

# The International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters: Creation of Law from thin Air?

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## I. Introduction

In 2016, the International Law Commission (hereinafter the “ILC”) adopted Draft Articles on the Protection of Persons in the Event of Disasters (hereinafter the “Draft Articles”).<sup>1</sup> The ILC had been engaged in the consideration of this topic since 2007, with Valencia Ospina as the Special Rapporteur. Unlike the previous draft articles adopted by the ILC, namely the Draft Articles on Expulsion of Aliens,<sup>2</sup> the ILC decided “to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles on the protection of persons in the event disasters”.<sup>3</sup> The ILC, with respect to the Draft Articles on the Expulsion of Aliens, decided only “[t]o take note of the draft articles” and to “encourage their widest possible dissemination.”<sup>4</sup> With regard to the question whether the General Assembly should proceed to elaborating a convention on the basis of the Draft Articles, the ILC merely decided to recommend that the General Assembly “consider, at a later stage, the elaboration of a convention on the basis of the draft articles.”<sup>5</sup>

The difference in the approaches appears to be based, at least in part, that in the view of the ILC, the Draft Articles on the Expulsion of Aliens does not reflect international law, while the Draft Articles on the Protection of Persons reflects international law as it stands. The general commentary to the Draft Articles on the Expulsion of Aliens, for example, states that “the entire subject area of does not have a foundation in customary international law or in the provisions of international conventions of a universal nature ...” and that the Draft Articles “involve both the codification and progressive development” of the rules of international law.<sup>6</sup> The notion that the Draft Articles on the Expulsion of Aliens amount to “mere” – and I use “mere” here because there is often a tendency to suggest that progressive development is lesser than codification – progressive development is ubiquitous.<sup>7</sup> In contrast with the Draft Articles on the Expulsion of Aliens, the commentary to the Draft Articles on the Protection of Persons in the Event of Disasters refer to progressive development only in the context of the preambular paragraph recalling the language in the Article 13 of the UN Charter which, it may recalled, General Assembly shall initiate studies and make recommendation “for the purposes of encourages the

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<sup>1</sup> ILC 2016 Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries.

<sup>2</sup> ILC 2014 Draft Articles on the Expulsion of Aliens, with Commentaries.

<sup>3</sup> ILC Report of the International Law Commission, Sixty-Eighth Session (2 May – 10 June and 4 July – 12 August 2016), Supplement No. 10 (A/71/10), para 46.

<sup>4</sup> ILC Report of the International Law, Sixty-Sixth Session (5 May – 6 June and 7 July – 8 August 2014), para 42(a)

<sup>5</sup> *Id.*, para 42(b).

<sup>6</sup> ILC 2014 Draft Articles on the Protection of Expulsion of Aliens, with Commentaries, para 1 of the General Commentary.

<sup>7</sup> See, e.g., *id.*, para 2 of the Commentary to para 2 (‘Some of the rules contained therein ...constitute progressive development’).

progressive development of international law and its codification.”<sup>8</sup> Although paragraph 2 of the commentary to the preamble of the Draft Articles on the Protection of Person in the Event of Disasters states that the insertion of the mandate of the General Assembly in Article 13 of the Charter, was to ‘highlight the fact that the draft articles contain elements of progressive development and codification’ the main reason is that the provision is often inserted in final texts adopted by the Commission which include preambles.

Whether the suggestion that the Draft Articles on Expulsion of Aliens is, as suggested by the Commission, not generally reflective of international law is beyond the scope of this article. This article rather, is concerned solely with the question concerning the status of the rules in the Draft Articles on the Protection of Persons. In particular, the question posed by the current article is whether the Draft Articles on the Protection of Persons in the Event of Disaster reflect international customary international law as it currently stands. If they do not – and the article seeks to show that they do not – the secondary question is whether there is any justifiable policy for proposing new rules of international law in the form proposed by the ILC. Again, the article will suggest that the policy reasons that may be advanced in support of the Draft Articles are misplaced. Some context is perhaps necessary to explain the necessity of posing these questions. At the commencement of the second reading of the Draft Articles and the commentary thereto, the current author, in his capacity as member of the Commission, stated that he would not participate in the adoption process because it was clear to him that the Commission was intent on adopting an approach that he fundamentally disagreed with because it was neither consistent customary international law not justifiable from a policy perspective.<sup>9</sup> The author continued that his silence should in no way be interpreted as acquiescence or agreement with either the text of the Draft Articles or the commentaries thereto.<sup>10</sup> Although deciding to participate in the process, Professor Sean Murphy, expressed his agreement with position of the current author concerning the fundamental flaws of the Draft Article.<sup>11</sup> The Commission, proceeded to adopt the Draft Articles and the commentaries thereto. This article therefore, seeks to highlight the flaws of the approach of the Commission.

The article will begin, in the next section, by briefly describing the basic of approach of the ILC in the Draft Articles. The description of the basic approach will include the possible justifications for this approach, namely that it is a reflection of law as it stands and that it is the appropriate policy option for the ILC to take into order to protect human life and dignity in the event of disasters. In Section III, the article will evaluate the two basis advanced for the basic approach. With respect to first justification, i.e. the basic approach is consistent with international law, the article will assess whether this, by largely employing what might be analogous to Sienho Yee’s promotion of the ‘rigorous approach’,<sup>12</sup> although an even less rigorous approach would, in the view of the current author, lead to the conclusion that the basic approach is not well established in customary international. With respect to the second justification, i.e. that the approach is necessary for the protection of human life and dignity, the article will assess mainly by considering whether there is rational connection between the objective, *viz* the protection of human life and dignity, and the approach adopted by the Commission. Given the views expressed by the author during the adoption of the Draft Articles, it will come as no surprise that the author is of the view that the

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<sup>8</sup> ILC 2016 Draft Articles on the Protection of Persons in the Event of Disasters, para 2 of the Commentary to Preamble.

<sup>9</sup> ILC Summary Records, 2 August 2016 (A/CN.4/SR.3332).

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> See generally, e.g. Sienho Yee, Report on the ILC Project on ‘Identification of Customary International Law, 14 Chinese JIL 375.

approach of the Commission is not justified, whether as a statement of law as it stands or as reflection of pro-human rights policy.

## II. The Approach of the Draft Articles: Cooperation or Rights-Duty Approach?

On the one hand, the Draft Articles set themselves out as advancing a cooperation model. In this connection, the preamble affirms “the fundamental value of solidarity” and the importance of “international cooperation.” The commentary to the preamble describes these concepts, “solidarity” and “international cooperation” as “key concepts underlying” the Draft Articles.<sup>13</sup> Draft Article 7 spells out the duty to cooperate, stating that “States shall, as appropriate, cooperate among themselves, with the United Nations” and with other entities. As a normative point, the commentary to Draft Article 7 declares that “international cooperation is indispensable for the protection of persons” when disasters strike.<sup>14</sup> As a legal matter, the commentary points to a number of legal instruments that contain, in some way or fashion a duty to cooperate.<sup>15</sup> In the particular context of disasters, the commentary refers to a number of instruments including the 2006 Convention on the Rights of Persons with Disabilities, General Assembly Resolution 46/182, the Sendai Framework for Disaster Reduction (2015-2030), bilateral treaties and the Tampere Convention.<sup>16</sup>

### II.A Identifying the Approaches

The duty to cooperate is then given expression form in two ways, namely through the detailing of concrete aspects that facilitate cooperation once an agreement between the affected State and the assisting entities is reached and through the application of a rights-duty approach. With respect to the former, the Draft Articles require specific measures to be taken to facilitate prompt assistance in relation to, for example, extension of immunities and relaxation of visa issues, custom requirements and taxation rules, and to protect relief personnel and their equipment, in Draft Articles 15 and 16. Draft Article 15 and 16 are the only provisions dedicated to concrete measures to be taken to promote cooperation.

The rights and duty elements is reflected in the Draft Articles in two distinct ways. First, the Draft Articles specify a catalogue of specific rights. These include human dignity,<sup>17</sup> a general duty for the respect and protection of human rights,<sup>18</sup> and the duty to respond to crisis, in “accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination”.<sup>19</sup> This catalogue of rights serves to provide rights to persons affected by disasters and imposes (or recognises) duties on States and other actors that may be involved in the disaster relief or prevention activities. This first of use of human rights reflects a vertical rights duty approach in the classical human rights sense (hereinafter the “human rights approach”).

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<sup>13</sup> ILC 2016 Draft Articles on the Protection of Persons in the Event of Disasters, para 3 of Commentary to Preamble

<sup>14</sup> *Ibid*, para 1 of Commentary to Draft Article 7.

<sup>15</sup> UN Charter, art 1(3), 55 and 56; Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.

<sup>16</sup> ILC 2016 Draft Articles on the Protection of Persons in the Event of Disasters, paras 2-4 of the commentary to Draft Article 7.

<sup>17</sup> *Id.*, Draft Article 4.

<sup>18</sup> *Id.*, Draft Article 5.

<sup>19</sup> *Id.*, Draft Article 6.

The second way that a rights duty perspective is presented in the Draft Articles is through the establishment of a horizontal rights and duties between affected States and other States and entities (hereinafter the “horizontal rights-duty approach”). It is this second, horizontal, rights and duty approach that raises questions about the propriety, both as a matter of law and as a matter, of the Draft Articles. It is therefore appropriate to set out the provisions that establish this horizontal rights-duty approach. Draft Article provides a bridge between the vertical (human rights) and horizontal rights-duty perspectives. Draft Article 10 provides that the “affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory ...”.<sup>20</sup> Neither the Draft Articles nor the commentary explicitly identify the beneficiary of the concurrent right. Article 10 merely States that the affected State has “the duty to ensure the protection of persons”. While it could be a duty owed to the “persons” who are the subject of the duty of protection (vertical rights-duties), it could also be a duty owed to other States and other actors to ensure that affected persons – the subjects of protection – are offered the protection (horizontal). Finally, it could be an abstract duty simply providing an orientation of the conduct required by the both the horizontal and vertical rights duty approaches.

The horizontal rights-duty approach is provided for in a package of integrated provisions whose meaning can only be determined by considering them together, namely Draft Articles 11, 12, 13 and 14. Draft Article 11 provides that ‘[t]o the extent that a disaster manifestly exceeds its national capacity’ to deal with a disaster, ‘the affected State has the duty to seek assistance from ...other States’ and other entities. Draft Article 12 has two paragraphs. The first paragraph provides that in the event of disasters States and other actors “may offer assistance to the affected State”, while the second paragraph provides that where a request for assistance is made by an affected States “the address shall expeditiously give due consideration to the request and inform the requested State of its reply.” Draft Article 13, the central provision, has three paragraphs. The first paragraph states that the provision of assistance in the event of disaster “requires the consent of the affected State”. The second paragraph, however, States that “consent to external assistance shall not be withheld arbitrarily withheld.” Finally, the third paragraph States that where an offer of external is made “the affected State shall ... make known its decision regarding the offer in a timely manner.” Draft Article 14, which completes the cluster of provisions on establishing the horizontal-rights duty approach, states that the “affected may place conditions on the provision of external assistance”.

Seen together, these provision, in essence, provide two rights-duties relationships between the affected State and third States and other actors. The first relationship is the right of the third State and other actors to offer assistance to the affected State in Draft Article 12, and the corresponding duty on the affected State not to arbitrarily refuse assistance offered. The second rights-duties relationship, which is related to the first, consists of the duty on the affected State to, in appropriate cases, seek assistance from third States and other actors and the corresponding right on those third States and actors to consider the request in Article 12 paragraph 2. While, Article 12 paragraph 2 is drafted *as if* it is a duty, the “duty” to “give due consideration” is in fact a right since it does not have substantive parameters attached to it. While this “duty” has a temporal parameter of expeditiousness, since it applies to the “consideration” of the request and not the communication of the decision, it is itself an empty parameter. The only real “duty”, in Article 12 paragraph 2 is inform the requested State of the decision and this has no parameters attached to it at all – not even “timeously” or “as soon as possible”, “as soon as is reasonably possible” or “within a reasonable period of time.” It is noteworthy that the corresponding provision in Draft Article 13, which provides a “duty” on the affected State to give consider an offer for assistance and to provide the requestor with a response is a “real duty” because there are both substantive and temporal parameters attached to the duty. It is not an unfettered discretion.<sup>21</sup> The substantive parameter is that the reason

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<sup>20</sup> *Id.*, Draft Article 10(1).

<sup>21</sup> *Id.*, para 3 of the Commentary to Draft 13 (“the affected State’s right to refuse is not unlimited”).

must not arbitrary, or, must be accompanied by reasons. Moreover, the commentary establishes a burden of proof on the affected State to show that the refusal is not arbitrary. The duty to communicate the decision is itself made subject to the requirement that it be executed “in a timely manner”. The qualifier “whenever possible” was not meant to prejudice or limit the duty to timeously inform actors that had made offers, but was simply a recognition that disasters may make it impossible for the State to communicate its decision or to do so in a timely manner. The Commission did not address the question of whether in such cases, the third State that offered assistance is free to provide assistance i.e. whether in such cases, consent should be presumed to exist.

The basis of all of the elements designed to promote the protection of persons i.e. cooperation regime, human rights angle (vertical rights-duty approach) and the horizontal rights-duty approach is, it seems, the principle of solidarity advanced above. Yet the Draft Article seem to recognise that, in particular, the rights-duty approach may involve a degree of encroachment (not necessarily violation) of the sovereignty of the affected State. It is apposite to pause here to emphasise that this would not be the case with vertical rights-duty approach because that veil of sovereignty has been pierced to the extent that it no longer exists i.e. when it comes to the protection of rights *owed to its population* a State can, in the modern world no longer claim sovereignty. Indeed, as the commentary to the Draft Articles spell out as several places, sovereignty has now come to be understood as encompassing human rights-related duties to the population.<sup>22</sup>

There are, at least two consequences, for this recognition that the horizontal rights-duty approach had the potential to encroach on sovereignty. First, the recognition by the Draft Articles of the possible encroachment of sovereignty was responsible for the caveats peppering the provisions establishing the horizontal rights-duties relationships. So for example, the duty to seek assistance in Draft Article 11 arises only if, and “[t]o the extent that a disaster manifestly exceeds” an affected State’s national response capacity. Indeed, even if the insertion of the word “appropriate”, whose main function was to distinguish third States from other actors, was a recognition of sovereignty. To put it differently, a while establishing a duty on the affected State to seek assistance from other States, who are primary actors of international law, might not be a serious encroachment of sovereignty, requiring States to seek assistance from non-government organisations might be seen as unacceptable encroachment of sovereignty such are the sensitivities of States. The second consequence is that it causes us, or at least should, to pause and ask why the Commission would establish such a duty if it *risked* encroaching on the sovereignty of States. For human rights, in twentieth century, the rightful encroachment on sovereignty was justified by the need to protect the dignity of human beings. Needless to say, the Commission considered the question of the justification for this potential encroachment.

## **II. B Criticism against the Horizontal Rights-Duty Approach**

The horizontal rights-duty approach has received some criticism for some time. The criticism has come from both within and outside the ILC. Unlike the text adopted on second reading, the commentary to the text adopted on first reading sometimes contained divergent views of the ILC. When originally adopted, for example, the commentary to what was then Draft Article 10 (now Draft Article 11) on the duty of the affected State to seek assistance, made clear that while the majority of members the members

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<sup>22</sup> *Id.*, para 3 of the Commentary to Draft Article 13. See also paras 3 and 4 of the Commentary to Draft Article 10.

of the ILC supported the duty, some members opposed it.<sup>23</sup> While several members of the Commission opposed the potential encroachment on the sovereignty of States implied by the horizontal rights-duty approach, the principal proponent was the Jamaican member of the Commission, Stephen Vasciannie. In 2011, when the Commission first considered the duty not to arbitrarily withhold consent, Vasciannie made the following observations:

There were at least three major problems with [the Draft Article providing for the duty not to arbitrarily withhold consent]. First, it seems contrary to existing law, under which States could withhold consent to external assistance. Second, the mandatory character of the provision went against established notions of State sovereignty. Thirdly, even as *lex ferenda*, the rule could create difficulties for States that might wish to refuse assistance from States or other entities that they regard with disdain ... The affected States might perceive external assistance as a kind of Trojan horse that opened it up to unwanted pressure.<sup>24</sup>

Concerns regarding this package of provisions had also been expressed by some States in response to the reports of the ILC's work on the subject. Pakistan for example, during the consideration of the ILC report in 2011, observed that "the provision of assistance had been based on international cooperation and solidarity, not assertion of legal rights and obligations" and this establishment of a horizontal rights-duty framework would "undermine the current practice of international cooperation".<sup>25</sup> Similarly, Sri-Lanka, while welcoming the stipulation that assistance could only take place after consent, expressed discomfort with the notion that consent may not be arbitrarily withheld.<sup>26</sup> It suggested that the provision should be reformulated in positive terms that emphasised solidarity and cooperation "rather than as a legal right".<sup>27</sup> Indonesia also expressed concern that the rights-duty approach in the Draft Articles undermined sovereignty.<sup>28</sup>

Ireland, for its part raised practical issues with the notion that consent may not be arbitrarily withheld.<sup>29</sup> Casting doubt on the basis of this requirement in international law, it suggested that the Commission 'elaborate on the situation existing international law by identifying treaties or practice relevant to consent and arbitrary refusal'.<sup>30</sup> Similarly, the United Kingdom doubted whether "a duty on the part of the

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<sup>23</sup> See, para 3 of the Commentary to Draft Article 10 provisionally adopted by the Commission in 2011, Report of the ILC 2011, Sixty-Third Session. See also, in the same report, para 3 of the Commentary to Draft Article 11.

<sup>24</sup> ILC Summary Records, Meeting of 12 July 2011 (A/CN.4/SR.3103), 6.

<sup>25</sup> UN 6<sup>th</sup> Committee, Summary Records, Meeting of 31 October 2011 (A/C.6/66/SR.25), para 7. See also Cuba, 6<sup>th</sup> Committee, Summary Records, Meeting of 28 October 2011 (A/C.6/66/SR.24), para 27 ("Given that States had the sovereign right to accept or refuse any type of humanitarian assistance, the draft articles should, under no circumstances, give rise to interpretations that violated the principle of non-intervention ... Only the affected State could determine whether the magnitude of the disaster exceeded its response capacity and, based on the principle of sovereignty, decide whether to request or accept assistance from international organisations.")

<sup>26</sup> UN 6<sup>th</sup> Committee, Summary Records, Meeting of 2 November 2011 (A/C.6/66/SR.27), para 20.

<sup>27</sup> *Ibid.* See also China, UN 6<sup>th</sup> Committee, Summary Records, Meeting of 28 October 2011 (A/C.6/66/SR 23), at 42.

<sup>28</sup> UN 6<sup>th</sup> Committee, Summary Records, Meeting of 28 October 2011 (A/C.6/66/SR.27), para 69.

<sup>29</sup> UN 6<sup>th</sup> Committee, Summary Records, Meeting of 31 October 2011 (A/C.6/66/SR.25), para 22.

<sup>30</sup> *Ibid.* See also Russian Federation, Summary Records, Meeting of 28 October 2011 (A/C.6/66/SR.27), para 37.

affected State could be derived” from existing international law.<sup>31</sup> Iran was more was more forthright in its criticism of the horizontal rights-duties approach:

A State affected by a natural disaster clearly has a duty to take all measures within its disposal to provide assistance required as a result of the disaster by (*sic*) its nationals and other persons on its territory. That duty, however, could not be disproportionately broadened to the level of a legal obligation to seek external assistance. International law imposed no such obligation, the presumption of which was far removed from any established or emerging practice, let alone any existing customary international law.

It is worthwhile observing that the States opposed to the rights-duties approach were not only numerous, but came from a cross-section of the international community. The ILC, despite the chorus of objection, proceeded to adopt the horizontal rights-duties approach on first reading in 2014.<sup>32</sup> Subsequent to the first reading, States were requested to provide written comments and observations on the text of the Draft Articles as a whole by January 2016.<sup>33</sup> Unfortunately, only fourteen States provided comments to the Commission by the deadline.<sup>34</sup> Two additional comments were received from the United States and Mexico subsequent to the deadline.<sup>35</sup>

It is unsurprising that a number of States raised the issue of the horizontal rights-duties approach in their written submissions to the ILC.<sup>36</sup> Australia’s comments were of particular interest. First, in what might at first glance appear to be an approval of the text, Australia expresses the hope that “[i]nsofar as”, the draft articles “consolidate existing rules of international law”, they will “serve as a *guide* for States.”<sup>37</sup> The phrase “insofar as” suggests that in some respects the draft articles go beyond the current state of international law. It is also noteworthy that Australia does not call for the draft articles to be respected or complied with but only expresses the hope that they will “serve as a guide” for State behaviour, suggesting something less than a legal obligation. What is implicit in this statement, however, is made explicit in the following paragraph of its comments, where Australia cautions as follows:

To the extent that the draft articles also seek to progressively develop the law relating to the protection of persons in the event of disasters, Australia would encourage further discussion as to whether the *proposed creation of new duties for States* or the *novel application of principles drawn from other areas* represent the most effective approach. Australia emphasises that ... progressive development of the law in this field pursued too rapidly may raise an impediment to achieving ... consensus.<sup>38</sup>

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<sup>31</sup> UN 6<sup>th</sup> Committee, Summary Records, Meeting of 28 October 2011 (A/C.6/66/SR 23), at para 45.

<sup>32</sup> ILC 2014 Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries (adopted on first reading).

<sup>33</sup> See ILC 2014 Report of the ILC on its Work at in the Sixth-Sixth Session, GA Official Records, Suppl No. 10 (A/69/10), para 14.

<sup>34</sup> Protection of Persons in the Event of Disasters: Comments and Observation Received from Governments and International Organisations, 14 March 2016 (A/CN.4/696) (States that commented were: Australia, Austria, Cuba, the Czech Republic, Ecuador, Germany, the Netherlands, Qatar, Switzerland and Finland also on behalf of Denmark, Iceland, Norway and Sweden).

<sup>35</sup> Additional Comments and Observations Received from Governments, 28 April 2016, (A/CN.4/969/Add.1).

<sup>36</sup> The review of the written comments by States on the rights-duties approach is based on the author’s annual contribution to the South Africa Yearbook of International Law: Dire Tladi, Progressively Developing and Codifying International Law: The Work of the International Law Commission in its Sixty-Eight Session, 41 South African YIL (2016), forthcoming.

<sup>37</sup> Comments and Observations Received from Governments (note 34 above) at 5 (emphasis added).

<sup>38</sup> *Ibid.*

Australia continued to caution that there should be “a careful balance struck between those elements of the draft articles which may encroach on the core international law principles of State Sovereignty and non-intervention as against the likelihood that their implementation will” result in tangible protection of human beings in times of disasters.<sup>39</sup> The United States was equally critical of the horizontal rights-duties approach in its comments. The United States expressed its “concern” that some of the Draft Articles “appear to articulate new legal ‘rights’ and ‘duties’, or to represent inaccurately the existing obligations of States.”<sup>40</sup> In particular, the United States observes that the Draft Articles “appear to represent attempts to develop the law progressively without specifically acknowledging this intention.”<sup>41</sup>

It seems safe to say, therefore, that the criticism persists. Indeed that view seems to be recognised by the Special Rapporteur, Valencia-Ospina himself in his final report to the Commission.<sup>42</sup> Yet in his final report, the Special Rapporteur in essence recommends that these criticisms be ignored:

The Special Rapporteur sees no need at the present late stage, when the Commission is about to embark upon the second reading process, to make a recommendation, based upon general comments and observations, on his approach to the topic, which after arduous discussion has been essentially adopted by the Commission and has received wide support by States ...<sup>43</sup>

To be fair, the Draft Articles did receive some support from a number of States during the Commission’s work on the topic.<sup>44</sup> Support for the balance struck for the ILC was also expressed in the written comments submitted subsequent to the first reading.<sup>45</sup> However, even States that expressed support for the draft articles do not express the view that the content reflects the state of international law as it stands. The Czech Republic, which expressed support for the Draft Articles adopted on first reading, observed that they ‘struck a balance among the principles of non-intervention and sovereignty ... humanitarian principles’, without expressing any view concerning the legal basis of this balance or the consistency of the draft with international law.<sup>46</sup>

## II. C ILC Support for the Horizontal Rights-Duties Approach

Despite the criticism by some States and some members of the ILC, the ILC proceeded to adopt the Draft Articles on a second reading. Given the strong resistance by some States and members of the ILC, it is worth asking what reasons are advanced for persisting with the horizontal rights-duties framework.

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<sup>39</sup> *Ibid.*

<sup>40</sup> See Additional Comments and Observations Received from Governments (note 35 above), at 21.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Eighth Report of the Special Rapporteur, Valencia-Ospina, on the Protection of Persons in the Event of Disasters*, A/CN.4/797, at para 11. (‘The United States and Israel expressed reservation regarding the resort to a rights-duty approach .....Trinidad and Tobago supported a rights-duty approach, *but expressed the belief that that such an approach could apply between the affected State and its population.*’)

<sup>43</sup> See Eighth Report on Protection of Persons in the Event of Disasters (note 42 above)

<sup>44</sup> See, e.g. Chile, UN 6<sup>th</sup> Committee, Summary Records, Meeting of 28 October 2011 (A/C.6/66/SR.24), para 8; See also, UN 6<sup>th</sup> Committee, Summary Records, Meeting of 28 October 2011 (A/C.6/66/SR 23), para 19 (Chile), para 48 (The Netherlands), 50 (Spain).

<sup>45</sup> See, e.g. Comments and Observations Received from Governments and International Organisations (note 34 above) from the Czech Republic (at 5), Finland (at 5), Germany (at 6) and the Netherlands (at 6).

<sup>46</sup> *Id.* See also statements by Finland (at 5), Germany (at 6) and the Netherlands (at 6).



On the basis of the commentary to Draft Articles 11, 12 and 13 and the interventions from members of the ILC that strongly supported the framework, it appears that the ILC advances a two-fold response to the objection. First, it seems to be suggested that the rights and duties proclaimed in this framework are well established in current international law, i.e. they constitute *lex lata* (doctrinal basis). Second, the horizontal rights-duties approach is advanced as morally appropriate approach to prevent human suffering in the event of disasters (normative basis).

As to the first basis, i.e. that the commentaries are based on existing international law, the ILC relies on several sources to come to the conclusion that, in the words of one member of the ILC, the horizontal rights-duties framework did not involve the imposition of new obligations, but rather, a reflection of a “well established rule of international law”.<sup>47</sup> First, the ILC states the rights-duties framework it proposes is derived “from an affected States obligation under international human instruments ..”.<sup>48</sup> there is reliance on various human rights, including *inter alia*, the right to life and the right to food. With respect to the duty to seek assistance where the disaster manifestly exceeds the affected State’s response capacity, for example, the commentary to Draft Article 11 points to General Comment no. 12 which stated that a “State claiming that it is unable to carry out its obligations for reasons beyond therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support” to meet its obligations.<sup>49</sup> The commentaries also suggested that to the extent disasters may threaten the life of persons, affected States are obliged to take all necessary measures, including obtaining assistance, to prevent the loss of life.<sup>50</sup>

In addition to the human rights instruments, the commentaries also advance, as justification for the rights-duties approach, disaster-specific instruments as illustrations of practice justifying a rights-duty framework. The first of these is the *Institut de Droit International’s* Resolution on Humanitarian Assistance.<sup>51</sup> In its resolution, the *Institut de Droit* stated that in the event that whenever an affected State is not able to provide the necessary assistance to its population affected by disaster, “it shall seek assistance” from third States or other entities.<sup>52</sup> The *Institut de Droit* further declared that “[a]ffected States are under the obligation not to arbitrarily and unjustifiably to reject a *bona fide* offer” of assistance.<sup>53</sup> Similarly the Guidelines of the International Federation of the Red Cross and Red Crescent Societies have provided that State if “determines that a disaster” exceeds its national capacity to respond, “it should seek international and/or regional assistance” from third States or other actors.<sup>54</sup> The ILC, further referred to General Assembly resolution 46/182 which provided as follows:

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<sup>47</sup> ILC, Summary Records, Meeting of 5 July 2012 (A/CN.4/SR.3141), 5 (Nolte).

<sup>48</sup> ILC 2016 Draft Articles on the Protection of Persons in the Event of Disasters, para 3 of the commentary to Draft Article 11.

<sup>49</sup> *Ibid.* The views of the ILC in this regard are described, with approval, by Thérèse O’Donnell and Craig Allan, Identifying Solidarity: The ILC Project on the Project on the Protection of Persons in Disasters and Human Rights, 49 *George Washington ILR* (2016), 53, at 73.

<sup>50</sup> ILC 2016 Draft Articles on the Protection of Persons in the Event of Disasters, para 3 of the commentary to Draft Article 11

<sup>51</sup> *Institut de Droit International*, 70 *Yearbook* (2003) Part II, 263.

<sup>52</sup> *Id.*, Art III, para 3.

<sup>53</sup> *Id.* Art VIII, para 1.

<sup>54</sup> 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), Guideline 3, para 2, referred to in ILC 2016 Draft Articles on the Protection of Persons in the Event of Disasters, para 5 of the commentary to Draft Article 11.

The magnitude and duration of many emergencies may be beyond the response capacities of many affected countries. International cooperation to address emergency situation and to strengthen the response capacity of affected countries is thus of great importance ... such cooperation should be provided in accordance with international and national laws.<sup>55</sup>

The commentary to Draft Article 13 also refers<sup>56</sup> to United Nations Office for the Coordination of Humanitarian Affairs Guiding Principles on Internal Displacement, which provides as follows:

Consent [to offers of humanitarian assistance] shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.<sup>57</sup>

The commentaries also refer, as an example of practice, to the practice of the UN Security Council. In particular, the commentaries refer to UN Security Council resolution 2165 (2014) in relation to the situation in Syria,<sup>58</sup> which authorised “the United Nations humanitarian agencies and their implementing partners are authorized to” provide “humanitarian assistance, including medical and surgical supplies, reaches people in need throughout Syria” without requiring the consent of Syria.<sup>59</sup> The commentary also refers to the 2000 Framework Convention on Civil Defence Assistance,<sup>60</sup> which provides that “[o]ffers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time.”<sup>61</sup>

The second, more normative, basis, for the horizontal rights-duties approach can be established from both the commentaries and the views of those members of the ILC that supported the horizontal rights-duties approach. In its commentary to Draft Article 11, the ILC states that the creation of a duty to seek assistance “facilitates an adequate and effective response to disasters that meets the essential needs of the persons concerning ..”.<sup>62</sup> Thus, the moral value-add of the approach appears to be that it addresses the needs of those most in need in times of disasters. It is, however, principally in the statements by members of the ILC that this underlying basis for an expansive reading of the law can be identified. Mr Petrič, for example, recalled that disasters could “considerable damage and sometimes wiped out hundreds of thousands of lives in the space of a few days” and noting the importance of “shared responsibility” and “principles of solidarity and humanity.”<sup>63</sup> He suggested that while, often governments acted in good faith and in the interest of the population during disasters, there were instances when governments did not act in the best of the population. Examples he offered included Myanmar in 2008 and the famine in Ethiopia in the mid-1980s (although not reflected in the summary records, in his

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<sup>55</sup> ILC 2016 Draft Articles on the Protection of Persons in the Event of Disasters, para 5 of the commentary to Draft Article 11.

<sup>56</sup> ILC 2016 Draft Articles on the Protection of Persons in the Event of Disasters, para 5 of the commentary to Draft Article 13.

<sup>57</sup> Office of the High Commission Humanitarian Affairs *Guiding Principles on Internal Displacement* (E/CN.4/1998/53/Add.2, Annex, principle 25, para 2.

<sup>58</sup> ILC 2016 Draft Articles on the Protection of Persons in the Event of Disasters, para 6 of the commentary to Draft Article 13.

<sup>59</sup> UN Security Council 2165 (2014), para 2.

<sup>60</sup> ILC 2016 Draft Articles on the Protection of Persons in the Event of Disasters, para 8 of the commentary to Draft Article 13.

<sup>61</sup> Framework Convention on Civil Defence Assistance, Art. 3 (e).

<sup>62</sup> ILC 2016 Draft Articles on the Protection of Persons in the Event of Disasters, para 2 of the commentary to Draft Article 11.

<sup>63</sup> ILC, Summary Records, Meeting of 3 July 2012 (A/CN.4/SR.3139), 5 (Petrič).

original statement he referred to these “lunatic governments”).<sup>64</sup> Mr Petrič seemed to accept that this horizontal rights-duties approach was not *lex lata* but rather represented “progressive development” which would be “a big step forward in protecting persons, human dignity and human rights” in the event of disasters and would promote “international solidarity”.<sup>65</sup> This general sentiment was reflected in the statement of other members such as Mr Nolte and Mr Saboia.<sup>66</sup> The arguments is that in these circumstances, there is a real risk of great human suffering without the horizontal rights-duties approach.

These two basis, the normative and the *lex lata* arguments, are at the basis of the ILC’s decision to adopt the horizontal rights duties approach in the Draft Articles on the Protection of Persons. I turn now to consider whether these arguments provide a sufficient basis for the approach adopted by the ILC.

Before proceeding to evaluate to the two justifications that underlie the horizontal rights-duties approach, it might be useful to briefly refer to a related argument in support of the horizontal rights-duties approach. It has been suggested that there is a distinction between “duties” and “obligations”. In particular, it has been suggested that by referring to “duties” rather than “obligations”, the ILC was making clear that it was not suggesting that there exists legally binding obligations.<sup>67</sup> In particular, Mr Murase, observed in 2011 that the Special Rapporteur was correct “to use the term ‘duty’ rather than ‘obligation’” and that, in his view, “the notion of ‘duty’ fell somewhere between a moral dictate and a legal obligation.”<sup>68</sup> There may well be a difference between duty and obligation. However, whatever the case, it appears that the ILC itself views the use of the term “duty” to be equivalent to “obligation”. In the commentary to Draft Article 11 on the duty to seek external assistance, for example, the ILC states that the Draft Article “affirms the *obligation* of the affected” in connection with disasters.<sup>69</sup> The interchangeability of the terms “duty” and “obligation” in the work of the ILC on the topic, the ILC refers to a “State’s duty in the fulfilment of the right to life”.<sup>70</sup>

### III. Evaluating the ILC’s Justifications for the Horizontal Rights-Duties Approach

#### III.A The Horizontal Right-Duty Framework Reflects Existing International Law

The claim that the horizontal rights-duties approach reflects existing rules of customary international law is based on two independent pillars. First, it is based on an interpretation of provisions of human rights

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<sup>64</sup> *Ibid.*

<sup>65</sup> *Id.*, 7.

<sup>66</sup> ILC, Summary Records, Meeting of 5 July 2012 (A/CN.4/SR.3141), 5 (Nolte) (The approach “was the minimum that should be respected by States, which had the human rights-based obligation to protect life and physical integrity and provide for the basic nutritional needs of the population.”); ILC, Summary Records, Meeting of 4 July 2012 (A/CN.4/SR.3140) (Saboia) (“Persons affected by disasters were quite likely to be subjected to treatment that affected their rights and their dignity ...Of course, it did not necessarily follow that the affected State ... was to blame for all the human suffering endured by its population; nevertheless, there was certainly justification for bearing human rights in mind ..”).

<sup>67</sup> Cf. Thérèse O’Donnell and Craig Allan, Identifying Solidarity: The ILC Project on the Project on the Protection of Persons in Disasters and Human Rights, 49 *George Washington ILR* (2016), 53, 80.

<sup>68</sup> See, ILC, Summary Records, Meeting of 11 July 2011 (A/CN.4/SR.3102), 14 (Murase).

<sup>69</sup> ILC 2016 Draft Articles on the Protection of Persons in the Event of Disasters, para 1 of the commentary to Draft Article 11.

<sup>70</sup> *Id.*, para 3 of the commentary to Draft Article 11.

treaties, including the right to life and the right to food. According to this argument, the failure to seek assistance and/or to accede to requests to assistance would amount to a violation of those rights since it would place the affected population at a risk. Second, the argument is based on practice reflected in, *inter alia*, various instruments on disaster management and relief. Sienho Yee has suggested that rules of customary inter should be identified on the basis of a “rigorous and systematic approach.”<sup>71</sup> He calls for the avoidance of “truncated”, “untidy” or “incomplete” processes to the identification of customary international law.<sup>72</sup> The primary “take away” from his argument for a rigorous approach appears to be that a more thorough assessment of the materials should be undertaken to determine the existence (or not) of a rule of customary international law.<sup>73</sup> I do not share in every aspect, Yee’s understanding of a “rigorous approach”. I do not share, for example, Yee’s apparent inclination towards reducing the value of “verbal” acts.<sup>74</sup> Although falling outside the scope of this article, I would point out that verbal acts are extremely important and, for many States, may represent the main possibility of contributing to international law. I similarly do not share in Yee’s apparent suspicion of UN resolutions, in particular the notion that they may only serve as *opinio politico*.<sup>75</sup> These points of differences, however, are but nuances. On the whole, I agree that a more rigorous assessment of the evidence – but all the evidence – is necessary. In particular, for each of the material relied upon, it is essential to carefully consider whether that particular material supports the proposition advanced. In this regard, arguments by extrapolation ought to be avoided. This rigorous approach to the assessment of the materials on which a rule of international law is to be based was reflected in the statement by Mr Nolte in the context of the topic of immunity of State officials in 2017.<sup>76</sup> In his statement, suggesting that there is no exception to immunity of State of officials from foreign criminal jurisdiction, points out the ways in which the Special Rapporteur’s report lacks rigour. For example, he points out that many of the many of the cases referred to in the report to justify the exception are based on cases that are on not on point and thus require extrapolation and deduction to justify the exception. Secondly, he mentions criticises the report for not recognising simply relying on case law without identifying whether the case law is based on consistent reasoning.

The first basis for the proposition that, under international law as it currently stands, there are rights and duties operating between affected States and the third State in the manner suggested by the Draft Articles is that this flows from provisions in human rights instruments. But of course this is extrapolation. Those instruments do not provide right to offer assistance, a duty not to arbitrarily refuse assistance or a duty to seek assistance. In this connection, the United Kingdom recalled that it the types of duties implied by the Draft Articles could not “be derived from existing international obligations under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.”<sup>77</sup> However, even if there were a duty to seek assistance and one not to arbitrarily refuse assistance, it is not clear why, under the human rights treaties concerned, the right-duty relationship should be between affected State and third State. Under those relevant human rights instruments, the relevant rights should be owed to the persons affected by disaster and not to third States. To give effect to the rights in the rights in the international human rights instruments, it would not be necessary to provide yet another duty. The legally more coherent approach, not involving unreasonable extrapolations, is that a disaster cannot be justification for a State not protecting the rights of persons elaborated in the instruments in the event that such a State had not requested external assistance or,

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<sup>71</sup> Sienho Yee, Report on the ILC Project on ‘Identification of Customary International Law, 14 Chinese JIL 375, 382.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Id.*, at 393.

<sup>76</sup> Nolte Statement XXXXX

<sup>77</sup> UN 6<sup>th</sup> Committee, Summary Records, Meeting of 28 October 2011 (A/C.6/66/SR 23), at para 45.

where assistance had been offered to it, had refused without just cause. This could have been provided for in the commentary or even in the text without the need for undue expansion of human rights beyond their commonly understood meaning.

It is true that the Draft Articles 11, 12 and 13 could be interpreted as establishing providing rights owed to persons rather than States. However, two facts militate against this interpretation. First, given that the horizontal rights-duty has been continuously challenged, the fact that the ILC has not made clear, either in the text or in the commentary, that the rights-duty relationship envisaged applies as between the affected State and the affected population. The fact that, in the face of the criticism against the horizontal rights-duty relationship, the ILC saw fit to merely justify its decision, suggests that, at least for the ILC, these provisions do apply as between the States concerned. Second, there is a certain synergy between the rights and duties in the Draft Articles 11, 12 and 13 that suggests a connection. Thus, the affected State has the duty to request assistance under the appropriate circumstances (Draft Article 13) and third States have the corresponding right to consider the request (Article 12 paragraph 2). Similarly, third States have the right to offer assistance while the affected State has the corresponding duty not to arbitrarily refuse assistance.

There is yet another problem with the Draft Articles extrapolation of the horizontal rights-duties approach from international human instruments. If, these rights are necessary corollaries of the rights in the International Covenant on Economic, Social and Cultural Rights, it is not clear why there isn't a parallel duty on third States to provide assistance or, at the very least not to arbitrarily refuse to requests for assistance. The argument may be advanced that the rights in the international human rights instruments are binding only on the territorial State. While this might true of the International Covenant on Civil and Political Rights, it is certainly not the case with International Covenant on Economic, Social and Cultural Rights. While the International Covenant on Civil and Political Rights provides that States Parties undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction" the rights in the Covenant,<sup>78</sup> the International Covenant on Economic, Social and Cultural Rights doesn't have an equivalent provision. Instead, the International Covenant on Economic, Social and Cultural Rights provides that States undertake "to take steps, individually and through international assistance and cooperation ..." to progressively realise the rights in the Covenant.<sup>79</sup> Thus, if duties on the affected State can be extrapolated from the rights in the International Covenant on Economic, Social and Cultural Rights, it is not clear why corresponding duties on third States cannot be extrapolated from the same Covenant whose application not only does not depend on territorial and jurisdictional control but also expressly calls for "international assistance and cooperation".

The second basis for the proposition that international law as it stands recognises the horizontal rights-duties framework in the context of protection in the event of disasters, is a number disaster-specific instruments as illustrations of practice. Yet a proper assessment of those instruments reveal, either that they are do not stand for the proposition or that they do not qualify as practice for the purposes of law-making. One instrument that suggests a duty-rights relationship between affected and third States is the *Institut de Droit's* resolution which stated the affected State "shall seek assistance" and that it is "under the obligation not to arbitrarily and unjustifiably to reject a *bona fide* offer" of assistance. Another instrument that, on its face, seemed to recognise the horizontal rights-duties approach is the United Nations Office for the Coordination of Humanitarian Affairs Guiding Principles on Internal Displacement which stated that "consent to [humanitarian assistance] shall not be arbitrarily withheld".

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<sup>78</sup> 1966 International Covenant on Civil and Political Rights, Art 2(1).

<sup>79</sup> 1966 International Covenant on Economic, Social and Cultural Rights, Art 2(1).

Yet, both of these instruments do not constitute practice for the purposes of international law-making. The ILC, for example, has stated that it is “primarily the practice of States that contributes to the formation, or expression, of rules of customary international law.”<sup>80</sup> The “primarily” in that Statement is not meant to indicate that resolutions or decisions of non-State actors can constitute for the purposes of practice. Rather, it indicates that under limited circumstances, the conduct of international organisations, may contribute to practice.<sup>81</sup> In particular, the circumstances under which the conduct of international organisations would contribute to the formation or reflect customary international law, are limited to two cases: where States have transferred exclusive competence to the international organisation;<sup>82</sup> and States have transferred powers that are equivalent to the powers exercised by States.<sup>83</sup> Both of these apply principally to an organisation such as the European Union. The Draft Articles further make it clear that the conduct of other entities does not constitute practice for the purposes of law making.<sup>84</sup>

The *Institut de Droit*, although authoritative, is a group of private experts of international law whose views or actions do not constitute State practice. For the purposes of contributing to the formation of, or reflecting, customary international law, it certainly constitutes “other actors” under Draft Conclusion 4(3) of the ILC’s draft conclusion on the identification of customary international law and can therefore not be relied upon as establishing a rule of law. While United Nations Office for the Coordination of Humanitarian Affairs is part of, and thus represents, an international organisation, its Guidelines do not fall within one of the exceptional circumstances mentioned above. In an apparent attempt to get around the lack of State acceptance, the commentary to Draft Article 13 creates the impression that the Guiding Principles have been endorsed by the General Assembly.<sup>85</sup> Yet it is clear that the General Assembly has never suggested that the Guiding Principles may be law. General Assembly resolution 62/153, for example, recognises the Guiding Principles as “an important international framework” and “encourages all relevant stakeholders” to make use them.<sup>86</sup> Leaving aside that this resolution (as are the Guiding Principles) applies internally displaced persons, this is hardly an endorsement of proposition that there is a legal obligation. More importantly, while the Guiding Principles apply internally displaced persons, the General Assembly has adopted over a dozen annual (and thus largely repetitive) resolutions on the humanitarian disasters.<sup>87</sup> None of the resolutions recognise any duty on the affected State, either not to arbitrarily refuse assistance or to seek assistance. Paragraph 14 of the Resolution 71/226, for example, recognizes that “while each State has the primary responsibility for preventing and reducing disaster risk, it is a shared responsibility between Governments and relevant stakeholders”, without purporting to impose any duty of any kind. Paragraph 14 of Resolution 71/128, for its part, simply “encourages” States “to strengthen operational and legal frameworks for international disaster relief and to adopt and implement national laws and regulations.”

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<sup>80</sup> ILC 2016 Draft Conclusions on the Identification of Customary International Law, with commentary, Draft Conclusion 4(1).

<sup>81</sup> *Ibid.*

<sup>82</sup> *Id.*, at para 5 of the commentary to Draft Conclusion 4.

<sup>83</sup> *Id.*, at para 6 of the commentary to Draft Conclusion 5.

<sup>84</sup> *Id.*, Draft Conclusion 4(3).

<sup>85</sup> See, ILC 2016 Draft Conclusions on the Protection of Persons in the Event of Disasters with commentaries, para 5 of commentary to Draft Conclusion 13, which notes that the Guiding Principles have been welcomed by the General Assembly.

<sup>86</sup> GA Resolution on the Protection of and Assistance to Internally Displaced Persons (A/Res/62/153).

<sup>87</sup> See, e.g. GA Resolution on Disaster Risk Reduction (A/Res/71/226) and GA Resolution on International cooperation on humanitarian assistance in the field of natural disasters, from relief to development (A/Res/71/128) for the latest resolutions on the subject.

Those instruments cited in the commentary that do flow from an inter-State process, and may thus contribute to law-making, do not support the proposition that the horizontal rights-duties approach is part of international law as it exists. Each of those instruments, to the extent that they include some kind of expectation for affected States to seek to assistance or not to arbitrarily refuse offers assistance all, without exception, couch this expectation in hortatory terms indicating the belief the expectation is not part of international law as it stands. An example includes the International Federation of the Red Cross and Red Crescent Societies Guidelines which state that a State “*should* seek international or regional assistance” if a disaster exceeds its capacity.<sup>88</sup> The commentary further refers to General Assembly resolutions 45/100 and 43/131.<sup>89</sup> Yet, quite apart from the fact that the commentary only refers to preambular paragraphs, these paragraphs do not stand for the proposition as they only express the General Assembly’s concern “about the difficulties that victims of natural disasters” may experience and that declare “rapid relief will avoid a tragic increase” in the number of victims.

The commentaries refer to UN Security Council resolution 2165 of 2014. This resolution, of course, is binding and, by its express terms, authorises humanitarian assistance in Syria requiring only notification to Syria and not necessarily the consent of Syria.<sup>90</sup> However, reliance on this resolution is misplaced. Apart from the fact that the resolution applies only to the situation in Syria and only applies to UN Humanitarian agencies and their cooperating partners, the mere fact that a UN Security Council was necessary to achieve the objective of access to Syria without consent, illustrates in the normal course of events, i.e. in the absence of a UN Security Council authorisation, consent is required.

Finally, it bears mentioning that even in treaty law, where States might be willing to limit their sovereignty in limited instances, States have not recognised the horizontal rights-duties approach in the manner advanced by the ILC. The ASEAN Agreement, for example, provides, strictly, that the “affected Party shall have the primary responsibility” in addressing disasters and that “external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party.”<sup>91</sup> Similarly, the Inter-American Convention on Disaster Assistance does not include any of the rights and duties that are characteristic of the horizontal rights-duties approach.<sup>92</sup>

The above illustrates that under international law as it currently stands, there is not right-duty relationship between affected States and third States in relation to disasters. There is simply no basis for the conclusion that, as a matter of international law as it currently stands, recognises the horizontal rights-duties approach in the context of protection of persons.

### **III.B The Horizontal Rights-Duties Approach is Necessary for Humanitarian Reasons**

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<sup>88</sup> 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), Guideline 3, para 2,

<sup>89</sup> See See, ILC 2016 Draft Conclusions on the Protection of Persons in the Event of Disasters with commentaries, para 7 of commentary to Draft Article 13.

<sup>90</sup> UN Security Council resolution 2165 (2014) in which the Security Council *decides* “hat the United Nations humanitarian agencies and their implementing partners are authorized to” access Syria “in order to ensure that humanitarian assistance, including medical and surgical supplies, reaches people in need throughout Syria through the most direct routes, with notification to the Syrian authorities”.

<sup>91</sup> 2005 ASEAN Agreement on Disaster Management and Emergency Response, art 2(1).

<sup>92</sup> 1991 Inter-American Convention to Facilitate Disaster Assistance, see especially art II.

The second basis for the horizontal rights-duties relationship, however, does not depend on the existence of legal rules, but rather on normative considerations. As described above, from a normative perspective, the horizontal rights-duties approach is justified as being necessary to ensure the protection of persons in the event of disasters. Thus, the holy cow of consent to operating on a State's territory, is justified by the fact that the lives will be saved and humanity protected. This is a powerful narrative, with a high degree of moral pull and resistance to which will lead to raised eyebrows. Yet it is misplaced and unsatisfactory for at least two reasons. First, empirically, it is simply not correct to suggest that creating a relationship of rights-duties between States will result (or even facilitate) the protection of persons in the event of disasters. Thus narrative, morally powerfully though it certainly is, is misleading. Second, there exists other, potentially more effective approaches, for enhancing the protection of persons.

From an empirical perspective, the main problem with the horizontal rights-duties is that it assumes that a State would make the determination that a disaster exceeds its national capacity and would, nonetheless, not seek assistance and, even more, reject offers for assistance unless compelled to do so by a legal duty. As a rule, States will always seek assistance and accept offers of assistance where a disaster exceeds the national capacity of the State and the establishment of a rights and duty relationship was not necessary for that purpose. As Mr Nolte, speaking on the horizontal rights-duties approach of the Commission, noted "the fact [is that] in practice, State uniformly did seek assistance when a disaster exceeded their national capacity".<sup>93</sup> Although Mr Nolte, was making the point to suggest that this regular normal occurrence of seeking assistance might be seen as practice for the purposes of customary international law, it was clear, as pointed out by Mr Murphy, that States did not view that the "seeking, offering or accepting of assistance reflected rights or duties flowing from international law."<sup>94</sup> Mr Murphy warned, correctly, that suggesting that regarding every conduct, performed out of good will and moral without the intention of establishing legal obligation, as creating law, would have the adverse effect of making States reluctant to engage in positive conduct.<sup>95</sup> The point here is that, ordinarily, States will, and have, made request for, offered, and accepted offers for assistance without the existence of a legal duty, so that the empirical relationship between legal duties and actions in the interest of persons affected by disasters is hard to prove.

In 2012, during the debate on the topic and in response to a similar argument made by the current author,<sup>96</sup> Mr Petric passionately argued that sometimes, some governments (those he referred to as "lunatic governments") could indeed act contrary to the interests of their populations, giving the examples Mengistu Haile Mariam's government of Ethiopia in the mid-1980s<sup>97</sup> and the Myanmar government in the aftermath of the cyclone in 2008. Yet even these cases reveal the empirical futility the horizontal rights-duties approach. First, governments sufficiently on the periphery of international community to be referred to as "lunatic governments", such as was arguably the case with Mengistu's Ethiopia, are unlikely to be swayed by the existence of abstract duties. Academics and international lawyers may argue about human rights violations, state responsibility and other similarly fancy-sounding terms, but that is unlikely to have an actual effect on the population.

The situation in Myanmar also illustrates the futility of the horizontal rights-duties approach – at least as currently drafted. It will be recalled that during the disaster of 2008, Myanmar did not just "refuse" offers

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<sup>93</sup> ILC, Summary Record, Meeting of 5 July 2012 (A/CN.4/SR.3141), 5.

<sup>94</sup> ILC, Summary Record, Meeting of 3 July 2012 (A/CN.4/SR.3139), 18.

<sup>95</sup> *Id.*

<sup>96</sup> ILC, Summary Records, Meeting of 2 July 2012 (A/CN.4/SR.3138), 13 (Tladi).

<sup>97</sup> As an anecdote it is interesting to note that Mr Petric was, at the time, stationed in Ethiopia, making his account even more powerful and compelling.



of assistance. Rather, it refused from specific States such as the United States.<sup>98</sup> The question, which was asked during the debates,<sup>99</sup> was whether refusing assistance from a specific State – a “sworn enemy” – would be considered “arbitrary”. After all, technically, by providing a reason, a decision is not arbitrary. Since States, even the lunatic ones, will likely have a reason for refusing an offer of assistance. More than likely, the reason will be the identity of the offerer, as was the case in the situation in Myanmar. Given the current political dynamics, can it really be expected of Israel to accept offers of assistance from Iran or vice versa? If not, then the horizontal rights-duties approach would be meaningless since States would always be able to provide reasons for its non-acceptance of offers. Thus, at least as currently drafted, the horizontal rights-duties approach would not be able to prevent the humanitarian suffering in the event of a disaster. During the ILC debate, Mr Wisnumurti summed up the issues as follows:

..it was obvious that, in practice, no affected State had ever refused outside assistance, even when it had sufficient response capacity. The only exception was, perhaps, Myanmar, which had not totally baulked, since it had accepted neighbouring countries’ assistance. Hence, there were grounds for serious doubts about the usefulness of [the duty not to arbitrarily refuse assistance].

Finally, if the primary objective of the horizontal rights duties was the prevention of human suffering in the event of disasters by creating or strengthening obligations on States, it is not clear why, as a normative proposition, third States are endowed with “rights” while the affected State is burdened with the “duties”. As a normative point, third States *should* not arbitrarily refuse requests for assistance when made. Within the ILC itself a strong proponent of the view that there should, as a normative proposition, be “balance or parallelism” between the rights and duties of the affected States and those of third States was Mr Forteau.<sup>100</sup> In his view, “it would be difficult to impose an international obligation on the affected State ... without imposing a parallel obligation on third States.”<sup>101</sup> Mr Nolte, however, opposed the idea, noting that a duty on third States “would raise difficult questions of the allocations of responsibility and the determination of the relative capacity of different States.”<sup>102</sup> But if the overriding consideration is the prevention of loss of human life and suffering, it is not clear why such a duty, along with its “difficult questions”, cannot be imposed. After all, both the duty to seek assistance when a disaster exceeds national response capacity and the duty not to arbitrarily refuse assistance, also raise “difficult questions”: when can it be said that a disaster exceeds national capacity? when is a decision to refuse assistance arbitrary? who determines whether a disaster exceeds national capacity and whether a refusal is arbitrary? Moreover, since the duty would be one of not “arbitrarily” refusing to provide assistance rather than a duty to provide assistance, it is not clear that these difficulties are insurmountable.

Furthermore, if the overriding consideration is the protection of persons, then rather than create rights for third States, the emphasis ought to have been placed more on strengthening the rights of affected persons rather than creating rights for third States. In legal terms this could take the shape of further elaborating on the duty of the affected States to prevent suffering in the event of disasters. As suggested above, a text indicating the circumstances under which a State could not rely on the disaster for its failure

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<sup>98</sup> See Corky Siemaszko, Myanmar Government Refuses US Aid, Daily News 8 May 2008, available at <http://www.nydailynews.com/news/world/myanmar-government-refuses-u-s-aid-article-1.328655> (accessed 8 June 2017) (“While some relief shipments from traditional allies like Indonesia and China were allowed in, the junta rebuffed President’s Bush offer .....The US has sanctioned Myanmar for cracking down on pro-democracy ..”)

<sup>99</sup> ILC, Summary Records, Meeting of 2 July 2012 (A/CN.4/SR.3138), 13 (Tladi).

<sup>100</sup> *Id.*, 11 (Forteau).

<sup>101</sup> *Ibid.*

<sup>102</sup> ILC, Summary Records, Meeting of 5 July 2012 (A/CN.4/SR.3141), 6 (Nolte).

to provide basic necessities or protect the life of its population would certainly strengthen the human rights protection of the population. Such circumstances could include refusal to accept assistance without just cause or failure to accept assistance. Other circumstances that could preclude a State from relying on the disaster could include delays in permitting access to the disaster relief personnel and/or their equipment. None of these, however, require the establishment of a horizontal rights-duties regime.

#### **IV. Concluding Remarks**

The ILC Draft Articles on the Protection of Persons establish rights and duties between States affected by disaster and third State. Yet this horizontal rights-duties framework lacks parallelism and is one directional, i.e. affected States have duties while third States have rights but the reverse is not true. Yet, international law, whether in the form of customary international law, or in the form of treaty law, does not support this horizontal rights-duties approach. Even treaty arrangement relating to disaster require consent (over and above the consent to become party to the treaty) for the provision of assistance. There is virtually no State practice to support any duty to accept assistance (or not to arbitrarily refuse consent) nor any duty to seek assistance, leaving aside that there also exists no evidence of *opinio juris*. Moreover, the normative reasons that have been advanced for the elaboration of this horizontal rights-duties approach appear similarly unfounded. First, since States routinely seek assistance and rarely refuse assistance – not as a matter of legal obligation but out of self-interest – the horizontal rights-duties approach cannot be said to empirically connected to the protection of persons in the event disasters. Second, in those exceptional instances where States do, unreasonably, refuse assistance, it is doubtful whether the elaboration of a horizontal rights-duties approach would affect the situation of affected persons on the ground. Third, if the overriding consideration was the protection of persons, the horizontal rights-duties be characterised by a parallelism to provide also duties on the affected.

At best, it seems that the horizontal rights-duties approach adopted in the Draft Articles are likely to have no impact whatsoever on disaster relief practice. In this sense they appear to be more water in the guise of wine. At any rate, they appear to have been imagined out of (almost) nothing at all. Even Jesus Christ needed some water to make wine. The ILC, it seems, have the power to make wine out of nothing at all.