s Preliminary report on the protection of persons in the event of disasters* UN Doc. A/CN.4/598 (ILC, 5 May 2008) (Special Rapporteur’s Preliminary Report).

⁴ D Kritsiotis, ‘Imagining the International Community’ (2002) 13 EJIL 961.

⁵ Reliefweb, *Nepal Flash Appeal Revision: Nepal Earthquake April - September 2015* <<http://reliefweb.int/report/nepal/nepal-flash-appeal-revision-nepal-earthquake-april-september-2015>> accessed 25 September 2015. For donors see, Financial Tracking Service, *NEPAL - Earthquake - April 2015* <https://fts.unocha.org/reports/daily/ocha_R24_E16575_1507240301.pdf> accessed 25 September 2015.

⁶ 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.

fundamental notions of state sovereignty, it is unfortunate, but perhaps unsurprising, that the language of the ILC Draft Articles is inconsistent and unclear. The articulation of duties and obligations appears interchangeably in the Draft Articles and Commentaries which hampers a full understanding of the project's implications. In an effort to offer clarification, it is submitted that a 'right' is legally empowering, an 'obligation' is an inescapable legal burden which can be enforced, 'responsibility' indicates how an entity should behave and a 'moral dictate' suggests a reflection upon conscience. Real definitional difficulties arise with the notion of a 'duty'. As will be discussed subsequently, the ILC texts use the term to convey both a legal obligation and something less strict than this. This definitional obscurity is aggravated by the likelihood that the Draft Articles will remain soft law. At the very least, it might be said that a 'duty' may entail a legal obligation but definitely conveys a strong encouragement/direction towards a particular course of action. In its lesser form, a 'duty' is unlikely to have an enforcement mechanism.

Given the current patterns of global wealth inequality and the increased impact of disasters upon impoverished and underdeveloped states, a 'duty to donate' appears attractive. Indeed, the Special Rapporteur in his fifth report when discussing the contours of the duty to co-operate (draft article 8) noted that this duty taken together with a right to provide assistance raised a fundamental issue:

... 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.⁷

However, as he acknowledged, given that the ‘overwhelming majority’ of states which submitted written comments in the Sixth Committee were focussed in their firm belief that no duty to provide assistance existed under general international law,⁸ he could not but reaffirm his previously reached conclusion that the cooperative duty did not currently include a legal duty for States to *provide* assistance when requested by an affected state.⁹ 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.¹⁰ Reflecting the progressive development of international law, it would highlight the need for the requested state to fulfil its duty to cooperate in good faith. This suggestion, however, leaves much discretion for non-affected states and room for endless debate as to the requirements and limits of ‘due consideration’.

Though, there is another possible compromise option. If there is no duty/obligation to provide aid, or such fierce resistance against it so as to make it a vain pursuit for its advocates, what of a duty/obligation to *offer* assistance? Attractive in itself (given notions of international solidarity) it is in tune with the draft article 8 duty of co-operation, and has support. Although intuitively this seems the weaker option (compared with the duty to provide aid) there are two reasons for favouring it. The first is a practical reason. An obligation/duty upon external actors to provide aid will definitely be resisted, but some states on the Sixth Committee states actually did make their submissions in terms of a duty to *offer* assistance. For example, the Polish representative suggested both that the draft article should

⁷ E Valencia-Ospina, *The Special Rapporteur’s Fifth report on the protection of persons in the event of disasters*, UN Doc. A/CN.4/652 (ILC, 9 April 2012) (Special Rapporteur’s Fifth Report) para 81 (emphasis added).

⁸ ILC, *Report on the work of the sixty-fourth session*, UN Doc. A/67/10 (2012) (Report on the work of the sixty-fourth session) para 57; Special Rapporteur’s Fifth Report (n 7) para 52.

⁹ Special Rapporteur’s Fifth Report (n 7) para 68.

¹⁰ 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 (Provisional summary record of the 3139th meeting).

be recast to portray offers of assistance as a positive duty and that the ILC should seek to encourage the international community to make such offers on the basis of the principles of cooperation and international solidarity.¹¹ Indeed, in 2012, ILC member Mr Kittichaisaree also suggested that the term ‘right’ should be replaced by ‘positive duty’.¹² Secondly, a duty to provide aid raises difficult questions regarding differentiated capacities of states and organisations, and the allocation of responsibilities.¹³ These arise less potently with a duty to offer aid, making it is less easy to resist. Finally, while ostensibly weaker than a duty to provide assistance, somewhat counter-intuitively, in fact it may better safeguard affected states. Admittedly if an offeror reneged on an offer, it would be difficult to seek redress. However, assuming that the majority of offers made are realistic and in good faith, once made, the decision to accept or reject them (albeit in limited terms) resides with the affected state. The danger with a duty to *provide* aid lies in the potential that a donor state becomes focussed on the discharge of its duty instead of prioritising the needs of the affected state. At best this results in inappropriate or badly timed aid, at worst it legally facilitates a Trojan horse. Certainly, there are difficulties surrounding the word ‘duty’, which will be discussed below. This, however, is part of a general terminological problem with the ILC project and does not remove the imperative for the ILC to re-consider whether the use of ‘right’ within draft article 16 is correct or appropriate given the project’s thrust.¹⁴

This chapter considers, in the context of these ILC Draft Articles, what is meant by a ‘right’ for international actors to offer assistance. Is there only a right to assist? Although we do not dwell on this point, is it problematic that the Draft Articles say nothing, *per se*, about a right to receive aid? Given the wider terrain of international disaster response law (IDRL¹⁵),

¹¹ Sixth Committee, *Summary record of the 21st meeting*, UN Doc. A/C.6/66/SR.21 (2 December 2011) para 86.

¹² ILC, *Provisional summary record of the 3141st meeting*, UN Doc. A/CN.4/SR.3141 (23 November 2012) 17.

¹³ See Mr Nolte, *ibid* 6.

¹⁴ Report on the work of the sixty-fourth session (n 8) para 57.

¹⁵ ‘IDRL’ derives from a 2001 initiative of the International Federation of Red Cross and Red Crescent Societies (IFRC) to assist in creating clarity about this area by way of a legal database. See IFRC, *International disaster*

and the fact that the acknowledged focus of the Draft Articles is the protection of stricken populations, might a potential duty/obligation to offer assistance already exist? For example some international organizations or their specialized agencies have specific mandates and therefore are obliged to respond to disasters. Further, it is arguable that the articulation of a right to donate raises legitimate expectations of donees, which in turn potentially fuels a duty to at least offer assistance. If in fact no duty/obligation to offer assistance exists for external actors, should it? Given that draft article 14 directs disaster-affected states not to ‘arbitrarily’ withhold consent to external assistance, does this, along with the co-operative duty articulated in draft Article 8, strengthen the argument for a duty/obligation to offer aid? If not, the ILC Draft Articles will be struck asymmetrically with the heavier burden falling on the disabled state. There is undoubtedly a desire to clearly demarcate the differing and specific rights and obligations of affected and assisting states. Draft article 2’s commentary notes any general statement on the obligation of states to ensure an adequate and effective response was avoided for fear of failing to capture these differences. However, concerns regarding affected states using a draft article 16 duty to ‘devolve’ their obligations to external actors are unfounded because draft Article 12 stresses the primary duty of affected states.

This chapter analyses draft article 16 in its own terms and in the context of the other draft articles and considers whether this right to offer assistance to disaster-affected states suggests or encourages the possibility of an obligation/duty for external actors to at least offer assistance in times of natural disasters, and, if it does not, whether the ILC should be clearer about the limits of assistance being articulated. As we do, however, acknowledge, the ILC has made significant strides with this project. Ultimately, the resistance of states (as seen in the submissions to the Sixth Committee) to the more bold initiatives suggested by the ILC

(regarding offers of aid donation or the formation of a binding convention) continues to hamper its work.

2. Definitions - What type of help?

Draft article 3 defines disasters.¹⁶ If a duty to offer aid were established, it would be important to generally define ‘aid’ with sufficient flexibility given the context of a disaster’s occurrence and taking account of any customary and specific treaty developments. There are a number of different stages of post-disaster aid ranging from short-term, life-saving emergency aid and recovery measures,¹⁷ through to more future-facing reconstruction, capacity-building and proactive mitigation measures. Currently, draft article 16 seems primarily focussed premised on the actual occurrence of a disaster rather than its pre-emption,¹⁸ and upon emergency relief.

Draft article 4 defines ‘relief personnel’ as including either civilian or military personnel. ‘External assistance’ includes relief personnel, equipment and goods, and services provided to an affected state by assisting states or other assisting actors for disaster relief/risk reduction. Relevant equipment and goods are understood to include ‘supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects’. Most existing IDRL provisions which detail appropriate aid¹⁹ stress timeliness of delivery²⁰ and refer to essential,²¹ ‘immediate’²²

¹⁶ The draft article reads in full: “‘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’.

¹⁷ IFRC, *Annotations to the Draft Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (2007) (Annotations to the IDRL Guidelines) s 2(3). See also Human Rights Council, *Final research-based report of the Human Rights Council Advisory Committee on best practices and main challenges in the promotion and protection of human rights in post-disaster and post-conflict situations*, UN Doc. A/HRC/28/76 (10 February 2015). See also the Botswana National Policy on Disaster Management 1986 (para 7); and Ethiopian National Policy on Disaster Prevention and Management (October 1993) s II(2).

¹⁸ See the commentary to draft article 16, ILC, *Report on the work of the sixty-sixth session*, UN Doc. A/69/10 (2014) (Report on the work of the sixty-sixth session) 130, para 4.

¹⁹ See the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (adopted 18 June 1998, entered into force 8 January 2005) (Tampere Convention); and ILC, *Protection of persons in the event of disasters*, UN Doc. A/CN.4/590/Add.1 (Secretariat Memorandum Addendum, 28 February 2008) (Secretariat Memorandum Addendum) Annex I.

needs, and those ‘indispensable to survival’.²³ The 1994 Mohonk Criteria²⁴ (a key reference point in IDRL sourcing) cite that which is ‘necessary to sustain life and dignity’.²⁵ Emergency humanitarian assistance undoubtedly includes ‘food, clothing, medicines, temporary shelter and hospital equipment’,²⁶ water, bedding and sanitation facilities.²⁷ While such documents ably outline material assistance, it is less easy for them to identify the protection activities (for example, guarding against trafficking of children or gender-based violence) which are also a fundamental aspect of humanitarian action. The concept of humanitarian action (rather than just assistance) simultaneously embraces both the material needs and protection of stricken populations, and is a more helpful way of looking at needs-based and rights-based assistance.²⁸ This is somewhat reflected in draft article 9 which considers forms of cooperation between relevant actors.²⁹ Such cooperation includes humanitarian assistance, the coordination of international relief actions and communications, and the making available of relief personnel, equipment and goods, and scientific, medical and technical resources. This list of examples is illustrative and explanatory rather than exhaustive.³⁰

²⁰ See the reference to rapid and effective relief in the Association of Southeast Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response (26 July 2005) (2005 ASEAN Agreement).

²¹ ILC Draft Articles (n 2), art 2.

²² Annotations to the IDRL Guidelines, (n 17) s 2(2).

²³ See also Bruges Resolution (n 1) art I(1)(a).

²⁴ 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) (Mohonk Criteria); JM.Ebersole ‘The Mohonk Criteria for Assistance in Complex Emergencies’ 17 HRQ (1995) 192.

²⁵ See also International Institute of Humanitarian Law, *Guiding Principles on the Right to Humanitarian Assistance* (1993) (San Remo Principles) principle 9, regarding ‘survival’ needs.

²⁶ Hardcastle and Chua (n 1) 591.

²⁷ Agreement between Member States and Associate Members of the Association of Caribbean States for Regional Cooperation on Natural Disasters (adopted 24 July 1999) (Caribbean Association Agreement) art 1.

²⁸ See E Ferris, *The Politics of Protection* (Brookings, 2011) and ILC Draft Articles (n 2) art 10 considering cooperation for disaster risk reduction.

²⁹ See inspiration from the Draft Articles on the law of Transboundary Aquifers, in particular Article 7.

³⁰ ILC, *Report on the work of the sixty-fifth session*, UN Doc. A/68/10 (2013) (Report on the work of the sixty-fifth session) 76-7. See also the ASEAN Declaration on Mutual Assistance on Natural Disasters (26 June 1976); and Strengthening of the coordination of humanitarian emergency assistance of the United Nations, GA Res. 46/182 (19 December 1991) para 27.

The Special Rapporteur was explicit that there is no intention to create any additional legal obligations for either affected states or assisting actors to engage in certain activities.³¹ As noted already, this comports well with the weak terms of article 16, that is, a right to offer assistance, but it sits slightly awkwardly with the article 8 duty to co-operate and article 14 regarding obligations of the affected state.

3. The ILC Project

3.1. Expectations of Assistance

As acknowledged, there has long been an understanding that following disasters, humanitarian relief will be forthcoming from states, international governmental organizations (IGOs) and non-governmental organizations (NGOs) which stricken states will generally accept. Evidence of humanitarian practices gives encouragement to those seeking to strengthen an international sense of solidarity. Indeed, many of the current ILC draft articles reflect the historical presumption of available externally-provided assistance.³² The good faith of external actors offering assistance is widely presumed (although not on an irrebutable basis). Expectations of assistance are further bolstered by principle 6 of the San Remo Principles on the Right to Humanitarian Assistance³³ which notes that in the event of refusal of either offers of assistance, or access to the victims when humanitarian access is agreed upon, states and organisations concerned *may* ‘undertake all necessary steps to *ensure such access*’ according to humanitarian and human rights principles.³⁴ In recognising a right, this principle moves very quickly to suggesting a responsibility and significantly elevates the profile and potential power of assisters. There are at least two ways of reading draft article

³¹ Report on the work of the sixty-fifth session (n 30) 77.

³² Draft articles 10 and 11 concern cooperation for disaster reduction and the duty to reduce the risk of disasters respectively. See also draft article 13 (the duty of the state to seek external assistance); 14 (consent of the affected state to external assistance); 15(conditions on the provision of external assistance); 17 (facilitation of external assistance); and 19 (termination of external assistance).

³³ San Remo Principles (n 25).

³⁴ *ibid*, principle 6 (emphasis added).

16: either, conservatively, as a codification of existing, discretionary practice or, more progressively, as signposting the way for development of an obligation/duty.

3.2. Codifying and cementing the legal terrain

If external actors routinely fulfil the expectations of aid implied in notions of international cooperation and embodied in many general and specialised IDRL instruments (which will be discussed subsequently), is there any need for further legal codification? Probably there is, because IDRL has historically been complicated and patchy to the extent that its identity as a discrete area of law has been challenged. While there exist a number of key reference points such as the 1994 Mohonk criteria and the 2007 IFRC/IDRL Guidelines³⁵ these are somewhat free-floating and soft. Given this situation of a legal mosaic where the tiles are yet to be affixed, the ILC is to be commended for undertaking the unenviable task of organising the law regarding disasters, and indeed cementing the very concept of IDRL as a coherent specialism. The study sees itself as demarcating a legal ‘space’³⁶ whereby a framework of key concepts and principles might be identified. Despite the Special Rapporteur’s inclination for a framework convention, it is likely the contribution will be to the soft law terrain via non-binding guidelines.³⁷ This route, although criticised for repeating IFRC efforts,³⁸ may be more practical and receive the widest possible acceptance given the number of actors involved. Although still soft, the ILC project aims to consolidate the legal landscape and recognise the full range of actors working on the terrain of disasters, with a view to highlighting the importance of, as well as better facilitating, co-operation among key

³⁵ Annotations to the IDRL Guidelines (n 17), the use of which was urged in Strengthening the coordination of emergency humanitarian assistance of the United Nations, GA Res. 63/139 (5 March 2009).

³⁶ F 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.

³⁷ Special Rapporteur’s Preliminary Report (n 3) para 60; ILC, *Report on the work of the sixty-third session* UN Doc. A/66/10 (2011) (Report on the work of the sixty-third session) para 285; and Special Rapporteur’s Fourth Report (n 3) para 25, Statement by representative of the UK in UNGA, Summary record of the 24th meeting, Sixth Committee, UN Doc. A/C.6/65/SR.24 (1 December 2010); and Statement by representative of Russia in UNGA, Summary record of the 23rd meeting, Sixth Committee, UN Doc.A/C.6/65/SR.23 (1 December 2010).

³⁸ Zorzi Giustiniani, (n 36) 69, arguing that only a treaty would have real added value.

international entities.³⁹ Draft article 16 declares the legitimate interest of the international community, states and organisations in the disaster context and reflects the diminution in state sovereignty evident since 1945, most notably as a result of human rights law.⁴⁰ It clarifies that offering relief is not to be seen as an unfriendly act. This is the straightforward codificatory reading of article 16. More interesting issues arise with the progressive development dimension of the ILC's work and we have written elsewhere regarding the progressiveness of the draft articles covering the duty to co-operate/right to refuse aid.⁴¹ Draft article 16's status appears first as a mere reiteration of philanthropic practices of external international actors. However, is it possible that its terms suggest (perhaps even unintentionally) a pathway developing towards a duty of offering assistance?

Draft article 16 walks a fine line between rhetoric and reality. The actual terms of draft Article 16 merely reflect a discretionary right to offer assistance. As noted already, despite key cooperative duties being premised on an expectation that aid will be forthcoming, this ILC-articulated right to offer assistance, ostensibly an embodiment of international solidarity and cosmopolitan responsibility, is merely optional.⁴² However, the flip-side of cosmopolitan global co-operative responsibility, as embodied in the stricken state's duty both to seek and not arbitrarily refuse aid, has very little room for manoeuvre. With its sovereignty

³⁹ In August 2014, the ILC transmitted the draft Articles through the UN Secretary-General to Governments, competent international organizations, the Red Cross and the Red Crescent Societies for comments and observations, to be submitted by January 2016. Comments from UN Office for the Coordination of Humanitarian Affairs (UNOCHA) and UNISDR were also welcomed.

⁴⁰ (Report on the work of the sixty-third session) (n 37) para 277.

⁴¹ C Allan and T O'Donnell 'A Call to Alms?: Natural Disasters, R2P, Duties of Cooperation and Uncharted Consequences' (2012) 17 JCSL 337; C Allan and T O'Donnell 'An Offer You Cannot Refuse? Natural Disasters, the Politics of Aid Refusal and Potential Legal Implications' (2013) Amsterdam Law Forum 5 36.

⁴² Although in fairness, it reflects Common Article 3 of the Geneva Conventions and their Additional Protocols (that is, right to offer services). See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) (First Geneva Convention) art 3; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950); Geneva Convention Relative to the Treatment of Prisoners of War, (adopted 12 August 1949, entered into force 21 October 1950) art 3; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) art 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) (API); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978)(APII).

seemingly significantly fettered, the role for the disaster-affected state is predominantly one of duty. The role for the unaffected, donor state or body is primarily discretionary. Such asymmetry is striking but is it defensible, especially given the comparative vulnerability of the different actors involved? It might be considered that a duty to offer assistance would be more equitable. Of course such a duty could not be identically imposed. Any obligation/duty would have to be differentiated to take into account individual state capacity but this is inherent in the proposed duty to offer, rather than provide, assistance. Indeed the commentary to draft article 1 states that the Draft Articles cover *ratione materiae* disaster-affected states, third states, international organisations and other entities ‘*in a position to cooperate, particularly in the provision of disaster relief and assistance*’.⁴³ Further, the practice of differentiated obligations according to capacity is already in place in human rights law, particularly for developing states with regard to the achievement of socio-economic rights.

Is there any scope to re-read draft article 16’s ‘right’? Draft article 16’s own terms are fairly modest, but the accompanying Commentaries are a little more bold and say that in the case of states, the United Nations (UN) and other IGOs, such bodies are ‘*encouraged to make offers of assistance*’ to a disaster-affected state.⁴⁴ While arguably this represents the ILC making policy recommendations, rather than offering legal clarification, perhaps, instead, this notion of ‘encouragement’ more clearly reflects our suggested idea of ‘duty’ and thus is legally, rather than politically, contoured. Further, draft article 16’s contextualisation within the body of the other draft Articles is important. It complements draft articles 8, which outlines a duty of key actors to co-operate, and 9 outlining forms of cooperation. It also undoubtedly bolsters the power of draft Articles 13 and 14⁴⁵ which clearly put pressure on affected states to accept externally-provided aid. Taken together, it might be said that the overall Draft Articles point to a strong expectation of assistance from able actors which might

⁴³ (emphasis added).

⁴⁴ Report on the work of the sixty-sixth session (n 18) 130, para 4. (emphasis added).

⁴⁵ Duty of the affected state to seek, and consent to, external assistance respectively.

in fact be read as a duty of offering. Whether or not such a reading is feasible, the question remains: should such a duty be included?

Arguably the ILC Draft Articles are not suitably equipped to *impose* duties of assistance and aid arrangements. However, while such arrangements might be more efficiently created and expressed in bilateral, trilateral or regional treaties which better estimate the type and extent of disasters likely to befall a region, a general duty of offering assistance is unlikely to compromise such existing arrangements. Indeed, a general duty could form a normative basis for treaty duties, and they in turn may provide evidence for the hardening of such a duty in a mutually reinforcing fashion.⁴⁶ Between them they may even produce an obligation of assistance.

The explicit articulation of such a duty (inherently tailored according to state capacity) would balance the ILC Draft Articles more clearly and do so without requiring external actors to behave any differently from their current practice. It would, however, remove the discretionary element of when, and to which disaster-stricken states, offers are made. Again, this would more clearly mirror the fettering of a stricken state's right to refuse. The ILC is always very cautious to stress when a drafting project is codifying or progressing the law. This project is no exception – it comprises a good deal of progressive development.⁴⁷ The difficult line to navigate is when there is a move from progressive development to creationism.⁴⁸ It is this latter possibility (and the danger of *creating* an obligation or implying secondary duties on the part of non-disaster-affected entities and the international community to respond) that alarmed some ILC delegates and states.⁴⁹

⁴⁶ D Cubie 'An Enchanted Tool? Humanitarian Assistance and the ILC Draft Articles on the Protection of Persons in the Event of Disasters' (2009-2010) *Irish Yearbook of International Law* Vol.IV-V 119.

⁴⁷ Special Rapporteur's Preliminary Report (n 3) paras 9 and 42; Report on the work of the sixty-third session (n 37) para 285.

⁴⁸ Special Rapporteur's Fifth Report (n 7) para 52.

⁴⁹ ILC, *Report on the work of the sixty-second session*, UN Doc. A/65/10 (2010) (Report on the work of the sixty-second session) paras 318-19.

However, a proposed duty to offer assistance might not in fact be a creative revolution in international law. A duty (rather than a right) of assistance has legal antecedents in IDRL. Article V of the 2003 Bruges Resolution outlined duties in respect of humanitarian assistance and stated that ‘[a]ll States should to the maximum extent possible offer humanitarian assistance to the victims in States affected by disasters’.⁵⁰ IGOs were addressed similarly. Article VI stated that in organising, providing and distributing assistance ‘assisting States and organizations *shall* cooperate with the authorities of the affected State or States’.⁵¹ A similarly phrased direction pertained to states regarding mitigating consequences where a disaster affected more than one state.⁵² These terms imply a stronger duty of initiation, that is, a duty to at least offer assistance. The 2003 Bruges Resolution does not stand alone. The influential 1994 Mohonk document also makes reference to responsibilities to provide assistance during complex emergencies. It notes that where the authorities of a disaster-affected state 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’.⁵³

Thus, draft article 16’s terms articulate a right, the Commentaries strongly suggest the right should be exercised where possible, the rest of the articles are premised on the fact that the assistance has been offered and key IDRL referencing instruments suggest a duty of (actual) assistance and maybe even an obligation. This is confusing.

4. Duties/rights/obligations/responsibilities

4.1 What’s in a name?

The articulation of duties and obligations appears interchangeably in the Draft Articles and their Commentaries. One ILC delegate thought it better not to avoid focussing

⁵⁰ Bruges Resolution (n 1) art V.

⁵¹ *ibid* art VI (emphasis added).

⁵² *ibid* art VI(2).

⁵³ Mohonk Criteria (n 24) PtII(4) (emphasis added).

on determining rights and duties and opt for wording that simply encouraged states to offer and accept assistance in disasters.⁵⁴ Another approved of the Special Rapporteur's general preference for 'duty' rather than 'obligation' because it indicated something between a moral dictate and a legal obligation.⁵⁵ However, this leaves some obscurity and produces a chess game of language. As noted already, IDRL is in a complex state. It comprises soft law, treaty law, customary law, guidelines and codes, the status and enforceability of which is often quite unclear. In a sense, IDRL exemplifies the unstable nature and unpredictable outcomes of norms operating in a de-centralised legal system. By way of illustration, the Mohonk Criteria refer to both the right and the obligation of the international community to assist when disaster-affected states are unable or unwilling to provide aid. This assumes that a right also carries an obligation. Further, as noted above, the duties/rights/obligations of potential external donors seem to differ between the ILC draft Articles, the 2003 Bruges Resolution and the 1994 Mohonk criteria. So, if the ILC Draft Articles were designed to clarify matters, they may still have some way to go.

4.2. Terms

The commentary to draft article 1 refers to 'rights and obligations' of relevant actors, but draft articles 8, 11, 12, 13 all refer to a particular 'duty'. The commentary to draft Article 2 (outlining the entire project's purpose) states that '[t]he obligations of States are considered in draft articles 11[16], 12[9], 13[10], 14[11], 17 [14] and 18'. Draft articles 14, 17 and 18 certainly follow the language of obligation.⁵⁶ However, draft article 2's commentary overlooks draft article 8. Draft article 8's title may only refer to a 'duty to cooperate' but its terms actually utilise obligatory language ('States shall...'). Draft articles 11,⁵⁷ 12⁵⁸ and 13⁵⁹

⁵⁴ See statement by Mr Murphy in Provisional summary record of the 3139th meeting (n 10) 18.

⁵⁵ See statement by Mr Murase in *Provisional summary record of the 3102nd meeting*, UN Doc. A/CN.4/SR/3102 (25 January 2012) (Provisional summary record of the 3102nd meeting) 14.

⁵⁶ The 'affected State shall ...'.

⁵⁷ Concerning risk reduction.

⁵⁸ Concerning an affected state's role.

also use the term ‘duty’ (draft article 1 only in its title) but article 2 refers to them all as obligatory. Thus, draft article 2’s commentary apparently synonymizes ‘duty’ and ‘obligation’ for some draft articles but not others.

Draft article 16 refers only to a right of external actors to offer assistance. Could a right, ever be understood as a duty, an obligation, a responsibility, or a moral imperative? Draft Article 16’s accompanying draft commentary is explicit in refusing to recognise a ‘legal duty’, (presumably an obligation) to assist. However, this is perhaps more about anxieties regarding an obligation to actually provide aid. If the ILC project is driven by an ethos of protection, then this assumes a general duty of care and responsibility. Such a duty resists any enforceable private-law type obligation but reflects international, inter-state comity. It is under the auspices of such responsible inter-state neighbourliness that a duty of offering assistance might sit. This perspective echoes views of certain states on the Sixth Committee. The Polish position has been noted already. Both 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).⁶⁰ The Sri Lankan delegation also urged a redrafting to present the offer of disaster relief as a positive duty of the international community.⁶¹

Despite the thrust of the ILC project being the protection of persons affected by disasters (with implicit and qualified recognition of the rights of disaster-affected states⁶²) explicit reference to the language of rights appears only in two articles, both very general: draft article 2 on the project’s purpose and draft article 6 detailing the need to respect for stricken people’s rights. Equally, the concept of protection is not defined fully in the Draft

⁵⁹ Concerning the affected state’s duty to seek external assistance.

⁶⁰ UNGA Sixth Committee, Summary record of the 24th meeting, UN Doc. A/C.6/66/SR.24 (1 December 2011) para 92.

⁶¹ UNGA Sixth Committee, Summary record of the 27th meeting, UN Doc A/C.6/66/SR.27 (8 December 2011) para.20

⁶² See draft Articles 12(2), 14 and 19.

Articles or Commentaries. Yet, the notion of responsibility of the international community, of third states and particularly of disaster-affected states is ever-present.⁶³ Article 16's 'right' also has to be read in the context of draft article 13 which refers to the duty of a disaster-affected state to seek assistance from external actors. To what extent does draft article 13's language and thrust legitimise the expectations of stricken states and their populaces that assistance *will* be forthcoming, and thereby reify a duty upon those external bodies to *offer* aid, regardless of the precise terminology?

It seems there are two issues to ponder when considering draft article 16's interpretation. First, the wording of the article itself states that certain entities 'have the *right* to offer assistance'⁶⁴ to an affected state. It does not say that external bodies '*can* offer assistance' which would be much more reflective of the entirely discretionary nature of philanthropy and goodwill (rather than the exercise of a legal right).⁶⁵ Secondly, if any interpretation (of an implied duty) is misplaced then it would seem that the powerful language of 'rights' and 'law' is 'fig-leaving' the non-mandatory nature of draft article 16.

4.3 Status of different duties and rights

What is the hierarchical relationship (in terms of authority) between obligations, responsibilities, duties and rights? As noted, the current Draft Articles have an overarching theme of responsibility, they promote certain duties and recognise certain rights, but what do they actually do? While it has been suggested that they should be hortatory, facilitative and promotional, rather than legally binding and enforceable,⁶⁶ the widespread referencing of the 2001 ILC Draft Articles on State Responsibility has shown the power of such ostensibly

⁶³ See, e.g., commentaries to draft Articles 11 and 13, Report on the work of the sixty-sixth session (n 18) 117 para 31 and 120 para 1 respectively.

⁶⁴ (emphasis added).

⁶⁵ See statement by Mr Murase in Provisional summary record of the 3102nd meeting (n 55) 15.

⁶⁶ *ibid* 14.

‘soft’ instruments.⁶⁷ It might be argued that the substantive provenance of the State Responsibility Articles was stronger. However, Special Rapporteur Valencia-Ospina’s careful exploration of existing international law and its progressive development, and his inclination for a possible framework convention,⁶⁸ suggest that these ILC Draft Articles are less tentative than they may appear. Likely to prove both authoritative and persuasive, they will undoubtedly contribute to the concretisation of IDRL.

As Sivakumaran notes, ILC drafting practice utilises three techniques: generalising from more specific instruments, analogising to related bodies of law and, finally, the development of a normative framework.⁶⁹ Undoubtedly the 2001 Draft Articles did not impose obligations, or establish state responsibility for the breach of an obligation or apply sanctions in case of non-fulfilment of that responsibility – they simply reflected and codified custom. Where progressive development was being made, that was explicit. However, this is less the case with the current Draft Articles. Indeed, arguably the Draft Articles have (problematically) created, or at least helped to crystallise, something of a duty to *accept aid*, despite the tentative terms and soft status of the instruments upon which they base that duty.⁷⁰ When trying to unpack notions of ‘duty’ and the relative status of different duties, it might be asked, whether there is a difference between a codifying duty (effectively an obligation) and a progressive duty (something less than an obligation)? Similarly, if ‘duties’ do not create actual obligations do they create expectations (of action/assistance)? While draft article 16 refers to a right not a duty, its interpretation will be guided by draft article 1.

4.4 Draft article 1 and responsibility

The commentary to draft article 1 states that the:

⁶⁷ Cited even prior to finalising, see *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* ICJ Rep 1997 (25 September 1997) 7; *France-New Zealand Arbitration Tribunal (Rainbow Warrior)* 82 ILR 500 (30 April 1990).

⁶⁸ Despite resistance towards it, see above n 37 and associated text.

⁶⁹ S Sivakumaran, ‘Techniques in International Law-Making: The Emergence of an International Disaster Response Law (currently unpublished manuscript)’

⁷⁰ Allan and O’Donnell, ‘A call to Alms’ (n 41) 345-6.

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, particularly in the provision of disaster relief and assistance*.⁷¹

This last clause implies the imposition of responsibility and, as mentioned already, the Draft Articles are forceful in their exposition of the affected state's primary duties to co-operate, reduce risk and seek assistance, and to refrain from arbitrarily refusing consent to externally offered assistance.⁷² This is consistent with the concept of conditional sovereignty where authority is premised upon 'rightful', legitimate exercise of power, and is reminiscent of the Responsibility to Protect (R2P) doctrine.

R2P's re-definition of 'responsibility' entailed a definite expectation of specific action (from the international community)⁷³ and political attempts to invoke R2P in the natural disasters context have been strongly resisted.⁷⁴ However, the ILC explicitly eschewed the language of 'responsibility' in the Draft Articles because of its transference into a term of art,⁷⁵ preferring instead the words 'duty' and 'role'.⁷⁶ The ILC's rejection of R2P does not necessarily mean that for external actors there is no responsibility at all in disasters, just no 'R2P responsibility'. As noted, a general theme of responsibility is returned to time and again in the Commentaries.⁷⁷ draft article 8 articulates the general international cooperative duty and draft article 12 stresses the protective duty of disaster-affected states. Concepts of

⁷¹ Report on the work of the sixty-sixth session (n 18) 90 para 2 (emphasis added).

⁷² See arts, 8 and 11-14.

⁷³ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, (Report, December 2001) <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> accessed 25 September 2015; AJ Bellamy, 'The Responsibility to Protect – Five Years On' (2010) 24 *Ethics & International Affairs* 143. See also statement by A Pellet in Provisional summary record of the 3102nd meeting (n 55) 12.

⁷⁴ See Allan and O'Donnell 'A call for Alms' (n 41) 348.

⁷⁵ Commentary to draft Article 12, Report on the work of the sixty-sixth session (n 18) , p.118

⁷⁶ *ibid* p.118-119

⁷⁷ See above text before n 60 and Allan and O'Donnell 'A Call for Alms' (n 41). In fact R2P's relevance to the ILC project was still being debated in Summer 2011, see Report on the work of the sixty-third session (n 37) para 286; Statement by Mr Vasciannie Pellet in Provisional summary record of the 3102nd meeting (n 55) 13.

‘humanity law’⁷⁸ and ‘common weal’ have undoubtedly recently gained currency and, regardless of nomenclature, notions of international fellowship and solidarity clearly penetrate sovereign Westphalian borders. So, what of the international community’s duty to safeguard the rights of benighted individuals? If the international responsibility of external actors in disasters is different to their responsibilities which arise during genocide,⁷⁹ what does it entail? Does it give rise to an obligation, a duty, or a right? It is hard to conceive of a ‘mere’ responsibility which has no consequences in the event of dereliction. If no new obligations in disaster-settings are desirable, a duty to offer assistance in the Draft Articles could help operationalise existing human rights obligations incumbent upon states. Thus, third states would respect sovereignty principles and simply be (responsibly and horizontally) assisting stricken states to comply with their (protective and vertically applied) human rights obligations to protect.⁸⁰

5. Draft article 16

Absent a specific prohibition restricting offers of assistance, some ILC members and states considered draft article 16 superfluous,⁸¹ but this is not a universal view. The Special Rapporteur asserted that it operationalized Vattelian notions of solidarity (which had informed the ILC project since its inception.⁸² It recognised the global interest in protecting stricken populations whose plight was straining the capacity of the affected sovereign state, while simultaneously confirming the centrality of the affected state’s primary responsibility.⁸³ However, as noted throughout this piece, it is still questionable why such a strongly articulated humanitarian commitment was expressed only as a right. Indeed, the Special

⁷⁸ R Teitel, *Humanity’s Law* (OUP, 2013).

⁷⁹ *2005 World Summit Outcome*, GA Res. 60/1 (24 October 2005) paras 138-9.

⁸⁰ D Cubie and M Hesselman ‘Accountability for the human rights implications of natural disasters: a proposal for systemic international oversight’ (2015) 33 *Netherlands Quarterly of Human Rights* 9.

⁸¹ See, for example, Mr. Petrič’s view that its necessary inclusion was ‘debatable’, Provisional summary record of the 3139th meeting) (n 10) 7.

⁸² Special Rapporteur’s Fourth Report (n 3) paras 78 and 84.

⁸³ *ibid* para 84; A/68/10 (n 30) 79.

Rapporteur clarified that the draft article was concerned only with offers of assistance and not with the actual ‘provision’ thereof. Any such offers (either unilaterally made or in response to a request) were ‘essentially voluntary and should not be construed as recognition of the existence of a legal duty to assist’.⁸⁴ This caveat was presumably included to reflect the anxieties being expressed in meetings by some ILC members and governments in the UNGA Sixth Committee. The Special Rapporteur was equally clear that there was no obligation on an affected state to accept an offer of assistance, although this was qualified by the terms of draft article 14 militating against bad faith refusals which as we have asserted, at its mildest, produces an unbalanced result. Of course stricken states remain the primary actor (draft article 12(2)), determine when national capacity is overwhelmed (draft article 13), can impose conditions on external assistance (draft article 15) and control when external assistance is required (and external actors require the affected state’s consent). However, affected states are not hermetically sealed off from surrounding politics and are even more exposed and vulnerable and potentially less able to exercise (paper) choices, when in a weakened condition. Further, such provisions assume a functioning government still exists, which the aftermath of the 2010 Haitian earthquake, where large parts of the government apparatus were badly affected, shows is not necessarily the case.

Finally, these Draft Articles must be read in the context of pre-existing specialist IDRL instruments. Such instruments (which the ILC already heavily relied on for the provision saying that an affected state ‘*shall not*’ arbitrarily withhold its consent to aid)⁸⁵ are more definite in their sense of an obligation for external actors to assist. While some ILC members were keen that draft article 16 did not create positive duties and specific legal obligations on the international community (including both third states and international

⁸⁴ Report on the work of the sixty-fifth session (n 30) 79.

⁸⁵ (emphasis added) See commentary to draft Article 14, Report on the work of the sixty-sixth session (n 18), n p.123-126

organisations) it will be interesting to see if the final version of the Draft Articles reflects such a conservative position.

5.1 Offers by states

As regards assistance from third states, the Special Rapporteur cited the provenance of Article 3 of the Convention for the Pacific Settlement of International Disputes (Hague I) 1907 which established the right of third parties to offer their assistance in the event of an international dispute, while recognising the right of the disputing states to reject such means of reconciliation.⁸⁶ 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 could⁸⁷ be made available for the provision of assistance to other States Parties in the event of a nuclear accident or radiological emergency’.⁸⁸ 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.⁸⁹

As already noted, the Mohonk criteria suggest both a right and an obligation of the international community to offer assistance, and general human rights law may offer some guidance. The UN Committee on Economic, Social and Cultural Rights (UNCESCR) General Comments has suggested a joint and individual responsibility of states to contribute in emergencies to the maximum of their capacities.⁹⁰ However, the lack of development in this right/obligation/duty inevitably throws into doubt its strength and although there was a possibility that draft article 16 might have emboldened the duty, it seems clear that this will

⁸⁶ Fourth Report n.3 A/CN.4/643 para.85

⁸⁷ In fairness it does not say ‘will’.

⁸⁸ Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (adopted 26 September 1986, entered into force 26 February 1987) art 2(4) (emphasis added).

⁸⁹ See also Tampere Convention (n 19) art 4; and 2005 ASEAN Agreement (n 20) arts 3-4.

⁹⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment 12 regarding the right to adequate food (Art 11 of the Covenant)*, UN Doc. E/C.12/1999/5 (12 May 1999) (GC12) para 38 and CESCR, *General Comment 14 regarding the right to the highest attainable standard of health (Art 11 of the Covenant)*, E/C.12/2000/4 (11 August 2000) (GC14) para 40.

be resisted. At the same time, as noted, such insistence on its own may not be enough to stop this particular trajectory and again a duty to offer might be distinguished from a duty to contribute.

5.2 Offers by international organisations

The Special Rapporteur considered offers of assistance from IGOs and other humanitarian actors as belonging ‘to the *acquis* of the international law of disaster response’.⁹¹ Such actors’ assistance does indeed have a long recognition in international law. In terms of instruments which specify the role of IGOs and NGOs, several UN General Assembly (UNGA) resolutions are relevant,⁹² and indeed the World Health Organisation and International Atomic Energy Agency are specifically empowered in the event of global health hazards and nuclear/radiological accidents respectively.⁹³ The San Remo Guiding Principles on the Right to Offer Humanitarian Assistance also provide a right to offer assistance for the ICRC, UNHCR and other UN organisations and professional humanitarian bodies. Common Article 3 of the 1949 Geneva Conventions, and Article 18 of 1977 Additional Protocol II, are also inclusive of such bodies.⁹⁴

The aforementioned landmark UN General Assembly resolution 43/131 (1988) was clear that the humanitarian work of NGOs was to be facilitated by affected states, and the support of all states to such organisations in their endeavours was urged.⁹⁵ The Annotations to the 2007 IFRC IDRL Guidelines define ‘assisting actors’ as including humanitarian

⁹¹ Special Rapporteur’s Fourth Report (n 3) para 97.

⁹² Notably Humanitarian assistance to victims of natural disasters and similar emergency situations, GA Res. 43/131 (8 December 1988), especially preamble and paras 3-5. See also Strengthening the capacity of the United Nations system to respond to natural disasters and other disaster situations, GA Res. 36/225 (17 December 1981) and Assistance to refugees, returnees and displaced persons in Africa, GA Res. 46/108 (16 December 1991).

⁹³ World Health Organization (WHO), *International Health Regulations* (2nd edn, WHO, 2008) art 10(3); Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (n 89) art 5(d).

⁹⁴ See ‘impartial humanitarian body’ and ‘relief societies’ in Common Article 3(2) of the Geneva Conventions 1949 (n 42) and Article 18(1) APII 1977 (n 42) respectively; Report on the work of the sixty-sixth session (n 18) 130; Inter-American Convention to Facilitate Disaster Assistance (adopted 7 June 1991) art XVI; the Tampere Convention (n 19); 2005 ASEAN Agreement (n 20) art 3.

⁹⁵ GA Res. 43/131 (n 93) paras 4-5.

organisations, states, foreign individuals and private companies providing charitable relief or other foreign entities (section 2.14). This is a very open-ended definition which has been critiqued elsewhere.⁹⁶ In the context of peacetime assistance, article 5 of the 1989 resolution of the Institut de Droit International, concerning the Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States, refers to offers ‘by a State, a group of states, an international organization or an impartial humanitarian body such as the International Committee of the Red Cross, of food or medical supplies’ in contexts where the ‘life or health of the population is seriously threatened’. This instrument stresses that such assistance cannot be considered an unlawful intervention in the affected states.⁹⁷ This principle was reiterated and strengthened in this same organisation’s 2003 resolution on humanitarian assistance, Article IV of which stated that states and organizations had the right to offer humanitarian assistance to an affected state, and assuming such an offer had an exclusively humanitarian character, it would not be unlawful. The right to offer assistance to stricken populations was subject to the consent of the affected state. Strangely, only the 1989 resolution’s (weaker) terms, are referred to in the Commentaries to draft article 16.

Draft article 16 differentiates between states, the UN and other IGOs which ‘have the right’ to offer assistance and relevant NGOs which ‘may also offer assistance’ to an affected state. This differentiation (whereby NGOs do not have ‘rights’) may be explained by the fact that during the ILC’s Summer 2011 meetings, some members expressed concern that the draft article implied that NGOs enjoyed the same legal status as states and IGOs.⁹⁸ Changing the phraseology more clearly provided an authorisation rather than a right.⁹⁹ However, yet

⁹⁶ Allan and O’Donnell ‘A Call for Alms’ (n 41).

⁹⁷ See also San Remo Principles (n 25) principle 5, noting that exercising the right to offer help is not an unfriendly act or interference.

⁹⁸ Possibly by being endowed with international legal personality and rights – see *Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session* UN Doc. A/CN.4/666 (January 2014) 9. See also Report on the work of the sixty-sixth session (n 18) 130. Draft Article 8’s Commentary also acknowledges the distinctive obligations held by these actors regarding human rights (at 105 ff.).

⁹⁹ See detail in n.94 and associated text.

again the phraseology causes further confusion - what is the difference between an *authorisation* and a right and a duty? Who is authorising the NGO? If the interpretation mentioned earlier ('can/may' offer rather than having 'the right to offer') is followed perhaps the NGO load has been 'lightened' – might this imply a more onerous burden for the other actors referred to in draft article 16? Or, does the notion of 'authorisation' (by whom?) imply a transfer of responsibility from those other actors to NGOs? The latter could perhaps be implied from the commentaries to draft article 16 which single out states, the UN and IGOs, (not NGOs) as being 'encouraged to make offers of assistance'.¹⁰⁰

Presumptions regarding aid offers spring from notions of common humanity and although the Draft Articles are not human rights provisions as such, they arguably embody a human rights theme. The next section considers how Draft Article 16 might be read in the context of existing human rights law.

6. Human rights

6.1 Ethos

Individuals suffer severe hardships when disasters occur. The Special Rapporteur favoured a rights based approach early on¹⁰¹ and the Secretariat's Memorandum clarified the core protective nature of existing human rights obligations as regards disaster-stricken populations.¹⁰² Draft article 6 specifically addresses the importance of protecting human rights. A more lukewarm endorsement appears in draft article 2 which urges 'an adequate and effective response ... with full respect for ... [stricken people's] ... rights'. Nevertheless, the Draft Commentaries specifically reference the 1966 International Covenant on Civil and Political Rights (ICCPR) (notably the right to life) and the 1966 International Covenant on Economic Social and Cultural Rights (ICESCR).¹⁰³

¹⁰⁰ Report on the work of the sixty-sixth session (n 18) 130.

¹⁰¹ See Special Rapporteur's Preliminary report (n 3) paras 12, 25-6 and 62.

¹⁰² Secretariat Memorandum Addendum (n 19) 3

¹⁰³ See the Commentaries to draft articles 2, 5, 7-8, 13-14 in Report on the work of the sixty-sixth session (n 18).

6.2 Human rights duties of disaster-affected states

Draft article 8's duty to co-operate and its prioritisation over sovereign initiative was defended in terms of its consonance with, and reflection in, human rights law. Interestingly the Special Rapporteur stressed the responsibilities of affected states referring to their 'margin of appreciation',¹⁰⁴ which is human rights language. In his fourth report, the Special Rapporteur cited a number of human rights sources offering a relatively hard-edged view of the role and duties of affected states¹⁰⁵ and their limited capacity to refuse aid. Indeed, misapplication of their margin of appreciation could produce an internationally wrongful act if aid-refusal undermined the rights of the affected individual under international law.¹⁰⁶ The UNCESCR has previously maintained that if individuals/groups cannot enjoy the right to food via available means, affected states have to fulfil that right directly.¹⁰⁷ Only those states able to demonstrate *both* an inability to carry out obligations unilaterally *and* unsuccessful efforts to obtain international support to ensure the availability and accessibility of the necessary food would avoid a finding of a violation of ICESCR terms.¹⁰⁸ Arguably, by stressing the disaster-affected state's 'duty to seek' aid,¹⁰⁹ with presumptions of international support, there could be certain (albeit hesitant and obscure) implications regarding aid-offers. Similarly, the powerfully made arguments against a right to *refuse* aid, also assume the existence of externally-provided aid. Taken together, these arguments imply a duty of

¹⁰⁴ As regards needs and responses, see Valencia-Ospina *The Special Rapporteur's Third report on the protection of persons in the event of disasters*, UN Doc. A/CN.4/629 (31 March 2010) (Special Rapporteur's Third report) para 76.

¹⁰⁵ Despite weak enforcement of such proactive rights on the domestic level, notably in states which advocate duties of cooperation.

¹⁰⁶ Report on the work of the sixty-second session (n 49) para 318.

¹⁰⁷ GC12 (n 91) paras 6 and 15 respectively.

¹⁰⁸ GC12 (n 91) para 17.

¹⁰⁹ K Luopajarvi, 'Is there an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?' (2003) 15 IJRL 678.

external states (in particular) to offer assistance to stricken states, even if they do not imply an individualised *right to* humanitarian assistance.¹¹⁰

6.3 Human rights duties of entities external to disasters

As noted already, certain international organisations' mandates may ordain them to act in disasters. Indeed there is potential for international responsibility when things go awry.¹¹¹ Nevertheless, the Special Rapporteur refers less to the human rights duties of external actors. Undeniably, a human rights frame of reference, being classically state-focussed, works easiest in the context of a state's responsibility to its own people. Nevertheless, the entities listed in draft article 16 may be said to constitute the building blocks of the 'international community',¹¹² and the draft article itself implies notions of collective responsibility. If no offers of assistance emerged, would external actors bear international responsibility if such omissions undermined stricken populations' rights under international law? This would effectively be a failure in due diligence. Such a consequence seems unlikely given the earlier mentioned Sixth Committee's negative response to the question of whether the general cooperative duty included a duty to *provide* assistance when requested by that state.¹¹³ In the ILC debates regarding draft article 2 it was clear that there was no proposal to expand existing human rights. Absent a specific right of individuals to directly enforce cooperation, the duty to cooperate is thus more of a horizontal inter-state duty.¹¹⁴ This fettering of the co-operative duty undoubtedly challenges the protective human rights ethos of the project and emphasises its imbalanced nature. However, as noted, this

¹¹⁰ CL Sun, 'Humanitarian Assistance by International Organisations: A Question of Compulsory Access to Victims' (1991) Singapore Journal of Legal Studies 320.

¹¹¹ See, e.g., Transnational Development Clinic of Yale Law School, Global Health Justice Partnership of the Yale Law School and the Yale School of Public Health, and Association Haïtienne de Droit de L'Environnement. *Peacekeeping without Accountability: The United Nations' Responsibility for the Haitian Cholera Epidemic* (2013) <http://www.law.yale.edu/documents/pdf/Clinics/Haiti_TDC_Final_Report.pdf> accessed 27 September 2015; Georges et al. v. United Nations et al., 13-CV-7146 (JPO) (SDNY, 9 January 2015) (currently on appeal).

¹¹² A Orford, *International Authority and the Responsibility to Protect* (CUP, 2011).

¹¹³ Report on the work of the sixty-fourth session (n 8) para 57; Special Rapporteur's Fifth Report (n 7) para 52.

¹¹⁴ Zorzi Giustiniani (n 36) 70-1, 83.

disinclination to re-understand the duty to co-operate was borne out of concerns regarding a possible duty to provide, rather than to offer assistance. A duty to offer would preserve the horizontal nature of the assistance-relationship and better retain a human rights focus for the project.

6.4 Human rights as a value rather than a context

The concept of human rights both describes the perilous context faced in disasters and represents a key value which informs the project on ‘the protection of *persons* in the event of disasters’.¹¹⁵ Thus, the selective invocation of the concept would seem indefensible and unsustainable. The human rights dimension of the draft articles needs to be discarded or made rational. If it is accepted that the world requires mutualised responsibilities, and that international disaster-assistance is desirable and should be safeguarded, can legal opportunities arise from wider human rights law, a context within which the draft articles will operate?

In fact, the idea of joint human rights responsibility is not new. Article 2(1) of the ICESCR refers to parties’ obligations to take steps at the international level to secure Covenant rights, with more specific co-operative obligations being mentioned in articles 11, 15, 22 and 23, as well as in CESCR General Comments 2,¹¹⁶ 7,¹¹⁷ and 15.¹¹⁸ In General Comment 14 concerning attainment of the highest standard of health,¹¹⁹ the UNCESR referred to the ‘joint and individual responsibility’ of states parties to cooperate in providing disaster relief and humanitarian assistance in emergencies.¹²⁰ In particular, it stated that ‘[e]ach State should contribute to this task to the maximum of its capacities’ and went on to

¹¹⁵ (emphasis added).

¹¹⁶ CESCR, *General Comment 2 regarding International technical assistance measures (Art 22 of the Covenant)* UN Doc. E/1990/23 (2 February 1990).

¹¹⁷ CESCR, *General Comment 7 regarding the right to adequate housing (Art 11(1) of the Covenant) forced evictions*, UN Doc. E/1998/22 (20 May 1997).

¹¹⁸ CESCR, *General Comment 15 regarding the right to water (Arts 11 and 12 of the Covenant)* UN Doc.E/C.12/2002/11 (20 January 2003).

¹¹⁹ Contained in International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force 3 January 1976) (ICESCR) art 12.

¹²⁰ GC14 (n 91) para 40.

specify that ‘economically developed states have a special responsibility and interest to assist the poorer developing states in this regard’.¹²¹ A special obligation is incumbent on those states parties and other actors ‘in a position to assist’, to provide ‘international assistance and cooperation, especially economic and technical’ to enable developing countries to fulfil their core and other ICESCR obligations.¹²² This of course drew upon the earlier UNCESCR General Comment 3 and the 1978 Alma-Ata declaration. In General Comment 3 the UNCESCR had emphasised that available resources include those available internally and from the ‘international community’.¹²³ The 1978 Alma-Ata declaration challenged as ‘politically, socially and economically unacceptable’ and ‘of common concern to all countries’,¹²⁴ the ‘existing gross inequality in the health status of the people particularly between developed and developing countries as well as within countries’. The Special Rapporteur acknowledged Article 3(3) of the Declaration on the Right to Development¹²⁵ and a 2008 report of the High Commissioner for Human Rights¹²⁶ which refers to cooperation both in the realisation of human rights by developing countries and a shared responsibility for their development. The 2001 ILC Articles on State Responsibility are very clear that states should not aid or assist in the commission of an internationally wrongful act. While there is no suggestion that the failure to offer or provide disaster aid is akin to one state supplying arms to another practising crimes against humanity, nevertheless there is a clear expectation of not acting so as to make bad situations worse. While some might flinch at the idea of a delictual-type responsibility for non-providing external states, there is already a body of law stressing shared responsibilities/obligation/duties. It is at least worth investigating whether a

¹²¹ GC14 (n 91) para 40.

¹²² GC14 (n 91) para 45.

¹²³ UNESCO, *General Comment 3 regarding the nature of states parties’ obligations (Art 2, para 1 of the Covenant)* UN Doc. E/1991/23 (14 December 1990) paras 10 and 13.

¹²⁴ See also Charter of the United Nations and Statute of the International Court of Justice (Art 56; and ICESCR Arts 12, **2(1)**, 22-3.

¹²⁵ Special Rapporteur’s Fourth Report (n 3) paras 36-8.

¹²⁶ *Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development*, UN Doc. A/HRC/9/10 (Note by the United Nations High Commissioner for Human Rights, 15 August 2008).

responsibility to mitigate loss (for example, starvation/the spreading of disease) indicates a duty to offer assistance. Recognising a duty to offer assistance would better reflect both existing law and the proclaimed ethos of international solidarity.

6.5 The duty to offer assistance donate as a way of removing aid conditionality

There is extensive analysis of the political context of aid-donation,¹²⁷ notably of the (dubious) conditionality which often attaches to relief. Obviously there are illegal conditions (such as discrimination in aid distribution¹²⁸), however, other problematic conditions can be sought, such as a commitment to cooperate on criminal matters or to democratise non-democracies. The Special Rapporteur's third report ostensibly rejected any ethos of 'new humanitarianism'¹²⁹ while draft article 7's stressing of the principle of humanity,¹³⁰ taken together with impartiality, indicated a qualitative question with the key distinguishing criteria for assistance being need.¹³¹ International actors were cautioned against 'committing acts which might constitute interference in the internal affairs of the domestic State, so as to ensure an adequate and effective response'.¹³² Impartiality¹³³ acts as an umbrella for the three criteria of non-discrimination, proportionality and neutrality *per se*. If the ILC project favours needs-based assistance and rejects self-conscious, politicised refusal of aid, then a right to

¹²⁷ M Tan-Mullins, J Rigg, L Law, and C Grundy-Warr, 'Re-mapping the politics of aid: the changing structures and networks of humanitarian assistance in post-tsunami Thailand' (2007) 7 *Progress in Development Studies* 327.

¹²⁸ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, ICJ Rep 1986 (27 June 1986) 14 paras 242-3. See also Draft Convention on Expediting the Delivery of Emergency Assistance (adopted 18 June 1984) art 1(a); and the landmark Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, Resolutions of the 26th International Conference of the Red Cross and Red Crescent, Geneva (1995) Annex VI. K Beeckman, 'International Response to Non-armed Conflict Disasters: legal challenges encountered in light of the current regulatory framework' (2006) 25 *Refugee Survey Quarterly* 129, 132. See also Annotations to the IDRL Guidelines (n 17) s 4(2).

¹²⁹ Special Rapporteur's Third Report (n 106).

¹³⁰ Draft art 7.

¹³¹ Report on the work of the sixty-second session (n 49) para 303. See also Fiona Fox 'New Humanitarianism: Does it provide a moral banner for the 21st century?' (2001) 25 *Disasters* 275, 287-8.

¹³² Report on the work of the sixty-second session (n 49) para 302. See also Alex De Waal 'The humanitarians' tragedy: escapable and inescapable cruelties', *Disasters* (2010) 34 130, 135.

¹³³ ILC, *Provisional summary record of the 3054th meeting*, UN Doc.A/CN.4/SR.3054 (26 November 2010) (Provisional summary record of the 3054th meeting) 18-19.

offer aid should be expressed in bolder, more obligatory or dutiful terms. If neutrality¹³⁴ is ‘the operational mechanism to implement the ideal of humanity’,¹³⁵ a duty to offer aid could circumvent murky politics, guarantee aid-neutrality and complement the trope of apoliticism stressed in draft article 7.¹³⁶

7. Guarding against donor unilateralism and protecting the primacy of the affected state

A duty to offer assistance to those in need and in times of stress, is intuitively attractive. However, it could strengthen perceptions of a resource-rich West/North and a weak Global South which can only ever be the recipient of charity. Such a duty would also not necessarily or inevitably be an unalloyed good if it had the potential to further weaken disaster-affected states. Unilateral action, particularly by third states, remains unacceptable. This section considers the dangers of a potential duty to offer assistance and whether they might be more illusory than real given the terms of the other draft articles.

Although the Draft Articles promote duties of cooperation and fetter affected states’ rights to refuse aid, they do not divest stricken states of sovereignty. A certain threshold of harm must be reached both to trigger aid and to guard against unwarranted interventions. Draft Article 3 defines disasters, and its commentaries refer to existing legal caveats stressing certain requirements¹³⁷ including an exceptional scale of damage and societal disruption.¹³⁸ Temporary emergencies which stretch, but do not disable, a state are probably insufficient.¹³⁹

By stressing the primacy, but only the primacy, of an affected state, draft article 12 perhaps suggests that there exists an alternative option of non-consensual, external,

¹³⁴ Report on the work of the sixty-second session (n 49) para 311; See also the First Geneva Convention (n 42).

¹³⁵ Provisional summary record of the 3154th meeting (n 135) 18.

¹³⁶ Report on the work of the sixty-sixth session (n 18) 104, para 4.

¹³⁷ Bruges Resolution (n 1) art I(2).

¹³⁸ 1993 Ethiopian National Policy (n 17) s II.1. See also the Draft Convention on Expediting the Delivery of Emergency Assistance (n 130), and the Caribbean Association Agreement (n 27) art I(1).

¹³⁹ Special Rapporteur’s Fourth Report (n 3) para 9, but interestingly there is no apparent requirement for human harm or transboundary damage, see Z Giustiniani (n 36) 68 citing the Report on the work of the sixty-second session (n 49) 11.

international intervention.¹⁴⁰ Draft article 14 alludes to the potentially non-consensual provision of international assistance in the event of an affected state's arbitrary refusal, raising concerns regarding safeguarding against undesirable unilateralism.¹⁴¹ Both of these concerns can be allayed. First, any re-drafting of draft article 12 so as to imply the international community's right (or secondary duty) as a whole to intervene in a non-consenting affected territory, was strongly opposed.¹⁴² Thus, if draft article 16 articulated a duty to offer assistance, draft article 12 should militate against its improper invocation. As regards draft article 14, this danger relates more to a potential duty to provide aid/assistance, rather than one to offer it. The perils for disaster-affected states of 'open door' policies for foreign actors are well-known: supply-driven thinking, non-professional relief workers and the blocking of appropriate aid.¹⁴³ Draft Article 15 recognises that affected states may place conditions on the provision of external assistance¹⁴⁴ taking into account the identified needs of stricken persons and the quality of the assistance (in line with draft Article 14¹⁴⁵). A 'duty to offer' allows for a process of offer-and-(potentially qualified)-acceptance which a 'duty to provide' cannot. The former also better balances relationships between assisting and affected states.

In terms of operationalising a duty to offer assistance, following a disaster's actual occurrence, external actors could make clear what their offers entail. It is, however, important to avoid a potential bureaucratic quagmire. Given that many disaster relief arrangements are

¹⁴⁰ See statements by Ms Jacobsson and Mr Vasciannie in Provisional summary record of the 3057th meeting, UN Doc.A/CN.4/SR.3057 (1 July 2010) (Provisional summary record of the 3057th meeting) 4-5; and references to the Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) (Advisory Opinion) ICJ Rep 1962 (20 July 1962) 151.

¹⁴¹ Report on the work of the sixty-sixth session (n 18).

¹⁴² See statement by Mr. Vascianne in Provisional summary record of the 3139th meeting (n 142) 5. No references to the international community's secondary responsibility were included nor was a 'without prejudice' clause inserted regarding the rights of the international community to provide lawful humanitarian assistance to stricken persons, in the event of state failure.

¹⁴³ Beeckman (n 130) 133-4. See also N Klein 'In the wake of catastrophe comes the whiff of unrest', *The Guardian* (6 May 2008).

¹⁴⁴ Provided they accord with good faith, sovereignty and humanitarian principles per draft art 7.

¹⁴⁵ Report on the work of the sixty-sixth session (n 18) 123.

dealt with regionally, draft article 8's terms regarding cooperation and draft article 10's duty to cooperate in disaster risk reduction, could perhaps produce a 'standing arrangement' regarding the types of assistance likely to be offered by neighbouring states either individually, or those to be filtered through a regional organisation. Injecting a preparatory dimension into a draft article 16 duty could mitigate any unwelcome assistance-deluge.

If the standing arrangement proposal is rejected or non-existent, requiring a call from stricken states, to indicate timing and type of assistance required, would allow them to exercise their 'margin of appreciation'¹⁴⁶ (although admittedly this assumes a still-functioning state apparatus). However, could draft article 13's 'duty to seek' assistance¹⁴⁷ equate to a request, or bypass such a requirement? This is unlikely. The drafters specifically rejected use of the word 'request'. To 'seek' assistance implied a broad 'negotiated approach' and process, meaning that affected states did not have to seek assistance from every source detailed,¹⁴⁸ nor was automatic consent to *any* offers implied following a call for help. Notably, 'request' tends to be used in the context of mutual assistance and between treaty parties where there is more trust.¹⁴⁹ Thus, draft article 13's inherent limitations mean that any potential right/duty to offer aid does not render an open season on stricken states and provides reassurance that any potential duty to offer assistance should not eliminate the capacity of stricken states to refuse aid.¹⁵⁰

8. Conclusion

During the ILC deliberations on the right to offer assistance, Mr Saboia, noted parallels between the project's rationale that disasters are matters of international concern and the international interest in human rights protection. As well as this project being an

¹⁴⁶ See n 104 and associated text and the commentary to draft article 12, Report on the work of the sixty-sixth session (n 18).

¹⁴⁷ See also Bruges Resolution (n 1) art III, para 3.

¹⁴⁸ Special Rapporteur's Fourth Report (n 3) para 44.

¹⁴⁹ See Tampere Convention (n 19) art 4; 2005 ASEAN Agreement (n 20) arts 3-4.

¹⁵⁰ For discussion see T Nelson, 'Rejecting the gift horse: international politics of disaster aid refusal', (2010) 10 Conflict Security & Development 379.

expression of solidarity, it could also be read as one of ‘enlightened self-interest’.¹⁵¹ His thoughts recall Judge Jennings’ comments that an assisting state simultaneously defends itself when it defends another because there is an inter-mingling of the security of all.¹⁵² By analogy, there is no telling when a state will be stricken by natural disaster and will need assistance. Further, a state weakened by natural disaster can be a breeding ground for numerous long-term threats that menace both internally and externally. While certain states in the Global South are often stricken, it is worth remembering that Hurricane Katrina and the Japanese tsunami and earthquake of 2010 occurred in highly developed, mature, market economies and international aid was still desperately needed.

A duty to offer assistance would lend a concreteness to the material edge of international solidarity. It would also complement the limited capacity to refuse aid as proclaimed by the ILC Draft Articles. If it is the case that *in extremis* politics should be suspended and humanitarianism should come to the fore, how can a duty to offer assistance, a duty of solidarity, be denied? Draft article 16 should not embody a right to do nothing.

¹⁵¹ Provisional summary record of the 3102nd meeting (n 55) 9.

¹⁵² *Nicaragua* (n 130) para 545.

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