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‘SOLIDARITY, DUTIES TO ASSIST AND THE POTENTIAL OF THE ILC DRAFT ARTICLES ON THE PROTECTION OF PERSONS IN THE EVENT OF DISASTERS’

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INTRODUCTION

This chapter is concerned with notions of solidarity in the international law relating to disaster assistance. Articulations of solidarity and fellowship are regularly propounded when catastrophes occur. It is often argued that such occasions demand that the usual geopolitical concerns and differences preoccupying international actors be put to one side in the light of circumstances so overwhelmingly awful they transcend any political notion of business-as-usual. However, disasters, as well as being intensely political, are also highly legalised contexts, even when the law is only questionably present or relevant. Thus, while proclamations of fellowship and solidarity are attractive, their operationalisation is much more thorny, and ultimately their legal manifestation is elusive. This chapter investigates whether there is much actual evidence of solidarity in international disaster law by unpacking the 2016 ILC Draft Articles on the Protection of Persons in the Event of Disasters¹, the most recent and now pre-eminent instrument in the sub-specialist field of international disaster response law (IDRL). The chapter also queries whether there is, or should be, a duty to offer (rather than provide) assistance and whether an affirmative duty might be discerned from the ILC initiative read in conjunction with other related international instruments. The ILC project is now concluded but debates continue regarding a possible treaty² and the ILC project will undoubtedly contribute to the development of international customary law. It is entirely possible that a duty to offer assistance could find an ultimate home in either of these sources of law courtesy of the ILC’s efforts. It is important to acknowledge, that the ILC has made significant strides with this project. Ultimately, the resistance of states³ to the bolder initiatives suggested by the ILC (regarding offers of disaster assistance or the formation of a binding

¹ A/71/10, Adopted by the International Law Commission at its sixty-eighth session, in 2016, Yearbook of the International Law Commission, 2016, vol. II, Part Two.

² UNGA Resolution 76/119 ‘Protection of Persons in the Event of Disasters’, 9 December 2021. See also Eduardo Valencia-Ospina ‘The Work of the International Law Commission on the ‘Protection Of Persons In the Event of Disasters’ 1 Yearbook of International Disaster Law (2018) 5-27.

³ Eduardo Valencia-Ospina ‘Eighth report on the protection of persons in the event of disasters’, A/CN.4/697 (Special Rapporteur’s Eighth Report).

convention) has thwarted some of its ambition. This perhaps highlights the peril of assuming a protective instinct on the part of such actors. Since the last edition of this collection, the world has endured the impact of the Covid 19-pandemic. This chapter will investigate briefly what the pandemic revealed regarding international solidarity in the face of disaster, and whether a greater willingness to countenance more concrete manifestations of solidarity was demonstrated.

II.HIGHLIGHTING THE GAP

(i) Questioning the Inevitability of Altruism

In his fourth report, the ILC Special Rapporteur Eduardo Valencia-Ospina noted that when disaster strikes, evidence of international compassion is abundant.⁴ This gives heart to those who look to encourage and nurture awareness of international interdependence. Such demonstrations of international solidarity also give living shape to more abstract conceptualisations of the ‘international community’.⁵ However, although there is a common assumption that external disaster assistance will be forthcoming, aside from the compelling mandates of certain IGOs, there is no *guarantee* of it. Indeed, the folly of such assumptions is demonstrated by the fact that disaster flash appeals often fall short in reaching their targets. Following the devastating Nepalese back-to-back earthquakes of April/May 2015 the United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) launched a flash appeal for \$422 million to support people through immediate lifesaving aid operations.⁶ By early September 2015, only 57 per cent of the total appeal was covered. The UNOCHA flash appeal for Turkey after the earthquake in February 2023 reached 53.8% coverage⁷ which followed a similar pattern of coverage regarding the flash appeal launched in response to the 2021 Kenyan drought.⁸ In September 2023, a powerful storm in Libya caused two dams to

⁴ 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).

⁵ Dino Kritsiotis, *Imagining the International Community*, *European Journal of International Law*, Volume 13, Issue 4, September 2002, 961–992, 21 *Eur. J. Int’l L.* 387, Santiago Villalpando, ‘The Legal Dimension of The International Community: How Community Interests Are Protected in International Law’ *European Journal of International Law*, (2010) 387, ‘What is the International Community’ *Foreign Policy*, 2002, Sreenivasa Rao Pemmaraju, ‘The Concept of ‘International Community’ in International Law and the Developing Countries’, in Ulrich Fastenrath, and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford, 2011).

⁶ Reliefweb, *Nepal Flash Appeal Revision: Nepal Earthquake April – September 2015* accessed 25 September 2015. For donors see, Financial Tracking Service, *NEPAL – Earthquake – April 2015* accessed 25 September 2015.

⁷ https://fts.unocha.org/plans/1150/flows?order=directional_property&sort=asc

⁸ <https://fts.unocha.org/plans/1073/summary>

collapse leading to catastrophic flooding in the northeast city of Derna. At the time of writing, just under 23% of the flash appeal's funding has received coverage.⁹ Less high-profile disasters, receive even less assistance. 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.¹⁰ This evidence highlights that there is no inevitability to the external provision of disaster assistance and emphasises the precarity of relying upon a philanthropic instinct on the part of external actors, particularly states.

(ii) Codifying, Cementing and Progressing the Legal Terrain

Given the expectations of assistance that are implied in notions of international cooperation, and that find articulation in many general¹¹ and specialized instruments (which will be discussed subsequently) it might be queried as to whether there is any need for further legal rules. It is submitted that such a need still remains, because IDRL has historically been complicated and patchy. While there exist a number of key reference points such as the 1994 Mohonk Criteria¹², the Oslo Guidelines,¹³ Resolutions of the Institute of International Law,¹⁴ the Sphere Handbook¹⁵ and the 2007 IFRC/IDRL Guidelines¹⁶ 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 organizing the law regarding disasters, and indeed cementing the very concept of IDRL as a coherent specialism.¹⁷

⁹ <https://fts.unocha.org/plans/1184/flows>

¹⁰ 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.

¹¹ UN Charter Articles 1, 55 & 56. See also UNGA Resolution 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

¹² The Task Force on Ethical and Legal Issues in Humanitarian Assistance formed by the Program on Humanitarian Assistance at the World Conference on Religion and Peace, 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, 194.

¹³ 'Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief' (May 1994).

¹⁴ 2003 Resolution of the Institute of International Law on Humanitarian Assistance (2 September 2003) (hereinafter the Bruges Resolution).

¹⁵ The latest edition is *The Sphere Handbook*, 2018, <https://spherestandards.org/handbook/editions/>

¹⁶ The International Federation of Red Cross and Red Crescent Societies, 'Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance' (2007) 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).

¹⁷ <https://phap.org/PHAP/PHAP/Themes/IDRL.aspx>

The study saw itself as demarcating a legal ‘space’¹⁸ whereby a framework of key concepts and principles might be identified. Although the Special Rapporteur expressed a clear inclination for a framework convention, currently the main contribution of the draft Articles is to the soft law terrain via non-binding guidelines.¹⁹ While this route has been criticized for repeating much in substance and form of IFRC efforts,²⁰ it may be a more pragmatic approach to achieving the widest possible acceptance among a diverse group of actors.

Ultimately, the ILC achieved its ambition of consolidating the legal landscape. It also recognised the full range of actors working on the terrain of disasters, with a view to highlighting the importance of, as well as better facilitating, cooperation among key international entities.²¹ However, uncertainties and gaps remain and there still exists room for further clarification and development. The UN Charter envisages that the ILC will not only codify the law but progressively develop it, a point explicitly acknowledged by the Special Rapporteur.²² There is therefore more ambitious potential for the ILC draft Articles to pave the way for developing a duty of external actors to offer assistance, to more concretely reflect the solidarity so often proclaimed. Although the ILC project has concluded, it will enjoy a significant afterlife via its strong influence on any subsequent treaty and developments in customary law. It is into these spaces that the proposed duty to assist can slot.

III. THE ILC DRAFT ARTICLES AND THE ETHOS OF RESPONSIBILITY

The ILC project declares the legitimate interest of the international community, states and organizations in the disaster context. In so doing, it reflects the diminution in state sovereignty

¹⁸ 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.

¹⁹ Special Rapporteur’s Preliminary Report (n 4) 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 4) 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).

²⁰ See IFRC’s comments in response to the ILC consultation, Special Rapporteur Eighth report (n 3) 406. See also Giustiniani (n 18) 69, arguing that only a treaty would have real added value.

²¹ 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 (OCHA) and UNISDR were also welcomed. By the Summer of 2016 the ILC had before it the Special Rapporteur’s Eighth Report (ibid), as well as comments and observations received from Governments, international organizations and other entities (A/CN.4/696 and Add.1).

²² Special Rapporteur’s Preliminary Report (n 4) paras 9 and 42; Report on the work of the sixty-third session (n 19) para 285.

evident since 1945 (most notably as a result of international human rights law²³) whilst clarifying that offering relief is certainly not to be seen as an unfriendly act. Draft Article 1 sets the scene for the entire project by outlining that its scope and focus concerns the protection of persons in disasters. The accompanying Commentaries go on to state that 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, and the rights and obligations of third States and intergovernmental organizations and non-governmental organizations and other entities in a position to cooperate, particularly in the provision of disaster relief assistance as well as in the reduction of disaster risk.²⁴

This last clause implies that responsibility is borne by a number of actors to varying extents. Draft Article 2 makes clear that the purpose of draft Articles ‘to facilitate the adequate and effective response to disasters and reduction of the risk of disasters, so as to meet the essential needs of the persons concerned, with full respect for their rights.’

(i) The Pre-eminent Role of the Disaster-stricken State

In the first instance of a disaster’s occurrence, the disaster-affected state has the duty of ensuring the protection of persons and provision of disaster relief assistance in its territory (or in territory under its jurisdiction or control) and it has the primary role in the direction, control, coordination and supervision of such relief assistance.²⁵ ILC draft Article 3 defines a disaster as

a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society;

This *de minimis* standard demands that a certain threshold of harm and scale of damage must occur, with attendant societal disruption.²⁶ Temporary emergencies which stretch, but do not disable, a state are likely insufficient to trigger the application of the draft Articles.²⁷ The

²³ Report on the work of the sixty-third session (n 19) para 277.

²⁴ Report on the work of the sixty-eighth session (n 1).

²⁵ Draft Article 10.

²⁶ Bruges Resolution (n 14) art I(2), 1993 Ethiopian National Policy on Disaster Prevention and Management (October 1993) s II.1. See also the Draft Convention on Expediting the Delivery of Emergency Assistance (1984), and the 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(1).

²⁷ Special Rapporteur’s Fourth Report (n 4) para 9, but interestingly there is no apparent requirement for human harm or transboundary damage, see Giustiniani (n 18) 68 citing the Report on the work of the sixty-second session A/65/10, 11.

approach of foregrounding the primary responsibility of the disaster-affected state very much fits with the vertical model of, and obligations that arise under, international human rights law for states in relation to their populations (discussed in more detail subsequently).

In relation to disaster-affected states, the draft Articles are explicit and forceful in their articulation that those states bear the primary duties to cooperate in disasters, reduce disaster risk²⁸ and seek assistance when their national coping capacities have been exceeded.²⁹ They must also refrain from arbitrarily refusing consent to externally offered assistance.³⁰ This clearly comports with modern understandings of sovereignty which favour notions regarding the ‘rightful’ legitimate exercise of power and responsibility over traditional Westphalian notions of sovereign power and rights. While this approach recalls the Responsibility to Protect (R2P) doctrine³¹ political attempts to invoke R2P in disasters, with its associated hawkish, militaristic intervention overtones, have been strongly resisted³² so much so that the ILC explicitly eschewed even the language of ‘responsibility’.³³

Nevertheless, a general theme of responsibility is returned to time and again in the ILC Commentaries.³⁴ Concepts of ‘humanity law’³⁵ and ‘common weal’ have undoubtedly recently gained currency and, regardless of nomenclature, notions of international fellowship and solidarity clearly penetrate sovereign borders. Questions thus arise as to the content of the international community’s duty to safeguard the rights of vulnerable disaster-stricken individuals. However, beyond broad, general international cooperative duties articulated in ILC draft Articles 7 and 8, it is unclear what this international responsibility in disasters might entail for external actors.

²⁸ Draft Article 9.

²⁹ Draft Article 11.

³⁰ Draft Article 13.

³¹ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Report, December 2001) 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 A/CN.4/3102 12.

³² See C Allan and T O’Donnell, ‘A Call to Alms? Natural Disasters, R2P, Duties of Cooperation and Uncharted Consequences’ (2012) 17 *JCSL* 337, 348.

³³ Commentaries to the then draft Art 12, 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) 118. It instead preferred the terms ‘duty’ and ‘role’, 118–19.

³⁴ Particularly of disaster-affected states. See Allan and O’Donnell ‘A Call to Alms’ (n 32). 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 19) para 286; Statement by Mr Vasciannie in Provisional summary record of the 3102nd meeting (n 31) 13.

³⁵ R Teitel, *Humanity’s Law* (OUP, 2013).

Still, there is a point at which the responsibilities of disaster-stricken states and external actors come together. As can be implied from draft Article 3's threshold criteria, it is often the hallmark of disasters that they overwhelm and exceed the national capacities of affected states. As noted, in such cases, under draft Article 11 disaster-affected states are expected to seek external assistance 'from, as appropriate, other States, the United Nations, and other potential assisting actors'.³⁶ The ILC draft Articles thus envisage a clear role for the international community when one of its members is afflicted by catastrophe. It might even be said that the terms of the ILC instrument create expectations in the minds of stricken states that once they are in a disaster crisis, any quest they undertake in seeking external assistance will be fruitful. If there are currently no obligations to assist, and doubts as to rights that stricken populations can invoke, there may be attractions to softer notion in a 'duty' to assist. In this way solidarity can be demonstrated and external actors, particularly states, assisting stricken states in complying with their human rights obligations to protect populations,³⁷ thereby fulfilling the thrust of the ILC draft Articles and preserving key tenets of sovereignty.

(iii) External Offers of Disaster Assistance

The clearest expression of notions of international fellowship appears in ILC draft Article 12 which concerns offers of external assistance and states,

1. In the event of disasters, States, the United Nations, and other potential assisting actors may offer assistance to the affected State.
2. When external assistance is sought by an affected State by means of a request addressed to another State, the United Nations, or other potential assisting actor, the addressee shall expeditiously give due consideration to the request and inform the affected State of its reply.

The provision had undergone various re-drafts and in the face of opposition to the 2014 version (then draft Article 16) which referred to states, the UN and other competent IGOs as having 'rights' to offer assistance, the more bland and less controversial phrase 'may offer assistance' was substituted.

As an expression of notions of international fellowship draft Article 12 is somewhat lukewarm. Nevertheless, the Commentaries to the draft Articles maintain that draft Article 12

³⁶ Draft Article 11.

³⁷ 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.

‘acknowledges the interest of the international community in the protection’ of disaster-stricken persons and is an ‘expression of the principles of solidarity and cooperation ... which underlie the whole set of draft articles’.³⁸ Indeed, the project’s Special Rapporteur Eduardo Valencia-Ospina from the outset stated that it was in the spirit of solidarity that the Commission’s found its *telos*³⁹ and often invoked the writings of Emer de Vattel.⁴⁰ The ILC Commentaries emphasises that the entire international community has an interest in the protection of disaster-stricken populations which in turn complements the disaster-affected state’s primary role.⁴¹ This notion of partnership is bolstered by cross-references to other draft Articles notably those concerning the duty to cooperate which is incumbent on all states⁴² and the forms that such cooperation might take.⁴³

The Commentaries make clear that any offers of disaster assistance that are forthcoming must comport with the terms of draft Article 6 articulating the importance of humanitarian principles such as humanity, neutrality and impartiality, and offers must be made on the basis of non-discrimination ‘while taking into account the needs of the particularly vulnerable’. Assuming that any external offers comply with these standards, they cannot be considered as interfering in the disaster-affected state’s internal affairs.⁴⁴ This re-emphasises the ILC’s commitment regarding the disaster state’s sovereignty and its pre-eminence.⁴⁵

There is a mixed tone, however, in draft Article 12’s Commentaries. They stress that draft Article is ‘only concerned with “offers” of assistance not with the actual “provision” thereof’ and that any such offers, be they made unilaterally or following a request, are ‘essentially voluntary’.⁴⁶ The Commentaries somewhat double-down on their conservatism by stressing that draft Article 12 should not be construed as recognising any legal duty to assist. This is arguably balanced by stating that should an offer be made, in line with understandings of sovereignty, there is no corresponding obligation on an affected state to accept as per the terms

³⁸ Commentaries to draft Article 12, para. 1.

³⁹ Eduardo Valencia Ospina ‘Second report on the protection of persons in the event of disasters’ A/CN.4/615 para.50

⁴⁰ Special Rapporteur’s Fourth report (n 4) paras 78 and 84.

⁴¹ Commentaries to draft Article 12, para. 1.

⁴² Draft Article 7.

⁴³ Draft Article 8.

⁴⁴ Commentaries to draft Article 12, para. 3. This echoes the 1989 Resolution of the Institute of International Law, Institute of International Law, Yearbook, vol. 63, Part II, Session of Santiago de Compostela (1989), p. 339, at p. 345, art. 5.

⁴⁵ Preamble and draft Article 10, para. 2.

⁴⁶ Commentaries to draft Article 12, para. 2.

of draft Article 13.⁴⁷ That is true. However, draft Article 13 apparently indicates a presumption in favour of acceptance, saying that consent should not be withheld 'arbitrarily' yet it does so without offering significant guidance on what constitutes arbitrariness or which body decides whether an arbitrary refusal has occurred. Therefore, external states exercise full discretion whether or not to offer assistance whereas disaster-affected states have their discretion fettered. Draft Article 12 thus emerges less as a provision offering lifelines of assistance than as a reinforcement of external actors' abilities to pick and choose whether, and which, disasters to assist. Meanwhile, stricken states wait to see if their requests will be fulfilled and must defend any refusals they make.

As is clear from its terms, draft Article 12 differentiates between different assisting actors by referencing states, the UN and 'other potential assisting' actors. This last category is fairly broad and is defined as embracing competent and relevant IGOs, NGOs or entities⁴⁸. As the Commentaries make clear, by virtue of their mandates the UN and certain IGOs are not only entitled but encouraged to make offers of assistance to disaster-affected states.⁴⁹ The position of NGOs is interesting by virtue of them being key, but generally unaddressed, actors in international law. Nevertheless, NGOs are often vital to disaster-response efforts either through via own initiatives or in partnerships with other agencies.⁵⁰ In fact the issue of identifying different categories of assisting actors was a matter of some controversy during the ILC project and various iterations of this particular draft Article appeared over the drafting period. As will be discussed subsequently (in Section V), the previous version of draft Article 12 (formerly draft Article 16) specifically mentioned non-governmental organisations as relevant actors in the disaster relief context. Notwithstanding the reality that the draft provision reflected, this specific articulation generated such controversy as to the potential recognition of further legal rights for NGOs that it was replaced ultimately by more neutral, less specific terminology.

⁴⁷ Commentaries to draft Article 12, para. 2.

⁴⁸ Draft Article 3(d).

⁴⁹ Commentaries to draft Article 12, para. 3.

⁵⁰ 'Türkiye and Syria earthquakes: IFRC response to date' 9th February, 2023, <https://www.ifrc.org/article/turkiye-and-syria-earthquakes-ifrc-response-date>, USAID 'Mozambique – Complex Emergency and Tropical Cyclone MARCH 13, 2023', https://www.usaid.gov/sites/default/files/2023-03/2023-03-13_USG_Mozambique_Complex_Emergency_and_Tropical_Cyclones_Fact_Sheet_2.pdf, IFAW monitoring heroic efforts in Hawaii wildfires, 22 August 2023 <https://www.ifaw.org/uk/news/hawaii-wildfires-response-2023>, Disasters Emergency Committee, Pakistan Floods Appeal: Reporting Back, <https://www.dec.org.uk/appeal/pakistan-floods-appeal>

A further alteration from the previous version of draft Article 12 was the removal of the language of the ‘rights’ of external actors to offer assistance. This phrasing was considered as unnecessarily confusing and unwelcome, carrying with it notions that external actors were acting in assertive ways. It seemed particularly jarring that external actors were being afforded rights whilst disaster-stricken states were bearing a considerable number of duties (to seek assistance, to not refuse offers of assistance and to facilitate aid entry). Some opponents to the notion of external actors’ rights even went so far as to say that ‘rights’ to assist should be recast as duties to do so⁵¹ indicating there is a momentum behind such a position (even if this position was not reflected in the final draft Articles).

Queries arise as to the added value of draft Article 12 within the ILC project. Some considered its contribution to be negligible, other thought it was superfluous⁵² to restate the existing position of external actors in disasters. A few thought it disappointing in its terms and a missed opportunity. Others were relieved at the drafting changes from the previous version of draft Article 16 with its language of ‘rights’. Some maintained that it still demonstrated the international community’s commitment to supporting disaster-affected populations. Ultimately, the draft provision exists and the debates are recorded. What is notable is that most of the anxiety expressed revolved around any possible duties to provide assistance while the capacity to make offers generated little attention or concern. This leaves open some space for exploring the possibilities of a duty to assist in disasters by offering aid and assistance.

IV.DISCERNING DIFFERENT DUTIES IN DISASTERS

Given the current patterns of global wealth inequality and the increased impact of disasters upon impoverished and underdeveloped states, a ‘duty to assist’ appears attractive. Notwithstanding the modest terms of draft Article 12, the ILC draft Articles reference the importance of human rights, and international human rights law (IHRL) is a key influence on disaster law. However, when it comes to IHRL’s enforcement on an individual basis, it has

⁵¹ Polish representative UNGA Sixth Committee, Summary record of the 21st meeting, UN Doc. A/C.6/66/SR.21 (2 December 2011) para 86, Thailand representative, UNGA Sixth Committee, UNGA Sixth Committee, Summary record of the 24th meeting, UN Doc. A/C.6/66/SR.24 (1 December 2011) para 92, Sri Lanka representative, UNGA Sixth Committee, Summary record of the 27th meeting, UN Doc A/C.6/66/SR.27 (8 December 2011) para 20.

See also in 2012, ILC member Mr Kittichaisaree, ILC, Provisional summary record of the 3141st meeting, UN Doc. A/CN.4/SR.3141 (23 November 2012) 17.

⁵² See, for example, Mr Petric’s view that its necessary inclusion was ‘debatable’, Provisional summary record of the 3139th meeting) A/CN.4/3139, para 20.

followed a vertical model of operation. That is, states are responsible for individuals within their territory and jurisdiction. A state's responsibility for persons in other states would lie mainly in terms of duties not to obstruct those states in the realisation of their human rights obligations (discussed below in Section IV(iii)). Therefore, it would be difficult to argue that individuals in one state could invoke a right to disaster assistance from another state.

Disaster law instruments are similarly hesitant about providing for an enforceable right to assistance and there was no intention that the ILC would be creating new rights or obligations.⁵³ However, as noted, the ILC was also fairly clear about the importance of international cooperation and the forms such cooperation might take. Indeed, the Special Rapporteur in his fifth report, noted that the duty to cooperate when taken together with any nascent right to provide assistance, raised certain fundamental issues: ...

... 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.⁵⁴

The Special Rapporteur saw the importance of cooperation and seemed to favour a binding obligation on external actors to extend disaster assistance. However, he was forced to acknowledge, that the 'overwhelming majority' of states which submitted written comments in the Sixth Committee were focused in their firm belief that no duty to so provide assistance existed under general international law.⁵⁵ Accordingly, he could only affirm that the cooperative duty did not currently include such a legal duty for States to provide assistance when requested by an affected state.⁵⁶ Any such offers of assistance (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'.⁵⁷ This caveat was presumably included to allay the anxieties being expressed by some ILC members and states.

⁵³ *Report on the work of the sixty-fifth session*, UN Doc. A/68/10 (2013) (Report on the work of the sixty-fifth session).

⁵⁴ 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.

⁵⁵ 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 55) para 52.

⁵⁶ Special Rapporteur's Fifth Report (n 55) para 68.

⁵⁷ Report on the work of the sixty-fifth session (n 54) 79

One ILC delegate suggested that including a duty to give ‘due consideration’ to requests for assistance from an affected state would be beneficial⁵⁸ and so this marked the limit of an assisting duty in draft Article 12. This does highlight the need for the requested state to fulfil its duty to cooperate in good faith, but it leaves considerable discretion for external states, and room for endless debate as to the requirements and limits of ‘due consideration’. However, again it is notable that most of the objections arose from concerns about any suggestion to *provide* assistance. Questions thus endure as to whether a duty to *offer* assistance can arise either from the ILC draft Articles themselves, or in conjunction with other instruments.

(i) Duties to Offer vs Duties to Provide Assistance – a second class option?

A duty to offer assistance seems intuitively rather diluted compared to any duty to actually provide aid. However, this apparently more modest option may have a number of attractions. First, a duty to offer has potential for external actors to positively, proactively fulfil cooperative imperatives envisaged in draft Article 7 whilst chiming with notions of international solidarity.⁵⁹ Secondly, a duty to offer assistance moves away from the uncomfortable language of ‘rights’ of external actors which was seen as unhelpful and proved controversial during the development of the ILC draft Articles.⁶⁰ Thirdly, a duty to offer assistance has the flexibility to recognise the differentiated capacities of states and organizations to realistically assist a disaster-stricken state. Fourthly, the duty to offer assistance avoids the anxieties provoked by a duty to provide aid. These include worries regarding the potential de-limitation of an external actor’s activities in the disaster-affected territory, the dangers of a duty measured in outcome rather than intention, and the potential of such a duty providing an alibi for unscrupulous or opportunistic external actors. This last concern is particularly potent for disaster-affected territories many of whom have pre-existing geo-political vulnerabilities. With a duty to provide aid there is a danger of an external state becoming focused on the discharge of its duty instead of prioritizing the needs of the affected state. At best this results in inappropriate or badly timed aid, at worst it legally facilitates a Trojan horse. Thus, although ostensibly weaker than a duty to provide assistance, somewhat counter-intuitively in fact, a duty to offer assistance may better safeguard the position of disaster-affected states by leaving with the

⁵⁸ See statement by Mr Hassouna in ILC, Provisional summary record of the 3139th meeting, (n 52) para.6.

⁵⁹ Sixth Committee, Summary record of the 21st meeting, UN Doc. A/C.6/66/SR.21 (2 December 2011) para 86.

⁶⁰ ILC, Provisional summary record of the 3141st meeting, UN Doc. A/CN.4/SR.3141 (23 November 2012) 17.

disaster-affected state the initiative of acceptance/refusal of, or imposing conditions upon, any forthcoming offers.

(ii) **Discerning a Duty to Assist**

Draft Article 12 needs to be read in the context of the other draft Articles. Draft Article 2 emphasises the project's protective purpose, draft Article 4 foregrounds the importance of human dignity and draft Article 5 stresses the human rights of disaster-stricken persons. Taken together this trio expresses a commitment to protecting and securing the wellbeing of vulnerable populations. Further, as noted, draft Article 11 refers to the duty of a disaster-affected state to seek assistance from external actors when its capacity is exceeded, arguably legitimising expectations of stricken states and their populations that assistance will be forthcoming. This potentially reifies a duty upon those external actors to make offers of assistance. Whilst the draft Articles focus on the rights and obligations of States in relation to one another,⁶¹ they acknowledge the rights and obligations of States in relation to persons in need of protection. Indeed, the duty of cooperation implies international comity and assistance and is derived directly from disaster law, key instruments of international human rights law and the UN Charter itself.

A duty (rather than a right) of assistance has legal antecedents in IDRL. Article V of the 2003 International Law Institute's Resolution (hereinafter the 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'.⁶² IGOs were addressed similarly. Article VI stated that in organizing, providing and distributing assistance 'assisting States and organizations shall cooperate with the authorities of the affected State or States'. It also contained a similarly phrased direction pertaining to states regarding mitigating consequences where a disaster affected more than one state. These terms imply a stronger duty of initiation, that is, a duty to at least offer assistance. Although the 2003 Bruges Resolution is soft law, it does not stand alone. The influential 1994 Mohonk Criteria 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

⁶¹ Commentary to draft Article 1, para. 2

⁶² Bruges Resolution (n 14).

and provide relief to affected and threatened civilian populations in conformity with the principles of international law'.⁶³ Principle 6 of the San Remo Principles on the Right to Humanitarian Assistance 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 organizations concerned may 'undertake all necessary steps to ensure such access' according to humanitarian and human rights principles.

(iii) Relevancy of International Human Rights Law

Individuals suffer severe hardships when disasters occur and presumptions regarding aid offers spring from notions of common humanity. While the ILC draft Articles are not human rights provisions as such, they embody a human rights theme and reference key instruments and concepts. Indeed, the Special Rapporteur favoured a rights-based approach early on⁶⁴ and the Secretariat's Memorandum clarified the core protective nature of existing human rights obligations as regards disaster-stricken populations.⁶⁵ As noted, draft Article 5 specifically addresses the importance of protecting human rights, with the Commentaries particularly referencing 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).⁶⁶

The notion of joint responsibility for securing human rights is not new and indeed it has formed a central plank of realising the rights under the International Covenant on Economic, Social and Cultural Rights. Article 2(1) of the ICESCR 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, as well as in the UN Committee on Economic, Social and Cultural Rights (CESCR) General Comments 2, 7 and 15.⁶⁷ In General Comment 14 concerning attainment of the highest standard of health,⁶⁸ the CESCR referred to the 'joint and individual responsibility' of states parties to cooperate in providing disaster relief and

⁶³ (n 12), Pt II(4).

⁶⁴ See Special Rapporteur's Preliminary report (n 4) paras 12, 25–6 and 62.

⁶⁵ Protection of persons in the event of disasters Memorandum by the Secretariat (Secretariat Memorandum) A/CN.4/590.

⁶⁶ See the Commentaries to draft articles 2, 5, 7–8, 13–14 in Report on the work of the sixty-sixth session (n 33).

⁶⁷ 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).

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

humanitarian assistance in emergencies.⁶⁹ In particular, it stated that ‘[e]ach State should contribute to this task to the maximum of its capacities’ and went on to specify that ‘economically developed states have a special responsibility and interest to assist the poorer developing states in this regard’.⁷⁰ 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.⁷¹ This drew upon the earlier CESCR General Comment 3 and the 1978 Alma-Ata declaration. In General Comment 3 the CESCR had emphasized that available resources include those available internally and from the ‘international community’.⁷² The 1978 Alma-Ata declaration challenged as ‘politically, socially and economically unacceptable’ and ‘of common concern to all countries’⁷³ the ‘existing gross inequality in the health status of the people particularly between developed and developing countries as well as within countries’. Similarly, the Special Rapporteur acknowledged Article 3(3) of the 1986 Declaration on the Right to Development⁷⁴ and a 2008 report of the High Commissioner for Human Rights⁷⁵ which refers to cooperation both in the realization of human rights by developing countries and a shared responsibility for their development.

(iv) Broader readings of human rights responsibilities

Given that there is no specific right for disaster-stricken individuals to directly enforce international cooperation, then recourse must be had to duties of inter-state cooperation.⁷⁶ If no offers of disaster assistance are forthcoming, and such omissions undermine stricken populations’ rights under IHRL, then this becomes a matter of international responsibility for those actors. International cooperation is therefore seen through the lens of due diligence. The Sixth Committee’s negative response as to whether the general cooperative duty provided for by the ILC draft Articles included a duty of assistance confined its main antipathy for the duty

⁶⁹ 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.

⁷⁰ Ibid.

⁷¹ Ibid para 45.

⁷² CESCR, 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.

⁷³ 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.

⁷⁴ Special Rapporteur’s Fourth Report (n 4) paras 36–8.

⁷⁵ 126 Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Human Rights and International Solidarity, UN Doc. A/HRC/9/10 (Note by the United Nations High Commissioner for Human Rights, 15 August 2008).

⁷⁶ Zorzi Giustiniani (n 18) 70–71, 83. 115 Emphasis added.

to provide, rather than to offer, assistance⁷⁷ A duty to offer would preserve state sovereignty (and the classic model of human rights protective systems) whilst retaining a meaningful, relationally-contoured, human rights focus in disasters.

Another possibility concerns the issue of external states being complicit in the inadequate delivery of assistance by a disaster-stricken state to its own people. The highly authoritative 2001 ILC Draft Articles on State Responsibility are very clear that states should not aid or assist in the commission of an internationally wrongful act. While some might flinch at the idea of a delictual-type responsibility for non-offering external states, it is undeniable there is already a body of law stressing shared responsibilities/ obligation/duties. Arguably a responsibility to mitigate loss (for example, starvation/the spreading of disease) indicates a duty to offer assistance. Recognizing such a duty would capture both existing law, the proclaimed ethos of international solidarity and *erga omnes* obligations to safeguard the right to life.

Concerns about human rights are driven by the perilous, harming context of disasters, and are also called upon to represent a key value informing the ILC project which as its title states concerns ‘the protection of *persons* in the event of disasters’ (emphasis added). As such, the importance of human rights cannot be invoked selectively or performatively. It cannot be used to justify the project while its tethering to national, sovereign implementation operates as an obstacle to operationalising the project’s aims. Mutualized responsibilities are understood as key in disasters, and international disaster assistance is seen as desirable and should be safeguarded. The invocation of international human rights law in the context of disasters needs to be discarded or rationalised.

V. CONTOURING A DUTY TO ASSIST

When arguing for a duty to offer disaster assistance, it is important to establish which actors would carry out this duty and what forms that assistance might take in order for it to be operationally relevant and agile. There are a number of different stages of post-disaster aid, ranging from short-term, life-saving emergency aid and recovery measures,⁷⁸ through to more

⁷⁷ Report on the work of the sixty-fourth session (n 56) para 57; Special Rapporteur’s Fifth Report (n 7) para 52.

⁷⁸ IFRC/IDRL Guidelines (n 16) Introduction 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

future-facing reconstruction, capacity-building and proactive mitigation measures. ILC Draft Article 12 focuses on the actual occurrence of a disaster (rather than its pre-emption⁷⁹) and upon emergency relief.

(i) Types of Disaster Assistance

Draft Article 3 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’. The ILC project reflects a large body of pre-existing material⁸⁰ which offers guidance on what constitutes relevant disaster assistance. These stress timeliness of delivery⁸¹ and refer to essential,⁸² ‘immediate’⁸³ needs of persons and those ‘indispensable to survival’.⁸⁴ The 1994 Mohonk Criteria⁸⁵ cite that which is ‘necessary to sustain life and dignity’.⁸⁶ Emergency humanitarian assistance undoubtedly includes ‘food, clothing, medicines, temporary shelter and hospital equipment’,⁸⁷ bedding, water and sanitation facilities.⁸⁸ While such documents outline ably 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

2015); the Botswana National Policy on Disaster Management 1986 para 7; Ethiopian National Policy on Disaster Prevention and Management (n 25) s II(2).

⁷⁹ See the Commentaries to draft article 16, ILC, Report on the work of the sixty-sixth session, (n 33) 130, para 4.

⁸⁰ 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. 30 ILC, Report on the work of the sixty-fifth session) (n 54) 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.

⁸¹ See the reference to rapid and effective disaster response in the Association of Southeast Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response (26 July 2005) (ASEAN AADMER).

⁸² ILC Draft Articles (n 2), art 2.

⁸³ IDRL Guidelines (n 16) Introduction s 2(2).

⁸⁴ See also Bruges Resolution (n 14) art I(1)(a).

⁸⁵ See (n 12).

⁸⁶ See also International Institute of Humanitarian Law, Guiding Principles on the Right to Humanitarian Assistance (1993) (San Remo Principles) principle 9, regarding ‘survival’ needs.

⁸⁷ R Hardcastle and A Chua, ‘Humanitarian Assistance: Towards a Right of Access to Victims of Natural Disasters’ (1998) 325 IRRC 589, 591.

⁸⁸ Caribbean Association Agreement (n 25) Art 1(10).

needs-based and rights-based assistance.⁸⁹ This is somewhat reflected in the forms of cooperation outlined in draft Article 8.⁹⁰ 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 exhaustive⁹¹ and so if states made offers of unusual or unorthodox assistance that was appropriate given the circumstances of a particular disaster, that would be permissible.

(ii) Relevant External Assisting Actors

The entities originally listed in draft Article 16, and which now broadly come within draft Article 12's remit of states, IGOs and 'other assisting actors', may be said to constitute the building blocks of the 'international community'.⁹² However, they are empowered by differing regimes and instruments.

(1) Offers by States

A number of instruments address disaster assistance emanating from external states. 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 could⁹³ be made available for the provision of assistance to other States Parties in the event of a nuclear accident or radiological emergency.⁹⁴

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.⁹⁵ The aforementioned 1994 Mohonk Criteria similarly suggest both a right and an obligation of the international community to offer assistance. In regional terms, the 2005 ASEAN Agreement on Disaster Management and Emergency Response (AADMER), states that the states parties are to make:

⁸⁹ See E Ferris, *The Politics of Protection* (Brookings, 2011) and ILC Draft Articles (n 2) art 10 considering cooperation for disaster risk reduction.

⁹⁰ See inspiration from the Draft Articles on the law of Transboundary Aquifers, in particular Article 7.

⁹¹ Commentaries to draft Article 8, para.3.

⁹² A Orford, *International Authority and the Responsibility to Protect* (CUP, 2011).

⁹³ NB it does not say 'will'

⁹⁴ 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).

⁹⁵ See also Tampere Convention (n 80) art 4; and 2005 ASEAN Agreement (n 20) arts 3–4

...standby arrangements for disaster relief and emergency response, exchange of information and technology, and the provision of mutual assistance;⁹⁶

States parties are also to ‘ earmark assets and capacities ’ which may be available for those regional standby arrangements.⁹⁷ Although this latter duty is a voluntary one, the treaty clearly indicates a strong culture of inter-connectedness, and assurances of mutual assistance, reinforced by the existence of the ASEAN Co-ordinating Centre for Humanitarian Assistance on Disaster Management.⁹⁸ Such models provide evidence of state practice of duties for states to offer disasters assistance.

As noted, the UN CESCR in its General Comments has suggested a joint and individual responsibility of states to contribute in emergencies to the maximum of their capacities.⁹⁹ While the lack of development in this duty inevitably throws into doubt its strength, following the Covid-19 pandemic there has been growing criticism of state insularity. Indeed, the proposed pandemic treaty, refers to pathogen-access and a benefit- sharing system,¹⁰⁰ and states that ‘ The Parties recognize the need to coordinate, collaborate and cooperate, in the spirit of international solidarity... ’.¹⁰¹ Although this instrument is primarily an artefact of global health law, such developments potentially signal a growing strength to calls for duties to offer disaster assistance, particularly on the part of states.

(2) Offers by International Organizations

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 ’¹⁰² and IGOs have long enjoyed recognition in international law.¹⁰³ Certain IGOs’ mandates contain commitments to act in disasters.¹⁰⁴ There are also a number of disaster-specific instruments outlining the role of IGOs and NGOs. Several UN General Assembly (UNGA) resolutions are

⁹⁶ ASEAN AADMER (n 84) Article 4(a).

⁹⁷ Article 9(1).

⁹⁸ 2011 Agreement on the Establishment of the ASEAN Coordinating Centre for Humanitarian Assistance on Disaster Management.

⁹⁹ 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, GC14 (n 71) para 40.

¹⁰⁰ Article 10, Zero draft of the WHO CA+ for the consideration of the Intergovernmental Negotiating Body at its fourth meeting, A/INB/4/3.

¹⁰¹ Draft Article 15, *ibid*.

¹⁰² Special Rapporteur’s Fourth Report (n 4) para 97

¹⁰³ *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949).

¹⁰⁴ The mandates of specialised UN agencies such as UNOCHA and WHO are cases in point.

relevant,¹⁰⁵ and indeed the World Health Organization and International Atomic Energy Agency are specifically empowered in the event of global health hazards and nuclear/radiological accidents respectively.¹⁰⁶ 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 organizations 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.¹⁰⁷ The landmark UN General Assembly resolution 43/131 (1988) was clear that the humanitarian work of NGOs was to be facilitated by affected states, and all states were urged to support such organizations in their endeavours.¹⁰⁸ 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.¹⁰⁹ This very open-ended definition has been critiqued.¹¹⁰ In the context of peacetime assistance, Article 5 of the 1989 resolution of the Institute of International Law 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, and the 2003 Bruges resolution, stress that such assistance, assuming it has an exclusively humanitarian character, cannot be considered an unlawful intervention in the affected states.¹¹¹

(3) NGOs

As noted, the former draft Article 16 stated that the UN and other IGOs had ‘the right’ to offer assistance whereas relevant NGOs ‘may also offer assistance’ to an affected state. This lesser capacity of NGOs could be explained by the concerns expressed during the ILC’s Summer

¹⁰⁵ 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).

¹⁰⁶ World Health Organization (WHO), International Health Regulations, 2005 (2nd edn, WHO, 2008) Art 10(3); Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (n 98) Art 5(d).

¹⁰⁷ 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 33) 130; Inter-American Convention to Facilitate Disaster Assistance (adopted 7 June 1991) art XVI; the Tampere Convention (n 82); 2005 ASEAN AADMER (n 84) art 3.

¹⁰⁸ GA Res. 43/131 (n 107) paras 4–5.

¹⁰⁹ IFRC/IDRL Guidelines (n 16), Introduction, section 2.14)

¹¹⁰ Allan and O’Donnell, ‘A Call to Alms’ (n 32).

¹¹¹ 2003 Bruges Resolution (n 14) Article IV. See also San Remo Principles (n 87) principle 5, noting that exercising the right to offer help is not an unfriendly act or interference.

2011 meetings that the draft article implied that NGOs enjoyed the same legal status as states and IGOs.¹¹² Changing the phraseology more clearly provided an authorization rather than a right. However, this phraseology caused its own confusion. Questions arose as to the difference between an authorization, a right and a duty and which body would be authorizing the NGO. One interpretation of ‘may offer’ saw the burden on NGOs as lighter compared to the other external actors iterated. Alternatively the notion of ‘authorization’ potentially implied a transfer of responsibility from those actors to NGOs. The latter could perhaps be implied from the draft Commentaries to former draft article 16 which singled out states, the UN and IGOs, but not NGOs, as being ‘*encouraged* to make offers of assistance’ [emphasis added].¹¹³

In the end, draft Article 12 adopted a more conservative approach and avoided controversies regarding the unintentional bestowal or enhancement of international personality. It did so by eliminating the language of rights and removing mention of NGOs as a distinct category. In relation to the question of identifying relevant actors, the final draft broadly reflects the recommendations of the Special Rapporteur in his Eighth Report. He noted that although the ‘right’/‘may’ distinction was intended to recognised distinctive, respective powers to offer assistance and in fact to stress that states and IGOs as one category of actors, and NGOs as another category, were *not* being placed on the same footing, this distinction was potentially a false one. If the focus was to stress the possibility of making an offer of assistance to *all actors* regardless of the legal grounds on which they might base their action, then that was better served by removing explicit mention of “other competent intergovernmental organizations” and “relevant non-governmental organizations” in favour of “other assisting actor”.¹¹⁴ Thus, emphasising the importance of aid offers was prioritised in favour of unnecessary wrangles over personality privileges. This seems a clear move in the direction of ‘nudge’ solidarity. However, although the language of a ‘right to assist’ was mercifully eliminated in draft Article 12, maintaining an approach that external actors ‘may still offer assistance’ remains tied to a model of discretion, institutional conscience-pricking and philanthropy. This is arguably a retrograde and disappointing step. However, it may have been a pragmatic choice given the resistance to progressive calls aiming for more proactive duties.

¹¹² 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 33) 130. Draft Article 7’s commentary also acknowledges the distinctive obligations held by these actors regarding human rights paras. 5 and 6.

¹¹³ Report on the work of the sixty-sixth session (n 33) 130.

¹¹⁴ Eduardo Valencia Ospina Eighth Report, (n 3) para.314-315.

VI. COULD A DUTY TO OFFER ASSISTANCE COMPROMISE THE PRIMACY OF THE AFFECTED STATE? GUARDING AGAINST DONOR UNILATERALISM

A duty to offer assistance to those in need and in times of stress after a disaster, is intuitively attractive. However, given the geographical patterns of disasters, such a duty could further embed perceptions of a resource-rich West/North and a weak Global South perennially doomed to be the recipient of charity. Such a duty might also carry the danger of potentially further weakening disaster-affected states. This section considers the dangers of a potential duty to offer disaster assistance, and whether they might be more illusory than real given the terms of the other draft articles.

There is always the risk of unwanted, unwarranted external interventions in disaster-stricken territories and unilateral action, particularly by third states, is always unacceptable. However, opportunistic, premature interventions are guarded against by draft Article 3 which as noted defines disasters, and together with its Commentaries, stresses certain requirements¹¹⁵ including an exceptional scale of damage and societal disruption. If there are concerns as to the capacity of states to refuse aid under draft Article 13, then again, a duty to offer, rather than provide aid, guards against hawkishness.

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.¹¹⁶ Draft Article 14 recognizes such dangers and provides that affected states may place conditions on the provision of external assistance,¹¹⁷ taking into account the identified needs of stricken persons and the quality of the assistance.¹¹⁸ A ‘duty to offer’ allows for a process of offer-and-(potentially qualified)-acceptance which a ‘duty to provide’ cannot. The former also balances better the relationships between assisting and affected states.

It is true that even a duty to offer assist runs the risk of aggravating bureaucratic quagmires and external actors would need to make very clear what their offers entail. Given that many disaster

¹¹⁵ See similar in Bruges Resolution (n 14) Art I(2).

¹¹⁶ 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, 133–4. See also N Klein, ‘In the Wake of Catastrophe Comes the Whiff of Unrest’, *The Guardian* (6 May 2008).

¹¹⁷ Provided they accord with good faith, sovereignty and humanitarian principles per draft Article 6.

¹¹⁸ Report on the work of the sixty-sixth session (n 33) 123.

relief arrangements are dealt with regionally, draft Article 7's terms regarding cooperation, draft Article 8's terms regarding response and draft Article 9's duty to cooperate in disaster risk reduction, could perhaps produce 'standing arrangements' regarding the types of assistance likely to be offered by neighbouring states either individually, or those to be filtered through a regional organization. As noted this is the model already followed in the 2005 ASEAN AADMER treaty which is a leading instrument on regionally-focused disaster management and mutual assistance. Injecting a preparatory dimension into any duty to assist could mitigate any unwelcome deluge of assistance.

If such standing arrangements are rejected or simply absent, it could be open to stricken states, to indicate the timing and type of assistance required thereby allowing them to exercise their 'margin of appreciation'¹¹⁹ (although admittedly this assumes a still functioning state apparatus). However, it might be argued that draft Article 11's 'duty to seek' assistance¹²⁰ equates to a (standing) request, or bypasses such a requirement? This is unlikely. The drafters specifically rejected using 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,¹²¹ nor was automatic consent to any offers to be 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.¹²² Thus, draft Article 11's inherent limitations mean that any potential right/duty to offer aid should preclude 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.¹²³

VII. LESSONS ON DISASTER SOLIDARITY FROM COVID-19

The Covid-19 pandemic and its impact will undoubtedly represent a major event in the history of the 21st century. The disease, caused by a new coronavirus, entailed mainly respiratory symptoms and proved highly infectious in the community. It was first reported in the Chinese province of Hubei and subsequently spread globally with millions of cases being reported. Many states announced highly restrictive measures to contain the spread of the outbreak. Such

¹¹⁹ See Special Rapporteur's Third Report A/CN.4/629 para. 76 and Report on the work of the sixty-sixth session (n 33).

¹²⁰ See also Bruges Resolution (n 14) art III, para 3.

¹²¹ Special Rapporteur's Fourth Report (n 4) para 44.

¹²² See Tampere Convention (n 82) art 4; 2005 ASEAN AADMER (n 84) arts 3–4.

¹²³ For discussion see T Nelson, 'Rejecting the Gift Horse: International Politics of Disaster Aid Refusal' (2010) 10 Conflict Security & Development 379

restrictions included: bans on non-essential travel; restrictions on public movement insisting that the public stay at home and leave only for particular reasons; public spaces and events were closed and cancelled, and public gatherings banned. When the WHO declared Covid-19 a Public Health Emergency of International Concern on 30th January 2020 the official death toll stood at 171. By December 31st 2020 the figure stood at 1,813,188.¹²⁴ In UK national terms, registered deaths in the UK rose by 20% between March and December 2020, and by December 2020 Covid was mentioned on 69,771 death certificates in England & Wales¹²⁵ and 6,298 in Scotland.¹²⁶ The outbreak represented the largest public health crisis in a century and the most sweeping powers since the Second World War.

Although there has been debate as to whether the pandemic fell within the legal terms of constituting a disaster as defined by the ILC,¹²⁷ it is fairly undeniable that it caused considerable human loss, material loss (to individual businesses and national economies) and produced an extensive amount of societal upheaval. It is also indisputable that the overall impact of the pandemic, together with subsequent measures, was uneven and that considerable amounts of pre-existing vulnerability,¹²⁸ previously criticised¹²⁹ (and which was often caused or aggravated by state-disinvestment policies) was fully exposed. What this particular pandemic also did was raise questions as to what was meant by disaster solidarity and whether it could be operationalised.¹³⁰

¹²⁴ <https://www.who.int/data/stories/the-true-death-toll-of-covid-19-estimating-global-excess-mortality>

¹²⁵ Office for National Statistics, <https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/articles/coronaviruscovid192020incharts/2020-12-18#:~:text=COVID%2D19%20has%20been%20mentioned,all%20deaths%20for%20that%20period.>

¹²⁶ National Records of Scotland, Deaths involving COVID-19 Week 51: 14-20 December 2020, [https://www.nrscotland.gov.uk/news/2020/deaths-involving-covid-19-week-51-14-20-december-2020#:~:text=As%20at%2020%20December%202020,of%20Scotland%20\(NRS\)%20today.](https://www.nrscotland.gov.uk/news/2020/deaths-involving-covid-19-week-51-14-20-december-2020#:~:text=As%20at%2020%20December%202020,of%20Scotland%20(NRS)%20today.)

¹²⁷ Alp Ozturk, ‘Covid-19: Just Disastrous or the Disaster Itself? Applying the ILC Articles on the Protection of Persons in the Event of Disasters to the Covid-19 Outbreak’ 24(6) ASIL Insights 2020, <https://www.asil.org/insights/volume/24/issue/6/covid-19-just-disastrous-or-disaster-itself-applying-ilc-articles>, Catherine Bertrand, Eric Lecarpentier, ‘COVID-19: A disaster,’ 6(1) Médecine de Catastrophe - Urgences Collectives, (2022) 45-48,

¹²⁸ Hamed Seddighi, ‘COVID-19 as a Natural Disaster: Focusing on Exposure and Vulnerability for Response’ Disaster Med Public Health Prep. 2020 Jul 27 : 1–2.

¹²⁹ Ilan Kelman ‘COVID-19: what is the disaster?’ 28(2) Social Anthropology, May 2020 296-297.

¹³⁰ Pouria Askary and Farzad Fallah ‘The Right to International Solidarity and Humanitarian Assistance in the Era of covid-19 Pandemic’, Journal of International Humanitarian Legal Studies 11 (2020) 193-203.

An attempt to manifest such solidarity came via the COVAX scheme.¹³¹ This project was led by the WHO, GAVI (the Vaccine Alliance), CEPI (the Coalition for Epidemic Preparedness Innovation, a more philanthropically-based foundation) and UNICEF (focused on vaccine distribution). The aim was to achieve pooled procurement and equitable distribution of Covid-19 vaccines. The scheme looked to promptly deliver vaccine doses for at least 20% of states' populations with a diverse and actively managed portfolio of vaccines. This was set within the broader context of ending the acute phase of the pandemic and rebuilding economies. There were no eligibility requirements. General areas for cooperation with Covax were identified as including the scaling up of donations and surplus Covid-19 vaccines, the provision of additional funding for global vaccine efforts, expanded vaccine manufacturing and the relaxation or waiving of intellectual property restrictions on vaccine technologies. The last suggestion may have derived from lessons learned and examples set during the AIDS crisis.

The COVAX scheme showed great ambition and imagination in the context of managing a worldwide disaster. However, as was noted in 2022, it became clear that the pandemic experience was not universal. In fact a two-track pandemic was being experienced and the COVAX scheme faltered, failing to meet even half of its 2021 target of delivering 2 billion doses. This mirrors the experience of disaster flash funds highlighted earlier. The COVAX experience highlights the enduring dangers of relying on philanthropy, discretion and goodwill. By contrast, a TRIPS waiver by the WTO to allow mRNA vaccine production in low-income countries had more potential to be effective and sustainable.¹³² This example is instructive in highlighting that, in the absence of obligations and regulation, international actors and particularly states, still struggle to demonstrate solidarity.

VIII. 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 expression of solidarity, it could also be read as one of 'enlightened self-interest'.¹³³ His thoughts recall Judge Jennings'

¹³¹[https://www.who.int/initiatives/act-accelerator/covax#:~:text=COVAX%20is%20the%20vaccines%20pillar,19%20Tools%20\(ACT\)%20Accelerator.](https://www.who.int/initiatives/act-accelerator/covax#:~:text=COVAX%20is%20the%20vaccines%20pillar,19%20Tools%20(ACT)%20Accelerator.)

¹³² Simar Singh Bajaj, Lwando Maki, Fatima Cody Stanford 'vaccine apartheid: global cooperation and equity' *The Lancet* February 2022.

¹³³ Provisional summary record of the 3102nd meeting (n 31) 9

comments that an assisting state simultaneously defends itself when it defends another because there is an inter-mingling of the security of all.¹³⁴ A state weakened by disaster can be a breeding ground for numerous long-term threats that menace both internally and externally. Further, tables turn with former disaster-aid recipients becoming aid donors¹³⁵ and affluent states such as the US (after Hurricane Katrina in 2005) and Japan (after the 2011 Tōhoku earthquake and tsunami and Fukushima nuclear accident) requiring international assistance. Indeed, the lessons of relational and pragmatic solidarity from Covid-19¹³⁶ should be instructive, truly no one is safe until everyone is safe. A duty to offer assistance lends a concreteness to the material edge of international solidarity. It would also complement the limited capacity of stricken states 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 12 should not be allowed to embody and embed the privilege of choosing to do nothing in disasters

¹³⁴ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States), ICJ Rep 1986, 14 (ICJ, 27 June 1986) para 545.

¹³⁵ Allison Carnegie and Lindsay R. Dolan, 'The effects of rejecting aid on recipients' reputations: evidence from natural disaster responses' (2021) 16 *The Review of International Organizations* 495–519, citing Kasturi, 'Foreign aid?'

¹³⁶ Anita Ho & Iulia Dascalu 'Relational solidarity and COVID-19: an ethical approach to disrupt the global health disparity pathway', 32(1) *Global Bioethics* (2021), 34-50.